SMU | Dedman School of Law

SMU Law Review

Volume 24
Issue 1 *Annual Survey of Texas Law*

Article 15

January 1970

Texas Civil Procedure

John H. McElhaney

TEXAS CIVIL PROCEDURE

by

*John H. McElhaney**

MORE than four hundred and fifty appellate opinions involving procedure during the survey period[1] are distilled into the following discussion of selected cases.

Jurisdiction over the Person. The federal courts, when required to make an *Erie* pronouncement on Texas long arm law, continue to construe article 2031b[2] as broadly as the constitutional standard of "minimum contacts" will allow.[3] However, the state decisions seldom raise the constitutional issues, and usually turn upon the mechanics of pleading the long arm jurisdictional allegations.

For example, the plaintiff's failure to plead jurisdictional allegations substantially tracking the language of article 2031b results in a judgment, which if rendered by default, is vulnerable to a successful attack by writ of error to the court of civil appeals.[4] In the same technical[5] vein, a court of civil appeals[6] has held that section 3 of article 2031b may be used to confer in personam jurisdiction only if section 6[7] does not fit the facts of the case. Likewise, purported in personam service under rule 108[8] is not sufficient to withstand a special appearance even though the facts of the case might have authorized service under section 2 of article 2031b.[9]

The supreme court has not yet decided the question, but apparently the burden of proof upon jurisdictional facts is upon a specially appearing defendant, rather than upon the plaintiff.[10] A court of civil appeals decision holds that a special appearance is a form of plea in abatement, and as such the burden of proof and persuasion is upon the defendant.[11] That same

* B.B.A., J.D., Southern Methodist University. Lecturer, Southern Methodist University; Attorney at Law, Dallas, Texas.

[1] Volumes 431 through 442 *South Western Reporter, Second Series.*

[2] TEX. REV. CIV. STAT. ANN. art. 2031b (1964).

[3] Barnes v. Irving Trust Co., 290 F. Supp. 116 (S.D. Tex. 1968).

[4] Two civil appeals decisions, Curry v. Dell Publishing Co., 438 S.W.2d 887 (Tex. Civ. App.—El Paso 1969), *error ref. n.r.e.*, and Harris v. Hayles, 433 S.W.2d 250 (Tex. Civ. App.—Texarkana 1968), so held, following McKanna v. Edgar, 388 S.W.2d 927 (Tex. 1965).

[5] In this sense a "technicality" is a settled rule of law which is unknown to counsel until successfully invoked against his client.

[6] Collins v. Mize, 436 S.W.2d 938 (Tex. Civ. App.—Amarillo 1968), *rev'd*, 447 S.W.2d 674 (Tex. 1969).

[7] TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (1964) provides for substituted service in the event the non-resident does not maintain an agent for service. It is, therefore, necessary to allege the failure to maintain an agent in order to use § 3. *Id.* § 6 provides for substituted service when a former resident leaves the state when the defendant is not required to appoint an agent for service.

[8] TEX. R. CIV. P. 108 does not actually authorize or confer pure in personam jurisdiction. *See* Bonanza, Inc. v. Lee, 337 S.W.2d 437 (Tex. Civ. App.—Dallas 1960).

[9] American Inst. of Real Estate Appraisers v. Hawk, 436 S.W.2d 359 (Tex. Civ. App.—Houston 1969).

[10] TEX. R. CIV. P. 120a. This rule was suggested in the early stages of the Texas special appearance practice in Thode, *In Personam Jurisdiction; art. 2031b, The Texas 'Long Arm' Jurisdiction Statute; and the Appearance To Challenge Jurisdiction in Texas and Elsewhere*, 42 TEXAS L. REV. 279 (1964).

[11] Roquemore v. Roquemore, 431 S.W.2d 595 (Tex. Civ. App.—Corpus Christi 1968).

case also holds that there is no right to a jury trial upon the jurisdictional facts.

A Mexican divorce, granted without actual notice under circumstances when actual notice was possible, was held to be void.[12] When citation is by publication, it is not an abuse of discretion to grant a new trial even though the defendant may have a copy of the pleadings in a divorce suit.[13]

In *Fitch v. Jones*[14] no clear distinction was made between subject matter and in personam jurisdiction. A bankrupt made a special appearance under rule 120a[15] in a state court suit, claiming prior exclusive jurisdiction in the bankruptcy court. The Texas supreme court held that a state court suit involving the affairs of a bankrupt may be subject to abatement during the pendency of the bankruptcy proceeding. If the state suit is not disposed of in the bankruptcy proceeding, it may be prosecuted in the state court after the termination of the bankruptcy proceeding, notwithstanding the special appearance.

In *Ex parte Herring*,[16] a child support-contempt proceeding, the supreme court held that personal service upon the defendant, rather than notice by registered mail to his attorney under rule 21a,[17] is required to meet due process notice requirements absent a showing that the defendant was avoiding service of process. Normally, of course, notice of hearings solely to an attorney during the ordinary course of litigation would comply with due process requirements, the principal issues being the existence and duration of the attorney's agency. Here, there was no discussion or proof of a continuing attorney-client relationship. Neither was there a showing of the defendant's knowledge of the pendency of the proceeding.

Default Judgments and Bills of Review. In a case of first impression, the Texas supreme court in *Texas Machinery & Equipment Co. v. Gordon Knox Oil & Exploration Co.*[18] held that a default judgment against a garnishee, who did not have any property belonging to the debtor, could not be set aside on the theory that a garnishment proceeding does not have all of the attributes of a full adversary proceeding. The defaulting garnishee sought relief by way of a bill of review, but could not meet the strict requirements of *Alexander v. Hagedorn*[19] which ordinarily apply. A strong dissent argued that the ordinary bill of review requirements should be relaxed in a garnishment situation because garnishment is inquisitorial rather than fully adversary in nature.[20] However, this view would have

[12] Schacht v. Schacht, 435 S.W.2d 197 (Tex. Civ. App.—Dallas 1968).
[13] Flowers v. Flowers, 433 S.W.2d 31 (Tex. Civ. App.—Eastland 1968), *error ref. n.r.e.*
[14] 441 S.W.2d 187 (Tex. 1969).
[15] TEX. R. CIV. P. 120a.
[16] 438 S.W.2d 801 (Tex. 1969).
[17] TEX. R. CIV. P. 21a.
[18] 442 S.W.2d 315 (Tex. 1969).
[19] 148 Tex. 565, 226 S.W.2d 996 (1950). To set aside a judgment under a bill of review the party must allege and prove: "(1) a meritorious defense to the cause of action alleged to support the judgment, (2) which he was prevented from making by the fraud, accident or wrongful act of the opposite party, (3) unmixed with any negligence of his own." *Id.* at 568-69, 226 S.W.2d at 998.
[20] *Id.* at 576, 226 S.W.2d at 1002.

been inconsistent with the strong policy favoring the finality of judgments which underlies the bill of review practice.

In *Finlay v. Jones*[21] the Texas supreme court held that the necessity of compliance with the requirements of a bill of review could not be avoided through the device of a *nunc pro tunc* order granting a new trial after expiration of the thirty-day time limit on the trial court's power to set aside the judgment except by bill of review.

Although it is improper to grant a summary judgment only nine days after the supporting motion is filed, *Callaway v. Elliott*[22] held this irregularity could be raised in a conventional appeal and does not make the judgment vulnerable to attack through a bill of review. When the right to prosecute a conventional appeal is lost through the failure to file a motion for new trial, the defendant is not entitled to maintain a bill of review.[23] Likewise, any error in a judgment rendered after the appearance and withdrawal of the defendant's attorney can be corrected by a conventional appeal, and the defendant is precluded from equitable relief by way of a bill of review.[24]

In two similar opinions, the excuse of an attorney that he was not given adequate notice of a setting was unavailable in a motion for new trial to set aside a default judgment,[25] and the erroneous informal advice of a court bailiff to the defendant's attorney that the case would not be tried was not a ground for a new trial.[26] Probably the year's most frivolous unsuccessful excuse for non-appearance was the claim of a defendant, who had been represented by a succession of lawyers, that he was unable to attend the trial because of a rash caused by his nervousness about not having an attorney.[27] Contrasting favorable treatment was given to the excuse of an attorney who did not appear because he was engaged in conversation with another judge.[28]

Despite actual knowledge of the rendition of a default judgment gained by receipt of a copy of the judgment through the clerk's compliance with rule 239a,[29] the defaulting defendant is entitled to appeal by writ of error to the court of civil appeals, raising errors apparent upon the face of the record.[30] The court held that such an error was present when the sheriff's return of citation did not affirmatively show the "manner of service" as required by rule 107.[31]

On a de novo appeal from a justice court judgment in favor of the plaintiff, the defendant still occupies the position of a defendant on appeal

[21] 435 S.W.2d 136 (Tex. 1969).
[22] 440 S.W.2d 99 (Tex. Civ. App.—Tyler 1969), *error dismissed.*
[23] Washington v. Golden State Mut. Life Ins. Co., 436 S.W.2d 554 (Tex. Civ. App.—Houston 1968), *error ref. n.r.e.*
[24] Ziebarth v. Lee & Beulah Moor Children's Home, 431 S.W.2d 798 (Tex. Civ. App.—El Paso 1968).
[25] Bland v. Bland, 437 S.W.2d 408 (Tex. Civ. App.—Corpus Christi 1969).
[26] Combs v. Combs, 435 S.W.2d 166 (Tex. Civ. App.—Houston 1968).
[27] Cate v. Beene, 440 S.W.2d 389 (Tex. Civ. App.—Waco 1969), *error ref.*
[28] Drennan v. Belgin Enterprises, Inc., 434 S.W.2d 899 (Tex. Civ. App.—Beaumont 1968).
[29] TEX. R. CIV. P. 239a.
[30] Diamond Chem. Co. v. Sonoco Prods. Co., 437 S.W.2d 307 (Tex. Civ. App.—Corpus Christi 1968).
[31] TEX. R. CIV. P. 107.

in the county court, and as such is not entitled to take a default judgment.[32] A default judgment rendered in a suit brought to try the right to property was held to be void and properly set aside by the trial court. It had been rendered in violation of the particular rules[33] applicable in such suits which require the trial court to order the issues joined before the trial proceeds.[34]

Parties. In *Thoreson v. Thompson*[35] the Texas supreme court held that the plaintiff's insurer is a necessary party where the insurer is subrogated to some portion of recovery. The court did not discuss the question as to whether it would be proper for the defendant to make this fact known to the jury. Although the insurer was held to be a "necessary" party the court gave no indication whether it considers the subrogated insurer an "indispensable" party, the absence of which would constitute fundamental error within the rule of *Petroleum Anchor Equipment, Inc. v. Tyra.*[36] However, in another case, where the record reflected the participation of the subrogated insurance carrier in the trial, a court of civil appeals held that the defendant is not exposed to further liability and it is not necessary to name the insurer in the judgment.[37]

A civil appeals decision held that a church, which was a residuary legatee under a will, was an indispensable party in a suit to construe the will; its absence constituted fundamental error noticed upon the court's own motion.[38] This same rule was applied to the failure to join the plaintiff's credit union in a suit to rescind the sale of a mobile home.[39]

The Texas supreme court has held that the absence of a plea in abatement prevents reversal when a widow has sued individually rather than as administratrix to recover real property in behalf of an estate.[40]

An unincorporated civil club which maintains, but does not own, the street entrance markers of a real estate subdivision, does not have a sufficient justiciable interest to maintain a damage suit for destruction of the markers.[41]

Pleadings. Texas pleading becomes increasingly intricate, and more chockfull of rules and exceptions to rules with each addition to the constantly increasing, and sometimes conflicting, body of case law. The critical fears of those who seemed disappointed with the Texas failure to adopt fully the federal pleading rules[42] now seem prophetic. One court of civil appeals

[32] Texas Dept. of Pub. Safety v. Hicks, 439 S.W.2d 894 (Tex. Civ. App.—Waco 1969).
[33] TEX. R. CIV. P. 717-36.
[34] Davis v. Howard, 436 S.W.2d 225 (Tex. Civ. App.—Austin 1968).
[35] 431 S.W.2d 341 (Tex. 1968).
[36] 406 S.W.2d 891 (Tex. 1966).
[37] Seamless Floors by Ford, Inc. v. Value Line Homes, Inc., 438 S.W.2d 598 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.*
[38] Kelsey v. Hill, 433 S.W.2d 241 (Tex. Civ. App.—Texarkana 1968).
[39] Crabtree v. Burkett, 433 S.W.2d 9 (Tex. Civ. App.—Beaumont 1968).
[40] Coakley v. Reising, 436 S.W.2d 315 (Tex. 1969).
[41] Reed v. Tanglewilde Civic Club, 431 S.W.2d 362 (Tex. Civ. App.—Houston 1968), *error ref. n.r.e.*
[42] *E.g.*, Clark, *The Texas and the Federal Rules of Civil Procedure*, 20 TEXAS L. REV. 4 (1941). The Texas pleading practice is certainly more complicated than the federal practice in which, for

held a general allegation of negligence to be insufficient to support a default judgment[43] while another recognized the rule that a petition which does not state a cause of action will nevertheless support a default judgment.[44] The specific conditions giving rise to a plea of unavoidable accident must be pleaded.[45] One court held that an oral motion for continuance was properly denied because the party did not ask leave subsequently to reduce the motion to writing,[46] while another court held that an oral amended pleading was properly considered when the trial court granted permission to later reduce it to writing.[47]

When a special exception to the opponent's pleading is sustained, the opponent, in the absence of an amendment, is left without any pleading on that matter,[48] but in that state of the record the issue still might be tried by implied consent.[49] One nonritualistic opinion held that a party's prior actual knowledge of the facts he attempts to extract from his adversary by exceptions asking for more detailed pleading should be taken into account in determining whether harmful error has resulted if the trial court technically errs in failing to require those facts to be more specifically pleaded.[50]

Rule 94[51] expressly includes the statute of frauds as an affirmative defense which must be affirmatively pleaded. In *First National Bank v. Zimmerman*[52] the supreme court disapproved prior opinions to the contrary, and following the express requirement of rule 94, held that an objection to evidence based upon the statute of frauds will not suffice without an affirmative pleading of that defense. Civil appeals decisions reminded practitioners that judicial estoppel,[53] waiver,[54] forgery,[55] and the contention that the plaintiff is attempting to recover a contractual penalty rather than liquidated damages[56] are all affirmative defenses which must be pleaded.

---

example, official form 9 governs negligence pleading without requiring pleading of details such as the specific acts of negligence. "There is no more need or purpose in supplementing form 9 by details of the negligent act, for example, than there would have been in making such a supplement to the old writ of trespass on the case, approved by Chitty, on which the form is directly patterned." W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1721, at 188 (1958).

[43] Stinson v. Jones, 434 S.W.2d 212 (Tex. Civ. App.—Beaumont 1968). Despite this opinion, TEX. R. CIV. P. 45(b) expressly sanctions the pleading of legal conclusions.

[44] Chokas v. Donald, 439 S.W.2d 870 (Tex. Civ. App.—Fort Worth 1969). This opinion correctly follows supreme court authority. Edwards Feed Mill v. Johnson, 158 Tex. 313, 311 S.W.2d 232 (1958).

[45] Mason v. Ratcliff, 437 S.W.2d 320 (Tex. Civ. App.—San Antonio 1969).

[46] Sealite Inc. v. Texas Warehouse Co., 437 S.W.2d 896 (Tex. Civ. App.—Dallas 1969).

[47] Missouri-Kan.-Tex. R.R. v. Gage, 438 S.W.2d 879 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.*

[48] Houser v. Sunshine Laundries & Dry Cleaning Corp., 438 S.W.2d 117 (Tex. Civ. App.—San Antonio 1969), *error ref. n.r.e.*

[49] Republic Bankers Life Ins. Co. v. McCool, 441 S.W.2d 314 (Tex. Civ. App.—Tyler 1969).

[50] Lynch v. Southern Coast Drilling Co., 442 S.W.2d 804 (Tex. Civ. App.—San Antonio 1969).

[51] TEX. R. CIV. P. 94.

[52] 442 S.W.2d 674 (Tex. 1969).

[53] Burket v. Delaware Drilling Corp., 435 S.W.2d 307 (Tex. Civ. App.—El Paso 1968), *error dismissed.*

[54] Seamless Floors by Ford, Inc. v. Value Line Homes, Inc., 438 S.W.2d 598 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e*

[55] Mercantile Nat'l Bank v. Electrical Supply Corp., 434 S.W.2d 907 (Tex. Civ. App.—Dallas 1968), *error ref. n.r.e.*

[56] Young v. Zimmerman, 434 S.W.2d 926 (Tex. Civ. App.—Waco 1968), *error dismissed.*

However, the denial of the alleged agency of an employee requires neither affirmative pleading nor verification.[57]

An attorney for a party may make an affidavit for his client under rule 14,[58] but the affidavit must contain a recitation that the attorney had authority to make it.[59] A court of civil appeals held that the plaintiff's prayer for general relief in an usury case did not expand the theory of recovery stated in the body of the petition to allow recovery for both penalty and interest.[60] In contrast to this holding, the supreme court approved a court of civil appeals opinion which held the prayer for general relief in the exception to a condemnation award was sufficient to entitle the plaintiff to recover interest on judgment excess.[61] The opinion makes no reference to any pleading, other than the prayer, which would support the recovery.

There is an important, but sometimes forgotten, distinction between the uses for a plea in abatement and a motion for summary judgment when the defendant contends that the plaintiff is entitled to no relief under the facts stated in his pleadings. In *Touchy v. Houston Legal Foundation*[62] the supreme court held that the defendant's plea in abatement addressed itself only to the question of whether the plaintiff had standing to sue, and not to the merits. The court concluded that since the trial court had sustained the plea in abatement before purporting to render summary judgment against the defendant, the summary judgment was meaningless, and that only the plea in abatement was before the supreme court for review.

In *Akers v. Simpson*[63] the supreme court held that rule 97(a),[64] the compulsory counterclaim rule, cut off the right of James Akers, one of two co-defendants, to prosecute his own separate personal injury suit against the plaintiff in the original suit, after the entry of an agreed judgment in the original suit. Akers was never served with citation and never knew of the fact that he was named as a defendant in the original suit. His defense was conducted by an attorney employed by the other defendant's liability insurance carrier. However, the judgment in the original suit recited the appearance of Akers, precluding a collateral attack upon that judgment in the second suit. The only remedy for a party in this predicament is a direct attack, such as a bill of review, upon the original judgment. In *Hall v. Bleisch*[65] Bleisch and Hall had been co-defendants in a state court suit arising out of an automobile accident. They had cross-claimed against each other for indemnity, and that suit was terminated by the entry of an agreed judgment. Bleisch then filed a federal diversity action against

[57] Risinger v. Fidelity & Deposit Co., 437 S.W.2d 294 (Tex. Civ. App.—Dallas 1969).
[58] TEX. R. CIV. P. 14.
[59] Kern v. Treeline Golf Club, Inc., 433 S.W.2d 215 (Tex. Civ. App.—Houston 1968).
[60] Gulf Coast Inv. Corp. v. Prichard, 438 S.W.2d 658 (Tex. Civ. App.—Dallas 1969), *error ref. n.r.e.*
[61] Trinity River Authority v. Sealy & Smith Foundation, 435 S.W.2d 864 (Tex. Civ. App.—Beaumont 1969), *error ref.*
[62] 432 S.W.2d 690 (Tex. 1968).
[63] 445 S.W.2d 957 (Tex. 1969).
[64] TEX. R. CIV. P. 97(a).
[65] 400 F.2d 896 (5th Cir. 1968).

Hall whose defense was that Bleisch's claim was a compulsory counterclaim which was cut off by the entry of the prior judgment. The court distinguished a compulsory counterclaim from a cross-claim and held that Bleisch's claim was not cut off. Rule 97(a) is worded broadly enough to make Bleisch's claim a compulsory counterclaim since it extends to any claim the pleader has against "any opposing party." Co-defendants asserting the right to indemnity against each other certainly seem to be "opposing parties." However, rule 97(e)[66] provides for cross-claims and makes them permissive rather than compulsory. The facts of *Hall v. Bleisch* expose a conflict between the literal provisions of rules 97(a) and 97(e). Final authoritative determination of this conflict will not be made until a Texas state court rules on the matter.

Discovery. In *Great American Insurance Co. v. Murray*[67] the supreme court ended any further doubt about discoverability of liability insurance limits in Texas, holding them not discoverable. The opinion is a veritable digest of the decisions permitting and prohibiting such discovery.

The supreme court has granted an application for writ of error in a case in which a court of civil appeals held that opinion testimony of an appraiser for the state is not immune from discovery in a condemnation case.[68] Rule 186a[69] exempts from discovery information obtained in the course of an investigation by a person employed to make an investigation, but once that information is disclosed to, or obtained by, the adversary, it is not immune from introduction into evidence.[70] *In camera* inspection of documents produced in response to a subpoena duces tecum, but claimed to be privileged, was made by a trial court. The trial court concluded that portions of the documents were privileged and placed them in a sealed envelope without disclosing their contents to the party who requested the subpoena. The court of civil appeals held that although rule 177a,[71] which provides for subpoenas duces tecum, does not require the party obtaining the subpoena to make a showing of relevancy, such a requirement should be engrafted upon the rule.[72] There is ample authority for the *in camera* inspection and the use of a sealed envelope to maintain secrecy until an appellate ruling can be obtained, but a member of the court of civil appeals separately deplored the use of *in camera* inspections which he views as "destructive of the adversary system."[73]

Two civil appeals decisions upheld the trial court's exercise of discretion in striking pleadings, one of a defendant for refusing to appear for an oral deposition[74] and the other in dismissing a workmen's compensa-

[66] TEX. R. CIV. P. 97(e).
[67] 437 S.W.2d 264 (Tex. 1969).
[68] City of Austin v. Capitol Livestock Auction Co., 434 S.W.2d 423 (Tex. Civ. App.—Austin 1968), *error granted.*
[69] TEX. R. CIV. P. 186a.
[70] Missouri-Kan.-Tex. R.R. v. Gage, 438 S.W.2d 879, 885 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.*
[71] TEX. R. CIV. P. 177a.
[72] McGregor v. Gordon, 442 S.W.2d 751 (Tex. Civ. App.—Austin 1969), *error ref. n.r.e.*
[73] *Id.* at 759.
[74] Roquemore v. Roquemore, 431 S.W.2d 595 (Tex. Civ. App.—Corpus Christi 1968).

tion suit when the plaintiff's doctor, upon the advice of the plaintiff's attorney, refused to answer cross interrogatories propounded to him.[75]

Venue. Rule 84[76] provides that the special appearance and plea of privilege practices are still subject to the rules regarding due order of pleading. A defendant who filed and presented a motion to quash "citation until the defendant is properly named and before the Court" before pleading and presenting its plea of privilege, was held to have waived its plea of privilege.[77] Logically, a plea to the jurisdiction of the court should be considered before venue matters. However, the motion to quash service only until the defendant was properly named was held to be a plea in abatement rather than a plea to the jurisdiction. Since it did not qualify as a special appearance, it amounted to a general appearance which waived the defendant's venue rights.

Several cases dealt with the proper characterization of suits purporting to deal with the title to land where the plaintiff was attempting to use subdivision 14[78] which provides that such a suit must be brought in the county in which the land is located. Normally the nature of the suit is determined by the allegations in the petition.[79] However, when the defendant admits that he is not claiming title to the land, the plaintiff cannot obtain the benefit of subdivision 14 merely by framing his pleadings as if title to land were involved.[80] Where the supreme court had previously determined that the plaintiff's cause of action was really for damages caused by a wrongful conspiracy rather than for recovery of land, the plaintiff could not use subdivision 14.[81] A suit for specific performance of a contract to convey title to land was held to be a suit which did not involve title to land.[82] A dissent logically argued that the claim could be characterized as a suit for the recovery of land.[83]

Unwitting waiver of venue rights can easily result in domestic relations situations. These cases, which are too often continuing conflicts, are complicated by the fact that the supervision of child support payments always remains in the same court which granted the divorce, despite subsequent changes in residence by the parties.[84] In one case,[85] a defendant-former wife was held to have waived her plea of privilege in the suit of her former husband to change child custody because her plea of privilege was combined with a petition asking for more child support and a review of her former

[75] Willis v. Premier Ins. Co., 442 S.W.2d 912 (Tex. Civ. App.—Fort Worth 1969).
[76] TEX. R. CIV. P. 84.
[77] Starr Gas Co. v. Employers Cas. Co., 436 S.W.2d 188 (Tex. Civ. App.—El Paso 1969), *error dismissed.*
[78] TEX. REV. CIV. STAT. ANN. art. 1995, § 14 (1964).
[79] Fannin Bank v. Johnson, 432 S.W.2d 138 (Tex. Civ. App.—Houston 1968), *error dismissed.*
[80] Richter v. Plains Nat'l Bank, 440 S.W.2d 76 (Tex. Civ. App.—Fort Worth 1969), *error dismissed.*
[81] Hunt Oil Co. v. Jones, 436 S.W.2d 186 (Tex. Civ. App.—Eastland 1968), *error dismissed.*
[82] Hyder v. Kraft, 431 S.W.2d 420 (Tex. Civ. App.—Fort Worth 1968), *mandamus overruled.*
[83] *Id.* at 421.
[84] *Ex parte* Goldsmith, 155 Tex. 605, 290 S.W.2d 502 (1956); Carlson v. Johnson, 327 S.W.2d 704 (Tex. Civ. App.—Houston 1959).
[85] Nixon v. Rohrbach, 438 S.W.2d 957 (Tex. Civ. App.—San Antonio 1969).

husband's visitation privileges. Another former wife obtained a severance of her former husband's counterclaim for custody which he filed following a contempt motion against him.[86] A severed counterclaim was subject to a proper plea of privilege since venue in custody-change suits follows the residence of the defendant.[87] This rule cannot be circumvented by obtaining an *ex parte* order temporarily changing custody to the plaintiff as a prelude to the contest on the permanent change.[88]

In *Lester v. Weddle*[89] the supreme court sent the case back to the court of civil appeals for a determination of a negligence question under subdivision 9a,[90] which specifically governs negligence actions, rather than accepting the opinion of the court of civil appeals, which discussed the case in terms of trespass under subdivision 9.[91]

By suing a local dealer along with the manufacturer or distributor of an alleged defective product, a plaintiff may use subdivision 4 to subject an out-of-county manufacturer or distributor to suit in the county where the plaintiff and the local dealer live.[92] This practice will probably be followed frequently since the *Restatement of Torts*[93] extends strict liability to dealers as well as to manufacturers.

The plaintiff's controverting affidavit may not be used to supplement or replace deficient venue allegations in his petition defining the nature of the suit.[94] Neither may admissions in the defendant's pleadings be used for this purpose.[95] However, it is not necessary for the plaintiff to incorporate his petition by reference in the controverting affidavit.[96]

Although venue rights are valuable rights, overall judicial efficiency and consistency of results are probably not well served by the usual rule that venue of a third party action[97] or a cross-claim[98] is determined without reference to venue of the main action. An exception to that rule is recognized when a cross-claim or counterclaim is filed against an out-of-county intervenor. Such a party occupies a position analogous to a plaintiff, who waives his venue right by voluntarily subjecting himself to the jurisdiction of the court.[99]

Two venue opinions during the survey period create at least a super-

[86] Hollingsworth v. Hollingsworth, 441 S.W.2d 619 (Tex. Civ. App.—Amarillo 1969). The opinion does not disclose how the possibly tricky problem of when and how the motion for severance was presented. Would the filing of a motion to sever violate the concept of due order of pleading, waiving the plea of privilege?

[87] Lakey v. McCarroll, 134 Tex. 191, 134 S.W.2d 1016 (1940).

[88] Calloway v. Calloway, 442 S.W.2d 926 (Tex. Civ. App.—Eastland 1969).

[89] 431 S.W.2d 1 (Tex. 1968).

[90] TEX. REV. CIV. STAT. ANN. art. 1995, § 9a (1964).

[91] The court of civil appeals then said it had merely inadvertently substituted the term "trespass" for "negligence." Lester v. Weddle, 433 S.W.2d 30 (Tex. Civ. App.—Tyler 1968).

[92] Byrum v. Stacy, 432 S.W.2d 590 (Tex. Civ. App.—Amarillo 1968).

[93] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[94] Groce v. Gulf Oil Corp., 439 S.W.2d 718 (Tex. Civ. App.—Dallas 1969).

[95] Moody Day Co. v. Westview Nat'l Bank, 441 S.W.2d 294 (Tex. Civ. App.—Waco 1969), *error dismissed.*

[96] Pitt Grill, Inc. v. Albert, 432 S.W.2d 160 (Tex. Civ. App.—Dallas 1968).

[97] High Plains Natural Gas Co. v. City of Perryton, 434 S.W.2d 203 (Tex. Civ. App.—Amarillo 1968).

[98] Moody Day Co. v. Westview Nat'l Bank, 441 S.W.2d 294 (Tex. Civ. App.—Waco 1969), *error dismissed.*

[99] Campbell v. Galbreath, 441 S.W.2d 297 (Tex. Civ. App.—Waco 1969), *error dismissed.*

ficial conflict. One holds that in order to sustain venue under subdivision 5,[100] the written contract exception, it is necessary to prove the execution of the written contract by the defendant.[101] The other opinion holds that the contract need not be signed by both parties if it is signed by one and accepted by the other by his acts, conduct or acquiescence in the terms of the agreement.[102] A check delivered in a county other than the residence of the drawee bank is not a contract performable in the county of delivery[103] for purposes of subdivision 5.

A controverting affidavit need not mention the number of the subdivision of article 1995 which is being invoked, as long as sufficient facts are stated to bring the plaintiff within the factual requirements of the subdivision relied upon.[104]

Special Issues. The Texas State Bar Committee on Substantive Law Changes and Advancements conducted a poll of the Texas district judges in December 1969, making an inquiry on certain tort subjects.[105] Although procedural matters were not mentioned or inquired about, it seems significant that sixty per cent of the judges who volunteered additional comments in response to the questionnaire, expressed a dissatisfaction with the present special issue system. These comments by two judges sum up the two greatest areas of the present dissatisfaction:

1. Modify Special Issue submissions to point of submitting a general charge—Jurors are usually aware of what they are actually doing and [it] would be a more honest approach.
2. [Permit] some more liberalization in Special Issue submission—cutting down on [the] number of Special Issues in line with common sense.

The two major areas of dissatisfaction do not necessarily mean that the whole system should be abolished in a complete retreat to the general charge. The federal practice, implemented by federal rule 49,[106] provides a flexible and simple practice. There the desirability of obtaining jury findings upon specific aspects of a suit is separated from the additional entanglements which follow when the factual inquiries are so fragmented that the jury is not supposed to be able to tell who will win the case.

Viewed from the perspective of the federal bench, the Texas system, based upon the theory of keeping the jury from learning the effect of its answers, is really a "trap" designed to "hoodwink" the jury and: "In this day and time with advanced education and advocacy of such a highly developed and demonstrative state, it is little short of insulting to the jurors—more so to the lawyers and most of all to the Judges who report

[100] TEX. REV. CIV. STAT. ANN. art. 1995, § 5 (1964).
[101] Pitt Grill, Inc. v. Albert, 432 S.W.2d 160 (Tex. Civ. App.—Dallas 1968).
[102] Pierce v. Pickett, 432 S.W.2d 586 (Tex. Civ. App.—Amarillo 1968).
[103] Lawyers Sur. Corp. v. Preston, 442 S.W.2d 435 (Tex. Civ. App.—Eastland 1969).
[104] Moss v. Loveless, 439 S.W.2d 463 (Tex. Civ. App.—Texarkana 1969).
[105] The questionnaire was primarily concerned with comparative vis-à-vis contributory negligence, and the so-called "no fault" compensation plans such as the Keeton-O'Connell plan. The questionnaire did not call for the judge's signature and the source of the answers and the source of the specific comments must, of course, be kept confidential.
[106] FED. R. CIV. P. 49.

such Shibboleths—to think that a juror will not have a good idea of the effect of his answer."[107]

Fifth Circuit Chief Judge John R. Brown sees the real value of a special interrogatory system "not to entrap nor even run out all of the inescapable emotions by a sort of automatic dryer," but to have imperfect general verdicts from total invalidity[108] when only a portion is erroneous.[109] Despite all this respectable judicial criticism, the Texas appellate courts continue to write opinions adding rules, exceptions to rules, and new wrinkles to old rules, in this already incredibly complicated body of law.

An issue asking if the plaintiff "either slowed or stopped her automobile suddenly upon a public highway . . . when the same could not be done with safety" was held to be reversibly erroneous because it combined two inquiries: (1) whether the plaintiff slowed or stopped, and (2) if the slowing or stopping took place at a time when it could not be done with safety.[110] Another negligence decision held as erroneously duplicitous an issue which inquired whether the operator of a train failed to blow its whistle or give warning of the approaching train.[111] In a slip and fall case, decided in a more liberal vein, the court held that an issue inquiring whether the defendant "failed to remedy" the slick and slippery condition of an asphalt ramp was proper, and that it would have been improper further to fragment the issue into separate inquiries such as the defendant's failure to apply carborundum strips, glue products, or other remedies.[112] The harmless error rule applies to an erroneous submission of multiple shades of the same inquiry.[113]

Decisions in non-negligence cases continue to allow a more liberal grouping of facts into a single issue. Issues were approved lumping all of the elements of a common-law marriage into a single inquiry,[114] and combining an inquiry which covered several banking transactions which took the same form.[115] A court of civil appeals opinion preserves the almost essential custom of making use of rule 272[116] by orally dictating objections to the charge to the court reporter with the agreement to reduce the objections to writing later.[117] One party claimed on appeal that he had not consented to this customary procedure, as required by rule 272. However, the appellate court held that the trial court's certificate that the objections had been

---

[107] Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 341 (1968).

[108] *E.g.*, E.L. Cheeney Co. v. Gates, 346 F.2d 197 (5th Cir. 1965).

[109] Brown, *supra* note 107, at 341. Judge Brown views the federal special interrogatory practice as a "wonder to behold." *Id.* at 344.

[110] McNutt v. Qualls, 433 S.W.2d 521 (Tex. Civ. App.—Dallas 1968).

[111] Atchison, T. & S.F. Ry. v. Acosta, 435 S.W.2d 539 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*

[112] H.E. Butt Grocery Co. v. Quick, 442 S.W.2d 798 (Tex. Civ. App.—San Antonio 1969), *error ref. n.r.e.*

[113] Shaw Tank Cleaning Co. v. Texas Pipeline Co., 442 S.W.2d 851 (Tex. Civ. App.—Amarillo 1969).

[114] Mata v. Rangel, 432 S.W.2d 146 (Tex. Civ. App.—Houston 1968), *error ref. n.r.e.*

[115] First Fed. Sav. & Loan Ass'n v. Northside State Bank, 436 S.W.2d 393 (Tex. Civ. App.—San Antonio 1969).

[116] TEX. R. CIV. P. 272.

[117] Atchison, T. & S.F. Ry. v. Acosta, 435 S.W.2d 539 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*

dictated in compliance with rule 272 rendered the complaint unmeritorious.

The job of preparing a correct charge is not made any easier by two logical but disquieting holdings which point out the fact that neither the mere use of a special issue quoted in an appellate opinion in which the trial court was affirmed,[118] nor the failure to follow the form of special issues which were approved by supreme court Chief Justice Robert W. Calvert, insure a litigant that the special issue will be given the same treatment in his own case.[119] Hopefully, the Texas State Bar's recent publication, "Texas Pattern Jury Charges," will go a long way toward alleviating the anathema of the application of the Texas special issue system.

Collateral Estoppel. The Texas application of the doctrines of res judicata and collateral estoppel is presently limited to cases in which there is an identity of parties.[120] This limitation makes those doctrines inapplicable in successive suits by victims of the same mass tort such as a train wreck or a commercial airline crash. However, New York courts, which view the Texas mutuality of parties rule as "anachronistic" have for now[121] decided that a Texas judgment for the plaintiff in a wrongful death case arising out of a Kentucky air disaster[122] entitles New York domiciled plaintiffs to summary judgment upon the issue of liability.[123] Cogent policy arguments can be made for the offensive use of collateral estoppel in mass torts. Repeated trials for all claims resulting from a commercial airline crash are an unthinkable luxury. Legal reasoning tied to the mutuality of parties doctrine may not really be applicable when the defendant is the same common carrier. The new application of offensive collateral estoppel is now so well entrenched in some jurisdictions, such as New York, that the old mutuality rule has been declared to be a "dead letter."[124] However, serious hypothetical problems can be posed: (1) What if the defendant wins the first case? If so, are the unrepresented plaintiffs entitled to another chance? (2) What if the first plaintiff loses but the second plaintiff wins? What then happens to the following plaintiffs? What then happens to the unlucky first plaintiff? Despite such unanswered questions, it is respectfully submitted that the Texas courts should take another look at Texas' "anachronistic" mutuality rule.

---

[118] State v. Tidwell, 435 S.W.2d 619 (Tex. Civ. App.—Waco 1969), *error ref. n.r.e.*

[119] Brock v. Underwood, 436 S.W.2d 557 (Tex. Civ. App.—Amarillo 1968), *error ref. n.r.e.* The requested issues appeared in Neal & Paddock, *Submission of Issues in Uncontrolled-Intersection Collision Cases in Texas*, 44 TEXAS L. REV. 1 (1965), to which Justice Calvert wrote a recommendatory introduction.

[120] Swilley v. McCain, 374 S.W.2d 871 (Tex. 1964); Kirby Lumber Corp. v. Southern Lumber Co., 145 Tex. 151, 196 S.W.2d 387 (1946), in which at least privity to a party to the first litigation is required to take advantage of a former judgment.

[121] The case to be discussed may be appealed.

[122] The Texas case, Creasy v. American Airlines, Inc., 418 F.2d 180 (5th Cir. 1969), was tried in a federal court on diversity of citizenship, but the New York courts have treated the collateral estoppel problems as involving an application of Texas rather than federal procedural law.

[123] Hart v. American Airlines, Inc., 304 N.Y.S.2d 810 (Sup. Ct. 1969). A previous New York holding arising out of the same litigation refused to bestow the benefits of offensive collateral estoppel upon non-New York domiciliary plaintiffs. Hart v. American Airlines, Inc., 10 Av. Cas. 17,894 (N.Y. Sup. Ct. 1968), *aff'd per curiam*, 297 N.Y.S.2d 587 (Ct. App. 1969), *noted in* 68 COLUM. L. REV. 1590 (1968); 35 J. AIR L. & COM. 289 (1969).

[124] B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

Summary Judgment. In two important decisions the supreme court has clearly indicated that expert opinions, contained in affidavits or depositions, are not sufficiently conclusive to support a summary judgment. In *Snow v. Bond*,[125] a malpractice case, the depositions and affidavits of disinterested doctors, supporting the defendant, were held to be insufficient to warrant affirmance of the summary judgment for the defendant because that testimony was stated in terms of a conclusion as to what a hypothetically reasonably prudent doctor should do. In *Broussard v. Moon*[126] uncontradicted expert testimony about what a reasonably prudent dishwasher repairman should do was held inconclusive under the rule that opinion testimony does not establish any material fact as a matter of law.

A civil appeals case which did not involve expert testimony held that interested but uncontradicted testimony may be considered in support of a summary judgment,[127] but such testimony should not be considered unless it is "positive," whatever that term may mean.[128] Similarly, the fact that a summary judgment deponent is related to a party may deprive his testimony of conclusive effect.[129]

Negligence cases are usually inappropriate for summary judgment since the defendant has the negative burden of proving that the plaintiff has no cause of action.[130]

A practical problem in the trial courts is the frequency of attempts upon the part of the non-moving party to file an affidavit on the day of the hearing. Rule 166-A(c)[131] provides that opposing affidavits may be served prior to the day of the hearing, but this provision has been applied to give the trial court discretion to allow[132] or to disallow[133] affidavits tendered on the day of the hearing. In the exercise of this discretion the trial court may terminate discovery and refuse an application to take a deposition filed on the day of the hearing on the motion for summary judgment.[134]

A civil appeals opinion acknowledges, but fails to apply, subdivision (a) of rule 166-A which expressly sanctions the rendition of a partial summary judgment as to liability although a fact dispute may exist as to damages. The court found a disputed fact only on the damage issue, but nevertheless reversed and remanded the entire controversy, apparently misapplying the general rule that partial remands are not sanctioned.[135] It is submitted that in summary judgment situations the express approval of partial judgments in rule 166-A(a) should have controlling application in both the trial and appellate courts.

---

[125] 438 S.W.2d 549 (Tex. 1969).

[126] 431 S.W.2d 534 (Tex. 1968).

[127] Benson v. Gunn & Briggs, Inc., 438 S.W.2d 896 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.*

[128] T.J. Bettes Co. v. American Airco, Inc., 437 S.W.2d 302 (Tex. Civ. App.—Houston 1969); Johnson v. Floyd West & Co., 437 S.W.2d 298 (Tex. Civ. App.—Dallas 1969).

[129] Lindley v. Transamerica Ins. Co., 437 S.W.2d 371 (Tex. Civ. App.—Fort Worth 1969).

[130] Scott v. T.G. & Y. Stores, 433 S.W.2d 790 (Tex. Civ. App.—Houston 1968), *error ref. n.r.e.*

[131] TEX. R. CIV. P. 166-A(c).

[132] City Nat'l Bank v. Bradshaw, 433 S.W.2d 955 (Tex. Civ. App.—Fort Worth 1968).

[133] Kemp v. Harrison, 431 S.W.2d 900 (Tex. Civ. App.—Houston 1968), *error ref. n.r.e.*

[134] Traweek v. Radio Brady, Inc., 441 S.W.2d 240, 243 (Tex. Civ. App.—Austin 1969), *error ref. n.r.e.*

[135] Waples-Platter Co. v. Commercial Standard Ins. Co., 156 Tex. 234, 294 S.W.2d 375 (1956).

Technical and mechanical matters of note are: A verified petition may not be considered as summary judgment evidence.[136] In the absence of an exception in the trial court, uncertified copies of exhibits which have been incorporated by reference from other pleadings may be considered.[137] Findings of fact have no place in a summary judgment record and are not binding upon an appellate court.[138] An objection that an affidavit is not based upon personal knowledge is waived if not presented in the trial court.[139] A recitation in a summary judgment that it was rendered after due notice is conclusive on appeal.[140] The court may rule upon a motion for summary judgment before the time has expired for the non-moving party to file an amended pleading in response to the moving party's amended pleading.[141] The absence of depositions filed in the trial court supporting the motion for summary judgment is fatal on appeal.[142]

Limitations. New article 5539c,[143] effective September 1, 1969, extends the statute of limitations for an additional thirty days on counterclaims and cross-claims, which otherwise would have been cut off between answer date and the time the original petition was filed. The statute changes the result of cases such as *Morris-Buick Co. v. Davis*,[144] which denied the right to affirmative recovery upon such a counterclaim, and only allowed it to be pleaded defensively to the extent that it defeated the plaintiff's right to recovery. However, the protection of the statute extends only to counterclaims and cross-claims which arise out of the same transaction or occurrence upon which the plaintiff's suit is based.

Appellate Procedure. In *City of Beaumont v. Graham*[145] the supreme court reminded practitioners that rules 453 and 455[146] only require the written opinion of a court of civil appeals to state whether the factual determinations in the trial court should be upheld and that it is a "grave misconception" for attorneys to think that the opinion should make evidentiary findings. The courts of civil appeals have no jurisdiction to make original findings of fact and they can only "unfind" facts.

A flexible and discretionary policy exists in both the supreme court and the courts of civil appeals in determining whether to reverse and render or to reverse and remand for a new trial when it is determined that there is no evidence to support the judgment of the trial court. In *National Life & Accident Insurance Co. v. Blagg*[147] the supreme court rendered judgment rather than allowing another "bite at the apple" because the court con-

[136] Marcus v. Kinabrew, 438 S.W.2d 431 (Tex. Civ. App.—Tyler 1969).
[137] Wexler v. Gibraltar Sav. Ass'n, 439 S.W.2d 378 (Tex. Civ. App.—Houston 1969).
[138] City of Grand Prairie v. City of Irving, 441 S.W.2d 270 (Tex. Civ. App.—Dallas 1969).
[139] Sims v. Citizens State Bank, 434 S.W.2d 210 (Tex. Civ. App.—Houston 1968).
[140] Farmers & Stockmens' Bank v. White, 434 S.W.2d 143 (Tex. Civ. App.—Amarillo 1968).
[141] L.A. Durrett & Co. v. Iley, 434 S.W.2d 367 (Tex. Civ. App.—Dallas 1968), *error ref. n.r.e.*
[142] Rinker v. Ward, 440 S.W.2d 387 (Tex. Civ. App.—El Paso 1969), *error ref. n.r.e.*
[143] TEX. REV. CIV. STAT. ANN. art. 5539c (Supp. 1969).
[144] 127 Tex. 41, 91 S.W.2d 313 (1936), *criticized in* 1 A.L.R.2d 703 (1948).
[145] 441 S.W.2d 829 (Tex. 1969).
[146] TEX. R. CIV. P. 453, 455.
[147] 438 S.W.2d 905 (Tex. 1969).

cluded that no new evidence would be available at another trial. However, in *Texas Sling Co. v. Emanuel*[148] and *Houston Fire & Casualty Insurance Co. v. Nichols*,[149] the supreme court exercised its "wide discretion" by remanding for a new trial despite its finding that as a matter of law the evidence would not support the judgment below. If the supreme court remands a case to the court of civil appeals for additional factual determinations, neither party may assert new or additional points of error at that stage of the proceedings.[150]

Damage and liability issues may not be severed,[151] and even though an error in admitting medical testimony[152] or in determining the amount recoverable under an insurance policy[153] does not affect the liability issues, the error affecting damages requires a complete new trial. It is respectfully submitted that this rule is an unnecessary and extravagant waste of precious judicial time in these days of overcrowded dockets.

A surprising number of appeals are dismissed upon a finding that the judgment below is interlocutory rather than final. In *State v. Gibson's Distributing Co.*[154] the trial court held that the Texas "blue law"[155] was unconstitutional in a hearing on a temporary injunction. The supreme court held this to be an interlocutory decree, subject to shorter appellate time limits, because the permanent injunction had not been ruled upon. The ruling upon the constitutionality of the statute logically disposed of both the temporary and permanent injunctions, but form rather than substance dictated treatment of the judgment as interlocutory.

Severance may not be accomplished by implication, and an appeal is premature in the absence of an express severance when fewer than all of the parties are disposed of even though all of the issues between the parties to the appeal may have been disposed of.[156] A severance is not accomplished by the mere use of separate trials under rule 174,[157] and an order reflecting an end of one separate phase of such litigation is interlocutory.[158]

With questionable logic, a court of civil appeals held that two separate orders which disposed of all of the parties and the subject matter, when taken together, were nevertheless interlocutory.[159] The court incorrectly distinguished the rule in *McEwen v. Harrison*,[160] which involved virtually the same situation, by noting that in *McEwen* one order granted relief and the other non-suited another party, while in the case before the court each of the two orders was a take nothing judgment upon the merits.

---

[148] 431 S.W.2d 538 (Tex. 1968).
[149] 435 S.W.2d 140 (Tex. 1968).
[150] Key v. W.T. Grant Co., 439 S.W.2d 902 (Tex. Civ. App.—El Paso 1969).
[151] Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648 (1958).
[152] Goodrich v. Tinker, 437 S.W.2d 882 (Tex. Civ. App.—El Paso 1969), *error ref. n.r.e.*
[153] Pacific Fid. Life Ins. Co. v. Simpson, 434 S.W.2d 116 (Tex. 1968).
[154] 436 S.W.2d 122 (Tex. 1968).
[155] TEX. PEN. CODE ANN. art. 286a (1967), which prohibits the sale of merchandise on consecutive Saturdays and Sundays.
[156] Mayfair Bldg. Corp. v. Oak Forest Bank, 441 S.W.2d 568 (Tex. Civ. App.—Austin 1969).
[157] TEX. R. CIV. P. 174.
[158] McKellar v. Bracewell, 437 S.W.2d 319 (Tex. Civ. App.—Houston 1969), *error ref.*
[159] Thomas v. Shult, 436 S.W.2d 194 (Tex. Civ. App.—Houston 1968).
[160] 162 Tex. 125, 345 S.W.2d 706 (1961).

The supreme court refused the application for writ of error from an opinion holding that an order striking a petition in intervention is interlocutory.[161] Although such an order is final as far as the potential intervenor is concerned, he must wait for the other parties to dispose of the case at their own pace before appellate review may be had upon the propriety of the attempted intervention.

In the situation where one of several parties dies before judgment, and is not mentioned in the judgment, one court of civil appeals held that disposition by implication of the claim involving the deceased party depends upon whether or not the record reflects that the trial court was aware of the death.[162] If the death does not appear of record, the judgment is not appealable, while if that fact is in the record, the judgment impliedly disposes of all matters and is appealable.

The fact that an order granting a new trial is interlocutory and nonappealable may not be circumvented by substituting the remedy of mandamus.[163]

The supreme court has held that in order to complain of jury misconduct, all of the evidence during the trial must be a part of the appellate record, because the appellate courts must determine whether it was the alleged jury misconduct rather than a deficiency in the evidence which caused the verdict.[164] A juror's affidavit upon the issue of misconduct, unsupported by a record of the testimony at the hearing on the motion for a new trial, does not support a claim of jury misconduct.[165]

In order to contend that the trial court erroneously prevented a proper jury argument, the record must contain a complete statement of facts and a bill of exceptions setting out the proffered argument.[166]

The 1967 addition to rule 372[167] attempts to liberalize the formalities of bill of exception practice by providing that anything occurring in open court or in chambers which is reported and certified by the court reporter may be included in the statement of facts. However, unless the trial judge signs the statement of facts, objections to the charge are not preserved.[168]

Texas litigants are frequently the victims of unnecessary waiver of the right of appellate complaint, caused by their attorney's general rather than specific objections in motions and briefs. Although a court of civil appeals might hold that a defective point of error will be considered if the underlying argument clears up the defect,[169] a court of civil appeals is at least as likely to hold the point was waived.[170] The failure to observe pre-

[161] Bryant v. Barnes, 433 S.W.2d 786 (Tex. Civ. App.—Waco 1968), *error ref.*

[162] Bogle v. Lee, 435 S.W.2d 890 (Tex. Civ. App.—Dallas 1969).

[163] Brown v. American Finance Co., 432 S.W.2d 564 (Tex. Civ. App.—Dallas 1968), *error ref. n.r.e.*

[164] Fountain v. Ferguson, 441 S.W.2d 506 (Tex. 1969).

[165] Fidelity & Cas. Co. v. Read, 433 S.W.2d 797 (Tex. Civ. App.—Waco 1968), *error ref. n.r.e.*

[166] Wood v. State, 434 S.W.2d 149 (Tex. Civ. App.—Corpus Christi 1968).

[167] TEX. R. CIV. P. 372(1).

[168] State v. Turboff, 431 S.W.2d 953, 955 (Tex. Civ. App.—Houston 1968).

[169] McClure v. City of Texarkana, 435 S.W.2d 599 (Tex. Civ. App.—Texarkana 1968), *error dismissed.*

[170] Weingarten, Inc. v. Moore, 441 S.W.2d 223 (Tex. Civ. App.—Houston 1969), *error granted* (point too general which complained of the submission of special issues "over the timely and proper

scribed time limits is also a prolific source of lost appellate rights. An important civil appeals decision[171] recognizes the careless but frequent practice of reciting the date of trial rather than the later date of signing in the first line of a judgment. In recognition of that practice, bolstered by a *nunc pro tunc* correction of a date, the court did not dismiss the appeal. The common, but incorrect, form of judgment recites, "On *this* the 13th day of March, 1968, came the parties," etc. It would be better to recite: "On the 13th day of March the case came on to be heard," etc. The latter correctly states the date the trial began but does not incorrectly imply that the judgment was signed on that date.

The supreme court has rendered an important decision defining the distinction between judicial errors and clerical errors for the purpose of determining whether a judgment may be corrected *nunc pro tunc*. In *Finlay v. Jones*[172] the supreme court held that erroneous recitations of proper service of process and of facts indicating the ripeness for default judgment, were judicial rather than clerical errors. Even though the origin of the errors could be traced to the clerk's misfiling of papers, the court had the judicial duty to determine whether there was proper in personam jurisdiction. Thus, the initial clerical error ultimately became a judicial error, making the *nunc pro tunc* order invalid and a subsequent order purporting to grant a new trial void.

Nunc pro tunc corrections are not available to re-enter orders for the purpose of extending appellate time limits.[173] The entry of an order purporting to overrule a motion for new trial after it has already been overruled by operation of law may not be used as a device for enlarging appellate time limits.[174]

A request for a transcript was held to be timely, authorizing an extension of filing time, despite the fact that the appellant failed to explain why he waited ten days after filing his appeal bond to order the transcript.[175] Another liberal case holds that a delay of forty-six days after the entry of judgment in ordering a statement of facts still permitted a finding of good cause for delay in filing. The court reporter was willing to sign an affidavit that if he had not been ill and busy with other work, he could have completed the statement of facts within the sixty-day period.[176] However, a delay in ordering a statement of facts until two days before the expiration of the sixty-day period was held to be fatal.[177] A delay in the preparation of the statement of facts is not good cause for failing timely to file the

objection of the defendant" without stating what that objection was); Texas Gen. Indem. Co. v. Sheffield, 439 S.W.2d 431 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.* (point too general saying trial court erred in not submitting special issues in the form requested by appellant); Sainz v. Nance Buick Co., 431 S.W.2d 779 (Tex. Civ. App.—El Paso 1968) (failure to specify why court erred in withdrawing case from jury).

[171] Jackson v. Gish, 440 S.W.2d 121 (Tex. Civ. App.—Waco 1969), *error ref. n.r.e.*

[172] 435 S.W.2d 136, 137 (Tex. 1969).

[173] Brown v. Vander Stucken, 435 S.W.2d 609 (Tex. Civ. App.—San Antonio 1968); Texas State Bd. of Dental Examiners v. Blankfield, 433 S.W.2d 179 (Tex. Civ. App.—Houston 1968), *error ref. n.r.e.*

[174] Lucas v. Windham, 439 S.W.2d 159 (Tex. Civ. App.—San Antonio 1969).

[175] Novosad v. Clary, 431 S.W.2d 422 (Tex. Civ. App.—Houston 1968), *error granted.*

[176] Carmichael v. Carmichael, 432 S.W.2d 126 (Tex. Civ. App.—Waco 1968).

[177] Reinhardt v. Martinez, 439 S.W.2d 478 (Tex. Civ. App.—San Antonio 1969).

transcript.[178] Neither is misplaced faith that a case will be settled an excuse for failure to file the appellant's brief on time.[179]

In *Dunn v. Dunn*[180] the supreme court held that the oral pronouncement of a judgment followed by the death of a party before the written judgment was signed was nonetheless a valid final judgment. No docket entry had been made reflecting the judgment. Although the date of the written judgment controls for appellate time limits purposes, it is the oral pronouncement which fixes the rights of the parties and the entry of a written judgment is merely a ministerial act. The court did not discuss intriguing hypothetical variations of the facts such as what would be the result if the court mailed letters to counsel informing them of his decision and one of the parties died before mailing or before receipt of the letters. Delay in signing an order extends the time during which the court has power to set the order aside because that time period begins to run upon the signing of the written order.[181] The trial court may rule upon an undisposed of motion for judgment n.o.v. even during the time between the entry of judgment and the time the judgment becomes final.[182]

In passing upon the sufficiency of the evidence to support a particular jury finding, an appellate court may only consider the statement of facts, and may not consider the jury's findings upon other issues.[183] A court of civil appeals has held that successfully to attack a negative jury answer to an issue upon which the dissatisfied party has the burden of proof, there must be a showing that the negative answer is without factual support.[184] In other words, such a point is unmeritorious unless the undisputed facts require a positive answer. In that event, there would be no need to submit the issue at all. The holding effectively denies an attack on a negative jury finding upon an issue on which the dissatisfied party has the burden of proof.

In cases where attorney's fees are recoverable, it is proper for a trial court to make a factual determination of an additional amount of attorney's fees to be recovered in the event the judgment is affirmed on appeal.[185] However, it is improper to approach the matter backwards, initially awarding the larger fee and subjecting it to remittitur in the event there is no appeal.[186]

Declaratory Judgments. The intended remedial benefits from a liberal construction of the Texas Uniform Declaratory Judgment Act[187] are not being realized because Texas courts broadly construe the constitutional

[178] Classy v. Railway Express Agency, Inc., 435 S.W.2d 535 (Tex. Civ. App.—San Antonio 1968).
[179] Pena v. Petroleum Cas. Co., 441 S.W.2d 657 (Tex. Civ. App.—Beaumont 1969).
[180] 439 S.W.2d 830 (Tex. 1969).
[181] Maddox v. Schwartz, 439 S.W.2d 369 (Tex. Civ. App.—Houston 1969).
[182] Machac v. Hajek, 437 S.W.2d 325 (Tex. Civ. App.—Corpus Christi 1969), *error ref. n.r.e.*
[183] Bourbon v. Glover, 431 S.W.2d 650 (Tex. Civ. App.—Beaumont 1968).
[184] Smith v. Safeway Stores, Inc., 433 S.W.2d 217 (Tex. Civ. App.—Tyler 1968), *error ref. n.r.e.*
[185] Grimes v. Robitaille, 288 S.W.2d 211 (Tex. Civ. App.—Galveston 1956), *error ref. n.r.e.*
[186] Security Life Ins. Co. v. Executive Car Leasing Co., 433 S.W.2d 915 (Tex. Civ. App.—Texarkana 1968), *error ref. n.r.e.*
[187] TEX. REV. CIV. STAT. ANN. art. 2524-1, § 12 (1965).

prohibitions against judicially rendered "advisory opinions." In *Firemen's Insurance Co. v. Burch*[188] the supreme court departed from the majority rule in the United States with its holding that declaratory relief is not available to determine the duty of a casualty insurer to pay a judgment against its insured in threatened or pending litigation. Declaratory judgment is available to determine the duty to defend, but the duty to defend is not always co-extensive with the separate obligation to pay a judgment. The court held that the duty to pay a judgment is hypothetical and "iffy" in view of the fact that the insured might not win the case. As a practical matter, this holding is a serious setback to the determination of insurance coverage questions. A court of civil appeals has followed in the footsteps of *Firemen's*. In avoiding a ruling upon the application of a Sunday closing law, the court held that the store operator had failed to show justiciable controversy in the absence of threatened prosecution for the admitted failure to comply with the closing law.[189]

Miscellaneous. The failure, over proper objection, to appoint a guardian *ad litem* to represent the interests of a minor in a change of name, an adoption proceeding, or a custody case may or may not be reversibly erroneous. In *Newman v. King*[190] the supreme court held that the failure to appoint a guardian *ad litem* in a change of name proceeding would not be reviewed in the absence of an objection in the trial court because the alleged error did not adversely affect the public, and therefore did not constitute fundamental error. That holding has been followed in a child custody case.[191]

The minor's court appointed guardian *ad litem* has real rather than perfunctory powers. It is not error, indeed it seems entirely proper, to allow the guardian *ad litem* to participate fully in the trial, and even to tax his fee against the unsuccessful defendant.[192] In the settlement of a claim involving a minor plaintiff, it is error, in the absence of good cause, for the court to tax the guardian *ad litem* fee against the minor's share of the award.[193]

If a juror's bias in the form of prejudgment of the facts is developed on voir dire examination, the juror is disqualified as a matter of law, and the complaining party need not also show that probable harm resulted to him.[194] Disqualification of a judge whose wife was a first cousin of a party was not waived when asserted as a motion for mistrial.[195] The jury's consideration of attorney's fees in a condemnation case was held to show probable harm as a matter of law.[196] This misconduct should not occur if the court

[188] 442 S.W.2d 331 (Tex. 1969).
[189] State v. Margolis, 439 S.W.2d 695 (Tex. Civ. App.—Austin 1969), *error ref. n.r.e.*
[190] 433 S.W.2d 420 (Tex. 1968).
[191] Huber v. Buder, 434 S.W.2d 177 (Tex. Civ. App.—Fort Worth 1968), *error ref. n.r.e.*
[192] Coastal States Gas Producing Co. v. Locker, 436 S.W.2d 592 (Tex. Civ. App.—Houston 1969).
[193] Siepert v. Brewer, 433 S.W.2d 773 (Tex. Civ. App.—Texarkana 1968), *error ref. n.r.e.*
[194] State v. Burke, 434 S.W.2d 240 (Tex. Civ. App.—Waco 1968).
[195] Natural Gas Pipeline Co. of America v. White, 439 S.W.2d 475 (Tex. Civ. App.—Beaumont 1969).
[196] Central Power & Light Co. v. Freeman, 431 S.W.2d 897 (Tex. Civ. App.—Corpus Christi 1968), *error ref. n.r.e.*

reads the mandatory admonition to the jury as required by rule 226a.[197] Arithmetical calculations by a juror, based on the evidence, do not constitute jury misconduct.[198]

In *Otis Elevator Co. v. Wood*[199] the supreme court again categorized "curable" and "incurable" jury arguments, holding that an objection is a necessary prerequisite to complaint of "curable" arguments, but is not required to challenge an "incurable" argument. These rules place counsel for the victim of erroneous argument squarely upon the horns of a dilemma as to whether or not to object. Protection of the record dictates making the objection; but trial strategy may dictate otherwise as shown by an argument made in an 1851 Georgia case: "For what practitioner has not regretted his untoward interference, when the counsel thus interrupted, resumes, 'yes, gentlemen, I have touched a tender spot, the galled jade will wince; you see where the shoe pinches.' "[200]

The argument that this is the plaintiff's "last day in court" is not improper.[201]

Improper but curable arguments are that the plaintiff should be paid workmen's compensation in a lump sum before the insurance company went broke;[202] that the most the workmen's compensation claimant could recover was $35 per week for 360 weeks;[203] and reference to primary and contributory negligence issues as "ours" and "theirs."[204]

A clerical error in recording the jury's unanimous answer to a special issue is a ground for a new trial, but if one juror claims that he intended the answer, the trial court may choose to believe him and may then properly deny a new trial.[205]

---

[197] TEX. R. CIV. P. 226a.

[198] McIlroy v. Wagley, 437 S.W.2d 5 (Tex. Civ. App.—Corpus Christi 1969), *error ref. n.r.e.*

[199] 436 S.W.2d 324 (Tex. 1968).

[200] Berry v. State, 10 Ga. 511 (1851), quoted in Tanner v. Texas Employers' Ins. Ass'n, 438 S.W.2d 395, 401 (Tex. Civ. App.—Beaumont 1969), *error ref. n.r.e.*

[201] Johnston Testers v. Rangel, 435 S.W.2d 927, 932 (Tex. Civ. App.—San Antonio 1969), *error ref. n.r.e.*

[202] Great Am. Ins. Co. v. Cantu, 438 S.W.2d 127 (Tex. Civ. App.—San Antonio 1969), *error ref. n.r.e.*

[203] Travelers Ins. Co. v. Walston, 436 S.W.2d 582 (Tex. Civ. App.—Tyler 1969).

[204] Switzer v. Johnson, 432 S.W.2d 164 (Tex. Civ. App.—Houston 1968).

[205] Stone v. Moore, 442 S.W.2d 746 (Tex. Civ. App.—Houston 1969), *error ref. n.r.e.*