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Pleading and Practice

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that where subsequently discovered facts definitely point to the defendant's guilt, there can be no valid objection that the confession is untrustworthy; and the policy of discouraging "third degree" methods must be relied upon for exclusion.

In view of the Legislative policy regarding the admissibility of confessions, it appears that the latter reason is considered sufficient to exclude.

Stanley A. Jones.

PLEADING AND PRACTICE

**Plaintiff’s Answer to Defendant’s Cross-Action by Supplemental Petition to Avoid a Default Judgment as to the Cross-Action**

ONE of the first cases to be decided by the Texas Supreme Court in 1948 was *Smock v. Fischel*. A defendant in a main action filed a cross-action against the plaintiff. On the day of the trial, neither defendant nor his counsel appeared to prosecute the cross-action. Plaintiff appeared and was given judgment on his main action; on the cross-action, the court rendered judgment against the defendant. This judgment was affirmed by the Court of Civil Appeals. The Supreme Court affirmed the judgment of the Court of Civil Appeals in so far as it had upheld the judgment for the plaintiff on the main action, but reversed with respect to the defendants' cross-action.

Four points are then suggested. First, is the question of service of the defendant's cross-action on the plaintiff; second, the effect of

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7 Tex. Code Crim. Pro. (1925) art. 727, governing the admissibility of confessions, requires that a confession be in writing and include a statutory warning. Art. 727a provides that evidence obtained by officers in violation of the Constitution or Laws of Texas, or of the Constitution of the United States, shall not be admitted against the accused. Tex. Pen. Code (1925) art. 1157, provides for stringent penalties on officers for inflicting physical or mental pain in making or attempting to make a person confess to a crime.

1 Smock v. Fischel, ......... Tex. ......... ..., 207 S. W. (2d) 891 (1948).
an appearance by the plaintiff subsequent to the filing of the defendant’s cross-action; third, the effect on the main action if the plaintiff does not appear to prosecute the main action; and fourth, the correct procedure if the defendant does not appear at the time of the trial.

The first two points are controlled by *Harris v. Schlinke* which has been widely followed in Texas. That case holds that the plaintiff is bound to take notice of all pleadings, filed by the defendant, in answer to the claims made in his petition; but he is not required to take notice of an independent claim or cross-action asserted by the defendant. If such a cross-action is asserted, it is error for the court to proceed to trial on it unless the plaintiff has been cited to answer the cross-bill or has appeared in the cause after it was filed. Plaintiff does not, by filing his suit, invoke the jurisdiction of the court to litigate the subject matter of a cross-action against him.

It is well settled that the defendant stands in the position of a plaintiff in so far as his cross-action is concerned, and it follows that the same means should be used to call upon the defendants to the cross-action to answer its charges as were required by law to compel the defendants in the original suit to appear and plead to that complaint.

The last two points may also be taken together for they present the question of the effect if the plaintiff does not appear on the day of the trial, and the result if defendant having filed a cross-action fails to appear. According to the Texas rule the Court should dismiss the original suit for want of prosecution if the plaintiff fails to appear, but if the defendant has filed a cross-

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5 *Harris v. Schlinke*, 95 Tex. 89, 65 S. W. 172 (1901).
6 *Houston v. Jennings*, 12 Tex. 487 (1854); *Burger v. Young*, 78 Tex. 656, 15 S. W.
action, he is entitled to have such cross-action tried unaffected by the plaintiff's dismissal. Thus, since the defendant stands in the position of a plaintiff in so far as his cross-action is concerned, the proper practice for the court to take when defendant fails to appear is to dismiss the defendant's cross-action for lack of prosecution.

It is to be noted that the service of the defendant's cross-action on plaintiff, or plaintiff's appearance in the suit subsequent to the filing of defendant's cross-action is jurisdictional, in so far as the cross-action is concerned, and any order rendered against the plaintiff on the cross-action without these requirements is void. Although the plaintiff has invoked the jurisdiction of the court on his main action, he is only placed on notice as to the defenses that the defendant might file to his allegations, and not to any new actions asking affirmative relief. It is only after the court has obtained jurisdiction over the plaintiff on the cross-action that he must plead his defenses. If the plaintiff does not appear on the day of the trial, the proper practice is to dismiss the main action without prejudice to any cross-claim in the suit. These cross-claims may proceed to final judgment if the court has jurisdiction over the respective parties by their having been served with process as to the cross-action or having appeared subsequent to the filing of the cross-action. The same rule of failure to prosecute by the plaintiff applies to the defendant. If defendant fails to prosecute his cross-action, it does not prejudice the plaintiff's main action and the proper procedure of the Court is to dismiss the defendant's cross-action.

Thus far, only those situations where the defendant files a cross-action against the plaintiff have been considered. The questions are presented as to the necessary procedure where defendant files a cross-action against a co-defendant, or where a plaintiff amends

107 (1890); Browning v. Pumphrey, 81 Tex. 166, 16 S. W. 870 (1891); Harris v. Schlinke, 95 Tex. 88, 65 S. W. 172 (1901); Roosth v. Poth, 198 S. W. (2d) 132 (Tex. Civ. App. 1946).

his original complaint against a defendant, setting up a new cause of action.

*Sullivan v. Doyle* holds that in a cross-action by one defendant against a co-defendant, there is no necessity of citation of the cross-action on the co-defendant if the co-defendant has made his appearance in the main action. Note that the rule is different in the case of a cross-action against the plaintiff, for he must be served or have made an appearance subsequent to the filing of the cross-action, but if the co-defendant has appeared in the main action, even if before the filing of the cross-action he is put on notice for all purposes.

Attention should also be given to *Phillips v. The Maccabees* which raises the question of the necessity of serving the defendant as to an amended pleading filed by the plaintiff, setting up a new cause of action against the defendant, where the defendant has appeared or pleaded to the plaintiff’s original petition, but he does not appear nor plead subsequent to the time that plaintiff amends his original petition. The court does not answer this question; however, the court reasons that a defendant who has been cited, but has not answered must be notified of every amendment which sets up a new cause of action, but if he has pleaded to the action or otherwise entered an appearance therein, then he is on notice of all amendments thereafter filed. Although the court says that if defendant has appeared, he is on notice of all subsequent amendments, it is not clear whether the court will consider the term “all amendments” to include also amendments setting up an entirely new cause of action. As the facts stood in the *Maccabees* case, the defendant was actually in the court room when the plaintiff asked the permission of the court to amend his

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petition. Defendant thereby had actual notice and did not need additional notice to inform him of the action that he would be expected to defend. Thus the question proposed is distinguished from the *Maccabees* case in that the defendant had only appeared in the original suit and knew nothing about the amended petition with the new cause of action. If the proposed hypothetical question is ever decided, the decision will probably turn upon whether the court strictly construes the general rule that after defendant has pleaded or appeared in the main action, he is before the court for all purposes and is charged with notice of all amendments thereafter. In this connection, it is interesting to note that in *Harris v. Schlinke*¹² the court based its conclusion that citation is necessary in a cross-action by defendant against plaintiff on the premise that citation is necessary when plaintiff by amendment sets up a new cause of action against defendant. This case cites with approval an early Texas case¹³ which holds that if process as to the original petition is served on the defendant, and later the plaintiff files an amended petition setting up a new cause of action, and this amended petition is not served on defendant, then a judgment by default cannot be taken against the defendant. The case further said that there must be service as to the amendment or the record must disclose the fact that the party to be affected by the amendment, was actually in court, in person, or by attorney, and might have had notice of such amendment.

**NEW TRIAL**

*Reynolds v. Dallas County*¹⁴ decided that Rule 5¹⁵ prevents the Court of Civil Appeals, after the initial time has expired, to extend or enlarge the period allowed for filing a motion for rehearing even when good cause for delay is shown. This holding is important for its effect upon late motions for new trials as a basis

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¹²*Harris v. Schlinke*, 95 Tex. 89, 65 S. W. 172 (1901).
for appeal, and also on late motions for new trials as such. Rule 5\footnote{Ibid.} provides that where an act is required or allowed to be done by the rules of civil procedure, in a specified time, the court may allow the time enlarged if application is made therefor before the period prescribed expires, or on motion may permit the act to be done after the expiration of the specified period. But, it is to be noticed that the rule further provides that it may not enlarge the period for taking any action under the rules relating to new trials or motions for rehearing except as stated in the individual rules specifying a time limit. Note also that as this is a part of subdivision (b) of the rule, which subdivision refers to the power to enlarge the time after the initial time has expired, a correct construction would seem to be that this restriction does not apply to an extension of time granted before the initial period has expired. On examination of the rules relating to new trials, it is noticed that none contain exceptions or means of extending the time allowed.\footnote{Reynolds v. Dallas County, 207 S. W. (2d) 562 (1948).} The Reynolds\footnote{Dallas Storage v. Taylor, 124 Tex. 315, 77 S. W. (2d) 1031 (Tex. Comm. App. 1934).} case by analogy supports the proposition that the period for filing a motion for a new trial cannot be extended by an order entered after the initial period has expired. However, it is to be noticed that the language of this case tends to deal in effect with a motion for a new trial as a basis of appeal. Thus, it is not clear as to whether the courts would allow a late motion for a new trial, as such, and not as a basis of appeal, on a showing of good cause for delay. One case decided in 1934 before Rule 5 was passed held:\footnote{Ibid.} 

"Subdivision 29 requires that the original motion for new trial be filed within 10 days after the judgment is rendered, and it contains nothing suggesting that the court may permit its filing at a later date. However, since jurisdiction over the case continues, in the absence of a motion, for 30 days from the date of the judgment, the court may in its discre-
tion, within such 30 day period, entertain a motion filed after the 10
days but within the 30 days...”

Whether a late motion for a new trial, not to be used as a basis for
an appeal, will be allowed is at present an open question in Texas,
but there is an indication in the Reynolds case of how the courts
might decide it, for Justice Sharp makes the statement that, “[t]he
language used in Rule 5 and in Rule 458 is also plain and spe-
cific.” And if the strict language of Rule 5 is applied, then no
late filings of motions for new trials, either as a basis of appeal or
not, will be allowed.

Evidence—Preponderance and No Evidence

What is the difference between no evidence and preponderance
of evidence? A 1948 Texas case Najera v. Great Atlantic and
Pacific Tea Co. involves this question and states:

“This finding by the Court of Civil Appeals of no evidence includes the
lesser finding that the evidence was insufficient to support the verdict;
and the insufficiency of the evidence having thus been presented by
proper assignments in the Court of Civil Appeals, this case must be
remanded to the district court for a new trial.”

Thus it is seen that in this case, there is presented not only the
question of the difference between no evidence and preponderance;
but also, the rulings of the appellate courts as to the disposition of
the case when there is a question of no evidence or preponderance
of the evidence.

The rule of no evidence has been defined as follows:

“The rule of no evidence is that if looking only to this one side, reason-
able minds simply could not differ—there is just no question but that

20Id. at 1033.
23Id. at 367.
this evidence has failed to prove the fact—then the no evidence rule applies."24

In such a case, since reasonable minds could not differ on the fact, then there is no jury question. But the rule of preponderance of evidence is:

"...completely blinding yourself to one side of the evidence and looking at the testimony on one side, if reasonable minds could at least differ on whether that evidence establishes the fact, then there is a jury issue."25

It is to be noticed that whether there is sufficient evidence upon an issue to warrant its submission to the jury is a question for the trial judge.26 The leading case in Texas on this subject is Joske v. Irvine.27

The Supreme Court being a court of law and not of fact, cannot determine for itself any questions of fact requisite to enable it to render judgment.28 The Court of Civil Appeals, however, has jurisdiction to review the trial court’s determination of the facts of a case, and it also has power to set aside the findings of the jury and remand the case for another trial.29 The powers of the Court of Civil Appeals in this connection are succinctly stated in an opinion of the Supreme Court as follows:

"If there is no evidence to sustain a judgment upon an issue material to a recovery, the Appellate Court may, in its discretion render judgment for the appellant or remand the cause for a new trial.... But if the evidence be conflicting, and the judgment be reversed because the

24Bar Institutes at Lubbock Tex. 1948, p. 80.
25Id., at 79.
27Joske v. Irvine, 91 Tex. 574, 44 S. W. 1059 (1898).
29Tweed v. West Union Tel. Co., 107 Tex. 247; 166 S. W. 696 (1914); Pollock v. Houston & T. C. R. R. Co., 103 Tex. 69, 123 S. W. 408 (1909).
verdict of the jury or the findings of the trial court are against the
great preponderance of the evidence, we think the only proper course
is to remand the cause.\textsuperscript{30}

The Court of Civil Appeals in the \textit{Najera} case found that there
was no evidence to support the judgment and rendered a verdict. The Supreme Court disagreed with the Court of Civil Appeals and
held that the Court of Civil Appeals actually made two findings,
one that there was no evidence; and two, that there was an insuf-
ficiency of evidence to support the verdict. The Supreme Court also
ruled that the Court of Civil Appeals was incorrect in finding that
there was no evidence because there was evidence sufficient to be
decided by a jury. Therefore, when the Supreme Court disagreed
with the Court of Civil Appeals finding of no evidence, it left
only the second finding of the insufficiency, or the preponderance
of the evidence, which the Supreme Court declared was contained
in the Court of Civil Appeals finding of no evidence. And, where
the question is a finding concerning preponderance or the insuf-
ficiency of the evidence, the correct procedure is not to render a
verdict but to remand the case for a new trial. The Supreme Court
could not pass upon the sufficiency of the evidence as this is a ques-
tion of fact, and the Supreme Court decides only questions of law.
In effect, the rule may be stated that if the Court of Civil Appeals
finds that there is no evidence on an issue material to the case, it
can render the case, but if the Supreme Court disagrees with the
Court of Civil Appeals finding of no evidence, then, since the
finding of no evidence includes the finding of insufficient evidence,
the only point left is the sufficiency of the evidence, and the proper
procedure is to remand the case for a new trial, because the
Supreme Court does not have the power to pass upon the sufficiency
of the evidence.

In connection with the rule stated above, it is interesting to con-
sider \textit{Watson v. Texas Indemnity Insurance Co.}\textsuperscript{31} This case in-

\textsuperscript{30}Patrick v. Smith, 40 Tex. 267, 274, 38 S. W. 17, 21 (1896).
volves a workmen’s compensation suit that went to the Court of Civil Appeals, which found that there was no evidence to support the judgment and reversed the trial court’s decision and rendered judgment for the insurance company. The Supreme Court, in its decision, never mentions the rule of the *Najera* case. Instead, in the *Watson* case the Supreme Court decided that the Court of Civil Appeals was in error in finding that there was no evidence, and reversed the judgment of the Court of Civil Appeals and affirmed the judgment of the trial court. This holding cannot be reconciled with the *Najera* case which held that if the Supreme Court disagreed with a finding of no evidence by the Court of Civil Appeals, the proper procedure is to render the case for a new trial.

*Lee S. Bane.*

**Submission of Issues—Waiver Avoided by Objection Thereto**

*Harkey v. Texas Employers’ Insurance Association*¹ demonstrates how, by timely objection to the submission of issues for lack of support in the pleadings, a party may avoid waiving the error and, at the same time, avoid pointing up the specific variance between the opponent’s proof and his pleadings.

In a workmen’s compensation action, the plaintiff alleged, as good cause in excusing his delay for filing a claim, his reliance upon “his own belief” as to his recovery from his injuries. His proof tended to establish a reliance upon a doctor’s advice. The defendant, without having objected to the introduction of testimony, objected to the submission of issues as to reliance upon a doctor’s advice because there was no pleading to support such issues. These objections were overruled, and the plaintiff had judgment.

¹ 146 Tex. 504, 208 S.W. (2d) 919 (1948).
The Supreme Court, affirming the judgment of the Court of Civil Appeals,\(^2\) reversing and remanding, held that the objection, "because there is no pleading authorizing the submission of such issue,"\(^3\) (italics supplied) was sufficient enough, in view of the concise nature of the pleadings and the testimony, to point out the error to the court.\(^4\) Rule 67\(^5\) was deemed inapplicable; the defendant having objected to the submission of issues upon a "tenable ground," he "cannot be regarded as impliedly consenting that they be tried when not raised by the pleadings..."\(^6\) Too, there was no ground for applying Rule 90\(^7\) which pertains to defective pleadings, not to a variance between pleading and proof. The rule applied by the Court, that waiver of pleadings is avoided by a specific objection prior to submission of the issue to the jury, is consistent with prior opinions. However, one might at least question whether the objection in this case was in fact sufficient to apprise the trial court and opposing counsel of the defect in question. Neither appellate opinion refers to the harmless error rule. This is in accord with the rule prior to the new rules.\(^8\) However, the requirement of pleading is now a rule,\(^9\) as is the harmless error rule,\(^10\) and it is submitted that the question of whether the harmless error rule should be applied to this type of defect should be re-examined.

**SPECIAL ISSUES—RIGHT TO SUBMISSION AND ANSWER**

Whether or not a party may insist that the jury make findings

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\(^3\) 146 Tex. 504, 507, 208 S.W.(2d) 919, 921.

\(^4\) Tex. Rules Civ. Pro. (1941) Rule 274. In part: "A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection..."

\(^5\) Tex. Rules Civ. Pro. (1941) Rule 67. In part: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

\(^6\) 146 Tex. 504, 509, 208 S.W.(2d) 919, 922.

\(^7\) Tex. Rules Civ. Pro. (1941) Rule 90.

\(^8\) Golden v. Odiorne, 112 Tex. 544, 249 S.W. 822 (1923).


on an issue where a favorable answer thereon would conflict with findings on adverse issues was considered in *Blanton v. E. & L. Transport Co.* The Supreme Court, in reversing the Court of Civil Appeals, reiterated its approval of the opinion by the Commission of Appeals in *Greer v. Thaman* that

"... in order to accord each party a fair trial, our rules require that the theories of each party be directly submitted where raised by the evidence, and this right cannot be lost or defeated by jury findings on other issues, which, in effect, indirectly negative a favorable finding on an issue not submitted, but raised by the evidence."

The principle case, for injuries sustained in a collision, was submitted on some 83 issues. The jury, in answer to two of the issues, found, as to both defendants, that the accident was the result of unavoidable accident; of the remaining issues, only eight were answered and those were incomplete and wholly indecisive of the question of primary negligence. Deadlocked, the jury was discharged after three days of deliberation. Plaintiff's motion for mistrial was denied, and defendant's motion for judgment on the findings of unavoidable accident was granted.

The Court of Civil Appeals affirmed the trial court's action on the theory that when an issue becomes "immaterial" under the findings on other issues, then a judgment properly may be rendered on the findings that are made; that the only benefit to be gained should the jury return conflicting answers on other issues would be that of setting aside the verdict and granting a new trial; and, that the court will presume the jury would have answered consistently with its actual findings.

However, the Supreme Court, recognizing a litigant's benefit under conflicting answers, distinguishes the case where answers to requested issues would be immaterial and that where the answers might result in conflict. The former is illustrated by the situation

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13 Id. at 520.
where, regardless of what the jury might have found on the omitted issues, there could be no difference in the result of the case. For instance, where the jury finds contributory negligence as a contributing cause, the omission of the issue of primary negligence becomes immaterial; for, whatever the findings might have been on primary negligence, the plaintiff could not recover. Similarly, when both parties are acquitted of negligence by findings on those issues, the issue of unavoidable accident becomes immaterial.

In these cases, “the winning party was entitled to judgment no matter what the jury may have said in response to the unanswered issues.”

If the jury had answered the issue of primary negligence against the defendant, in the principle case, the jury would have foreclosed the defendant’s right to a judgment on the verdict; the conflict would have required a new trial. If otherwise, the requirement of Rule 290, that the verdict comprehend the whole or all issues submitted to the jury, would not be met.

It was no answer, the Supreme Court held, to say that the court will presume the jury would have answered consistently with its actual findings, when, as in the principle case, it definitely appears that the jury could make no findings whatever.

SPECIAL ISSUES—ASSUMPTION OF A DISPUTED FACT

In Texas Employers’ Insurance Association v. McKay, one of the issues submitted was: “Do you find . . . that any incapacity . . . is due solely to disease that is not traceable to the injury sustained . . .?” The defendant complained of this issue on grounds that its unconditional reference to an injury improperly assumed

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18 TEX. RULES CIV. PROC. (1941) Rule 290.
19 146 Tex. 569, 210 S.W.(2d) 147 (1948).
20 Id. at 571, 210 S.W.(2d) 147, 148.
affirmative answers to those issues which inquired if plaintiff sustained such injury. The Court of Civil Appeals\textsuperscript{21} avoided discussion of the contention by holding that the evidence, as a matter of law, established accidental injury and made the error harmless.

The Supreme Court, recognizing the general rule that the practice of assuming affirmative answers to special issues was one to be condemned, held the error to be harmless under Rule 434.\textsuperscript{22} It stated that the basis for the rule is a presumption—that jurors will, because of the offending issue, infer “that the judge thinks his own question a mere formality.” And, in view of this, common sense was said to require the court to consider the offending issue’s probable effect on the minds of the jury in the light of the charge as a whole.

Here the jury was admonished to answer on the evidence and general instructions alone; full definitions were given on injury; two issues were submitted as to whether or not plaintiff sustained injury; and the words, “injury, if any,” occurred fourteen times in twelve issues preceding the offending issue.

“Under these circumstances, to say that... (the offending issue) ... might have misled the jury... is to attribute to the jurors a mentality considerably different from that of the average man.”\textsuperscript{23}

The question would seem to be one of degree; the case definitely affirms that the harmless error rule is applicable to a defective charge.

**APPEAL AND ERROR—POWER OF CIVIL APPEALS TO PASS ON EVIDENCE**

Whether the Court of Civil Appeals can make original findings of fact in exercise of its appellate jurisdiction, and the weight to be given to the findings of the trial court were considered in *Wisdom v. Smith*.\textsuperscript{24} In a trial without jury, the findings and con-

\textsuperscript{22} Tex. Rules Civ. Pro. (1941) Rule 434.
\textsuperscript{23} 146 Tex. 420, 209 S.W.(2d) 164 (1948).
\textsuperscript{24} 146 Tex. 420, 209 S. W. (2d) 164 (1948).
clusions established that petitioner was a *bona fide* purchaser for value without notice.

The only assignment of error in the Court of Civil Appeals\(^{25}\) was that the evidence "conclusively established" that petitioner was charged with notice. Notwithstanding, Civil Appeals assumed that it had jurisdiction to pass upon the *sufficiency* of the evidence to sustain the trial court *and* to make original findings of fact not expressly found below. Consequently, it held that no express findings were made on "constructive notice," and that the evidence showed facts constituting such notice.

In reversing the judgment of the Court of Civil Appeals and affirming the judgment of the trial court, the Supreme Court held that no assignment of error having been made on grounds of insufficiency of evidence to sustain the judgment, it was error for the Court of Civil Appeals to pass upon that question;\(^{26}\) that the only question before that court was whether there was *any evidence* upon which the judgment could be based;\(^{27}\) that the Court of Civil Appeals had no power to determine originally questions of fact in cases there on appeal;\(^{28}\) and, that where there are omitted findings, the court must presume the evidence supports them as well as those expressly found, provided there is *some* evidence upon the omitted elements.\(^{29}\)

As to the jurisdiction of the Supreme Court, it is confined to the question—a question of law—whether there was any evidence to sustain the judgment of the trial court. Concluding that there

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\(^{27}\) In 3 Tex. Jur. § 771, 1102 (1929) it is stated to be a well settled rule that... findings of fact by the trial court will be upheld unless they are manifestly erroneous, and that they will be overruled only where they are without any evidence to support them, or... so against the great weight or preponderance of the evidence as to be manifestly wrong." See Sweatt v. Painter, 210 S.W.(2d) 442 Tex. Civ. App. 1948 (citing the principle case).


was evidence to support the judgment, the Supreme Court upheld the trial court's decision.

COUNTY COURTS—REVIEW OF PROCEEDINGS THEREIN

The Supreme Court, in *Clements v. Chajkowski*,\(^{30}\) denied a party's right to an equitable proceeding in the nature of a bill of review where adequate relief could have been obtained by an appeal.

The action was filed in the probate court; on August 26, 1946, the court denied relief, and the term expired five days later. On September 13, 1946, respondent filed a motion in the probate court to vacate its order of August 26, date of the original hearing. When relief was again denied, respondent appealed to the district court.\(^{31}\) In the district court, respondent's appeal was dismissed for having been filed too late.

The Court of Civil Appeals reversed and remanded the dismissal of the district court,\(^{32}\) holding that the time for appeal began to run from October 15, when the motion to vacate was denied; that the motion to vacate was in the nature of a bill of review; and that respondent had 15 days from that date in which to appeal.

However, the Supreme Court determined that the original orders of the probate court were signed and entered *nunc pro tunc* on September 12, and that respondent's time for appeal began to run from that date.\(^{33}\) Instead of then taking an appeal to the district court, respondent filed an equitable action while he still had time for an appeal. Stating that the relief on appeal would be as adequate and effective as a bill of review, since the appeal to

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30 146 Tex. 408, 208 S.W.(2d) 841 (1948).
33 "When a judgment or order is entered *nunc pro tunc*, the right of appeal shall date from the date of rendition of the *nunc pro tunc* judgment or order, which shall be deemed to be the date upon which the trial judge signed the *nunc pro tunc* order..." *Tex. Rules Civ. Pro.* (1946) Rule 306b.
the district court would be a trial *de novo*, the court held that an equitable action in the nature of a bill of review, seeking to vacate orders of a probate court, cannot be used as a substitute for an appeal. Respondent having failed to utilize the legal remedy provided, equitable relief should be denied to him.34

**JURY MISCONDUCT—AGREEMENTS AMONG JURORS**

In *Kindy v. Willingham*35 the Supreme Court had occasion to distinguish between agreements among jurors which are proper and those which constitute misconduct. The principle case presents an example of the latter.

After retiring, and prior to any test vote or commitment by the jurors, it was agreed that the entire panel would abide by the verdict of 75% of the members upon a vote thereafter taken. On taking the vote, some issues were answered unanimously; others were answered 8 to 4, one of the latter being vital to the determination of the cause.

In remanding for a new trial, the court held that agreements of jurors to bind themselves, in advance, to abide by the decision of the majority before a vote is taken is improper.

"The vice... is that the jurors would not know the kind of verdict to which they were bound, and would result in some of the jurors adopting the views of others without surrendering their own."36

This is distinguished from the situation arising where, after a definite vote is taken, the minority, not by reason of previous agreements, but in abandonment of prior convictions, agreed to adopt the majority’s views. Under these circumstances, the agreement is not condemned.

_Eldon R. Vaughan._

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35 146 Tex. 548, 208 S.W.(2d) 585 (1948).

36 Id. at 551, 209 S. W. (2d) 585, 587.
MISCONDUCT OF JURY—HARMLESS ERROR RULE APPLICABLE

In *Watson v. Texas Indemnity Insurance Company*, a court of Civil Appeals\(^1\) had held that the lack of sufficient evidence on good cause for tardy filing of a workmen’s compensation claim should have prevented submission of such issue to the jury; and accordingly, the defendant should have received an instructed verdict. The Supreme Court,\(^2\) however, held there was sufficient evidence on that issue to support the jury verdict, and reversed and rendered for the plaintiff, affirming the trial court’s judgment. The defendant attempted to secure a new trial rather than have judgment rendered against him by showing jury misconduct. On *voir dire* it developed one juror had received a personal injury. While the trial was in process, during a recess, he stopped at the plaintiff’s table to secure a “little free advice” as to his chances of recovering for his injury. The juror stated to plaintiff’s counsel that his employer had insurance. The counsel told him he would have to see the policy. The juror stated he received $75 for the injury, and signed a release. Both agreed the claim was probably “dead”. At the conclusion of the recess, the defendant moved for a mistrial because of the incident, and again urged the point in its motion for new trial. Both motions were overruled. The Supreme Court applied Rule 327, and found no reversible error.

Jury misconduct is governed by the special Rule 327, which provides:

“Where the ground of the motion is misconduct of the jury or of the officer in charge of them, or because of any communication made to the jury or that they received other testimony, the court shall hear evidence thereof from the jury or others in open court, and may grant a new trial if such misconduct proved, or the testimony received, or the communication made, be material, and if it reasonably appears

\(^2\)___, ___ Tex., 210 S. W. (2d) 989 (1948).
from the evidence both on the trial of the case and from the record as a whole that injury probably resulted to the complaining party."

The rule, in the main, carries on old Article 2234, except that the complaining party now has the burden of showing probability of injury. Before the adoption of the Rules of Civil Procedure, Article 2234 was construed as compelling reversal if there was any reasonable doubt as to whether the misconduct affected the decision of the jury. Cases such as Texas Milk Products Company v. Bircher, which were tried before the adoption of the new Rules, but which reached the appellate courts after their adoption, applied the old Rule and placed on the party seeking to uphold the jury's verdict the heavy burden of removing from the court's mind all reasonable doubt that the misconduct prejudiced the complaining party.

Barrington v. Duncan marks the first departure from the reasonable doubt rule; holding, in fact, that Rule 327 abolishes it, and substitutes in its stead

"... a rule which imposes upon the party asserting misconduct the burden not only of proving by a preponderance of the evidence that such misconduct occurred, but also of showing that such misconduct probably resulted in injury to him."

The case further holds the determination of whether misconduct occurred to be question of fact, determinable by the fact finder, unless undisputed evidence either way changes it to a law question. Further, once misconduct is established, the reviewing court, in the light of the entire record, must determine whether probable injury resulted, i.e., it becomes a question of law in each court.

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7 140 Tex. 510, 169 S. W. (2d) 462 (1943). The court held discussion of insurance resulted in probable injury, necessitating reversal.
8 140 Tex. 510, 515, 169 S. W. (2d) 462, 464.
9 City of Houston v. Quinones, 142 Tex. 282, 177 S. W. (2d) 259 (1944).
The principal case, in spite of the strong facts indicating injury, would seem to have correctly applied the present rules. It is hard for one to require an innocent counsel, accosted by an amiable juror, to assume the unwanted duty of delivering a lecture to the layman on the stringency of the law of jury misconduct. The present rules accept this and approach the problem realistically. However, the views of Judge Alexander in the Birtcher case, and the cases prior to the new rules have merit. They feel the whole “spirit of the law” prohibits even the most innocent contact between litigants or their counsels and jurors; that even the juror who states he was not influenced, may unknowingly favor the party accommodating him. The trial judge is perhaps best able to balance the two considerations, and as the principal case notes, his conclusion “will be respected.”

VENUE-SUIT INVOLVING TITLE TO LAND

In Gates v. Coquat the plaintiff sued the defendant to enforce a written promise to convey part of a ranch to the plaintiff. The plaintiff brought his suit in the county in which the ranch was located seeking to maintain venue in that county under exception 14 of Article 1995. In affirming the order of the lower court sustaining a plea of privilege changing the venue to the defendant’s home county, the San Antonio Court of Civil Appeals held that the suit was not one for the “recovery of lands” as embraced by the statute.

Exception 14 provides:

“Suits for the recovery of lands or damages thereto, or to remove incumbrances upon the title to land, or to quiet the title to land, or to prevent or stay waste on lands, must be brought in the county in which the land, or a part thereof, may be.”

It was early held in Texas that a suit for specific performance of a contract for the sale of land was not a suit for the recovery of

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land. Nor does the term "suit for recovery of lands" embrace such actions as that to foreclose a vendor's lien, to recover damages for an alleged breach of an agreement to purchase a lease on land, or to enforce an oral agreement for a joint interest in a mineral lease.

Difficulties are many times presented in distinguishing between suits for specific performance and suits to recover lands. In *Mecom v. Gallagher* the court found a suit to recover lands in a petition seeking to assert a preferential right, if the lessor acquired the desire to sell, to purchase property under a recorded lease. Likewise in *Robinson v. O'Keefe* where the plaintiff was suing to establish his interest in a mineral lease, basing his right on an alleged contract, the court found a suit for recovery of lands. Both cases seem to base their distinctions on reasoning in *Hearst's Heirs v. Kuykendall's Heirs*, the early case cited previously. It was there stated, *inter alia*, that a suit for specific performance had as its object the enforcement of the contract for its sale—the delivery of a deed or title to the land—not the recovery of the land itself. Recovery of lands, on the other hand, meant ejectment, trespass to try title, or a suit to recover the land itself. "To secure title deeds to land is one thing; to recover the land itself is another..." The *Robinson* case quoted the early case extensively, and felt it needed no elaboration or stated application to the facts. The *Mecom* case, while not citing the *Hearst's Heirs* case, did cite the *Robinson* case, and went to great length to show the plaintiff was "entitled *prima facie*, to recover the lands sued..."
for without the necessity for any deed of conveyance to him." Subsequent cases have regarded the distinction as well settled.

The court in the principal case states its rule as follows:

A suit based upon an equitable right, such as a suit for reformation of a written instrument, or for specific performance of a contract, is not a suit for the recovery of land within the provision of exception 14.

Under Texas decisions, to say that a suit for specific performance of a contract is not a suit for recovery of lands, is not at all to say a suit to enforce an equitable right will never be one to recover lands. If the court by its rule is stating such a proposition, it is out of line with many cases enforcing equitable rights. The Mecom case allowed the recovery of an equitable interest in land to be within the exception, sustaining venue in the county where the land was situated.

There is also Carstairs v. Bomar, a Commission of Appeals Case, whose opinion was adopted by the Supreme Court, which enforced the clearest form of equitable right, and held the suit to be one for the recovery of land within the exception.

**VENUE-SUIT FOR FRAUD BROUGHT IN COUNTY WHERE IT WAS COMMITTED**

1948 presented the interesting case of Waller Peanut Company v. Lee County Peanut Company. The defendants had purchased several truck loads of peanuts from the plaintiffs. Each time

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21 192 S. W. (2d) 804, 806.
23 192 S. W. (2d) 804, 806. The court called the right "an absolute, vested equitable interest ... prior in right and superior in equity to any ... acquired or held by appellees."
24 29 S. W. (2d) 334 (1930).
25 A constructive trust in property devised to others in violation of a promise to leave the property to the plaintiff.
plaintiffs would bill the defendants for the nuts at the agreed price, and defendants would send their check to the plaintiffs in payment. This procedure was followed for the last truck load of nuts, but the defendants stopped payment on their check. It was shown by the plaintiffs that the defendants had no intention of paying for the nuts when they ordered them; that the defendants felt the plaintiffs had shipped them worthless peanuts on a prior load, but did not want to sue the plaintiffs in Lee County (plaintiff's residence) for breach of warranty. Instead after consultation with their lawyer, they devised this ruse to force the plaintiff's to come to Waller County (defendant's residence) and sue for the price of the last load of nuts, intending to counterclaim for breach of warranty. The action pleaded by the plaintiff was for fraud, and suit was instituted in Lee County. The defendants interposed a plea of privilege to be sued in Waller County, and appealed from the lower court's order overruling the plea. The Austin Court of Civil Appeals held the action was one for fraud, committed in Lee County and thus came under exception 7 of Article 1995.

The pertinent part of exception 7 is as follows: "In all cases of fraud... suit may be brought in the county in which the fraud was committed..." It is considered fraud if one makes a contractual promise with the undisclosed intention of not performing it. Thus a false representation of the existence of an intent to pay for goods, which induces the seller to advance credit, is fraud. Even if there be no express false statement, as the principal case notes, the mere application for credit necessarily implies an intention to pay, and a contrary intention constitutes actionable fraud. The principal case is the first Texas case found applying these

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29 Restatement of Contracts § 473, 900 (1932).
rules of fraud to exception 7 of the venue statute, and holding the petition to be one based on fraud.

There was injected into the principal case an issue which has caused much confusion throughout the law, viz: is the cause of action alleged in tort or contract? Mere breach of contract is not fraud, and the exception does not include suits for breach of contract. Nor can "mere reiterations of fraud alter the real nature of the suit as shown by the facts alleged." Thus in Bunger v. Campbell the court said:

"The rule is well settled that even though a contract may have been induced by fraud, where the innocent party elects to sue on the contract, rather than for his damages for the fraud, he cannot rely on the fraud to fix the venue of his suit."

An alternative prayer for recovery in breach of contract does not affect the venue where the cause of action is basically ex delicto. The courts simply weigh all the facts, as in the principal case, to find which was the incidental and which was the basic theory of recovery. Upon finding it to be fraud, they allow the suit to be maintained in the county in which it was committed.

It should be noted that constructive fraud is included within the exception. Stephens County v. Burt and Company indicates the difficulty in distinguishing a case of constructive fraud from a quasi-contractual recovery. As the dissenter, Justice Funderburk, notes if the cause of action on tort is once voluntarily waived

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33Lyon v. Gray, 265 S. W. 1094 (1924).
37209 S. W. (2d) 405, 407.
38"Constructive fraud is a breach of duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive, to violate confidence, or to injure public interests." 37 C. J. S. 211 (1943).
then the legal fiction—the implied promise—is the cause of action. Any acts of fraud then relied on do not constitute the cause of action, but simply are evidence "to show the existence of the duty to refund." This subtle distinction, no matter what merit it may have in logic, does not seem to have been accepted by the recent cases. The liberal tendency to find actionable fraud in an ambiguous petition is followed with little discussion.\(^4\)

**Venue—Necessity of Active Negligence under Exception 9**

Two 1948 cases take their place alongside the countless other Texas cases seeking to distinguish that negligence which is active, and thus a trespass under exception 9 of the venue statute, from that negligence which is passive and not under the exception. In *Hoover v. Horton*\(^4\) plaintiff and defendant owned adjoining farms. Plaintiff sued for damages to his crops, fence rows and lands occasioned when topsoil from defendant's land was blown onto that of the plaintiff. Plaintiff alleged that a duty rested on defendant to use such farming methods as would prevent blowing of his topsoil onto plaintiff's land; that, notwithstanding this duty, defendant "failed and refused" to farm his land properly. Specific acts of negligence alleged were use of a one-way plow, failure to plow deep enough, failing to plow to the top clods of subsoil which would not blow, and waiting until late December to plant his wheat crop. Plaintiff brought suit in D County where the land was located seeking to maintain venue there under exceptions 9 and 14.\(^4\) Defendant filed his plea of privilege to be sued in the county of his residence. The plea was sustained. In affirming the action of the lower court, the Court of Civil Appeals found

\(^4\)Note, 8 Tex. L. Rev. 446 (1930); Oakley v. Hargrove, 125 S. W. (2d) 403 (1939); see also the principal case, 209 S. W. (2d) at 407, where the fact that the alleged market value of the peanuts and the contract value were the same was considered immaterial.


\(^4\)This exception is not within the scope of this article. See 2 Southwestern L. J. 437 (1948).
only an omission to perform a duty, thus not a trespass within exception 9.

In *Bussey v. Mack* 44 defendant was servicing a butane gas tank by gravity flow. In violation of a Railroad Commission order requiring two hoses in such situations—one to equalize pressure, the other to transfer the liquid—defendant was using only one hose. The outlet leading from the tank to plaintiff's house had been shut off by the defendant, and there was no way pressure could escape. Liquefied gas was being forced into the open air, and was clearly discernible as it vaporized into a white fog. This gas caught fire, and a strong wind blew the flames towards the house. Plaintiffs sue in C County, where the accident occurred, for loss of personalty. They seek to establish venue there under exception 9. The Court of Civil Appeals held defendant's use of improper or insufficient equipment constituted affirmative negligence, and thus was a trespass under the exception.

Exception 9 of Article 1995 46 provides:

"A suit based upon a crime, offense, or trespass may be brought in the county where such crime, offense, or trespass was committed..."

Reference should be made to the 1947 survey issue of this journal for additional comments on this exception. 46

Lawyers who remember the famous old case of *Hill v. Kimball* 47 for its pioneering efforts in the law of mental anguish may be surprised to learn Judge Gaines had only to decide an important point of venue. He there held that the word trespass in what is our present exception 9 embraced wrongs arising from negligence as well as intentional wrongs. It was only a year later in 1891 that the same judge had to qualify his decision, and in the oft-cited case of *Ricker v. Shoemaker* 48 drew the nebulous dis-

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462 Southwestern L. J. 443 (1948).
4776 Tex. 210, 13 S. W. 59 (1890); cf: Hubbard v. Lord, 59 Tex. 384 (1883).
4881 Tex. 22, 16 S. W. 645 (1891).
ntinction which Texas law still retains. The case held that trespass in the statute includes only the actions based on wrongful acts "willfully or negligently committed, and not those which result from a mere omission to do a duty." To say the least, the subsequent cases defining the limits between active and passive negligence have been unsatisfactory.

Perhaps the most lucid explanation to be found is that in *Metzger's Dairies v. Wharton.* In holding that a suit alleging defendant was negligent in bottling milk with glass in it was not a suit based on a trespass the court stated:

"Negligence always, if it exists, involves a failure of duty. Negligence consists of acts or omission. If the duty is breached by 'an act' the negligence is that of affirmative character which may be a trespass. If the duty is breached by the failure or omission to do something which it was the person's duty to do, the negligence is negative and does not constitute a trespass."

Yet this very case, approved by the Supreme Court, and so well considered did not refer to the earlier case of *Universal Mills v. Kennedy* which would appear to be directly in point on the facts. It was there held a suit for "negligently permitting" pieces of metal to be in dairy rations sold to plaintiff was a trespass.

When confronted with a doubtful case a consideration of the rule and the statute in their setting might be useful. The word trespass came into the statute in 1863, when bringing a suit, particularly when the defendant's residence in a distant county necessitated a long trip, was a tiresome and time-consuming operation. As Judge Gaines noted in *Hill v. Kimball,* the inducement

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49 Id. at 26, 16 S. W. 645, 646.
51 1113 S. W. (2d) 675, 677.
54 Gammel's Laws 664, amending 2 Gammel's Laws 1670.
in granting the exception to the general rule which was designed to place the inconvenience on the suing party.\textsuperscript{55}

"... was that one who has been injured in his person or property by the wrongful or negligent conduct of another, should not be driven to a distant forum to get redress of his wrongs."\textsuperscript{56}

Thus the legislature coupled a trespass with a crime or an offence and said the defendant in such cases was to bear the inconvenience. One wonders, then, in doubtful cases if the true distinction can really be said to be between a passive or an active act. Might not a more useful classification be between a reckless, culpable act which approaches a crime or an offense on the one hand, and one which does not so greatly deviate from the accepted norm of conduct as to merit placing on the defendant the inconvenience?

The two principal cases are illustrative. In the \textit{Hoover} case the court carefully examined the evidence and concluded that the use of a one-way plow was not inherently wrong, "that there is a difference of opinion among farmers as to" its proper use.\textsuperscript{57} Further the court was quick to note that unusually high winds partially caused the erosion. The court in the \textit{Bussey} case also examined the evidence carefully and found circumstances of reckless conduct.\textsuperscript{68}

The rules applicable to failure to keep a proper lookout are openly based on the culpable nature of the defendant's acts, rather than a strict application of the active-passive distinction. It has been held that failure to keep a proper lookout is active negligence,\textsuperscript{69} but a very recent case requires evidence of recklessness or an unlawful rate of speed before the negligence is considered

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\textsuperscript{55}Meredith v. McClendon, 130 Tex. 527, 111 S. W. (2d) 1062 (1938).
\textsuperscript{56}76 Tex. 210, 217, 13 S. W. 59, 60.
\textsuperscript{57}209 S. W. (2d) 646, 649.
\textsuperscript{68}209 S. W. (2d) 385, 386.
\textsuperscript{69}Evans v. Jeffrey, 181 S. W. (2d) 709 (Tex. Civ. App. 1944); J. A. & E. D. Trans- 
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The case was following *Barron v. James* where numerous alleged acts of omission (among them failure to keep a proper lookout) were held to constitute passive negligence, but the court carefully pointed out: "There is no evidence that the bus was being driven recklessly or at an unlawful rate of speed or in violation of any law." See the note for further illustrations.

The *Barron* case makes it clear that whatever may be the underlying distinction in doubtful cases, where the facts clearly show nonfeasance the *Ricker* case, and its terminology, remain Texas law. For example, leaving an unlighted car on a well traveled highway is always considered passive negligence under the exception if Article 799 of the Penal Code is inapplicable. One case even held this to be passive even though the defendant's agent parked his unlighted truck completely across the street.

*Dean Gandy.*

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62 *Id* at 291, 198 S. W. (2d) 256, 261.

63 *Jackson v. McClendon*, 143 Tex. 577, 187 S. W. (2d) 374 (1945) (failure to have machinery present to remove cement from plaintiff's valuable well before it hardened held active negligence); *Brooks v. Hornbeck*, 274 S. W. 162 (Tex. Civ. App. 1925) (Plaintiff's broken leg set improperly); *cf. Lyle v. Wadlile*, 144 Tex. 90, 188 S. W. (2d) 770 (1945); *English v. Miller*, 33 S. W. (2d) 477 (Tex. Civ. App. 1930) (acrobatic airplane flying at low altitude held active negligence—the court defines such negligence as "the doing of something that should not have been done"); Compare such cases as *Sherrod v. Bird*, 155 S. W. (2d) 422 (Tex. Civ. App. 1941) and *Murray v. Jones*, 56 S. W. (2d) 276 (Tex. Civ. App. 1932): there an act intervened between the defendant's negligence and the plaintiff's injury; Note also the cases holding that the trespass must be committed by the defendant and not by his agent which it is submitted would not be material under a strict active-passive rule, but would only have weight if the word trespass had a criminal tinge, *e.g.* *Wettemark v. Cameron*, 93 Tex. 517, 56 S. W. 331 (1900); *Murray v. Jones*, 56 S. W. (2d) 276 (Tex. Civ. App. 1932).

