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A. E. Collier

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THE SPECIAL PRACTICE ACT IN TEXAS

*A. E. Collier**

IN 1923 the Texas Legislature enacted the Special Practice Act to govern certain aspects of procedure in the district courts of a few populous counties.¹ Gradually, through the combination of a broadening of the requirements for operation of the Act and the trend toward continuous terms within most of the smaller counties, it is now applicable to the district courts in more than 85 per cent of the 254 counties in Texas.² As a result of discussion and correspondence, it is believed that some members of the Bar do not realize that the Special Practice Act is no longer "special." This article is written to furnish a guide in determining the counties in which it operates and to consider the effects of some of its more important provisions.

HISTORY AND PURPOSE OF THE SPECIAL PRACTICE ACT

When the Special Practice Act was originally enacted in 1923, its purpose was to expedite litigation in the more populous centers.³ The heavy litigation in urban areas made it necessary to provide that the district courts be always in session, but in making this provision the Legislature had to take into account the constitutional requirement that every district court should have at least

*B.B.A., LL.B., Southern Methodist University; Editor-in-Chief, *Southwestern Law Journal*, 1951-1952. The writer has had the benefit of special help and supervision from Professor Wilmer D. Masterson, Jr., of the Southern Methodist University Law School faculty.

¹ Acts 1923, 38th Leg., c. 105, § 1. The "Special Practice Act" is the popular name by which the Act is referred to by both bench and bar. *Fitzgerald v. Lane*, 137 Tex. 514, 155 S.W. 2d 602 (1941).

² See Appendix *infra* p. 223.

³ "The purpose of the enactment was to adjust the practice and procedure in the civil district courts of certain of the populous counties to dispose of their continuous litigation, without interfering in any way with the practice and procedure of the other courts of the state." *Walker Avenue Realty Co. v. Alaskan Fur Co.*, 123 S. W. 2d 999, 1000 (Tex. Civ. App. 1938).

two terms in each year.⁴ This necessity led to the adoption of terms of court lasting as long as three to six months instead of the generally shorter terms in use in other counties throughout the state. The fact that judgments rendered during the early part of one of these longer terms remained subject to the control of the court until the end of the term prevented such judgments from having the desired element of finality. The Special Practice Act was adopted to meet this problem. It did so by providing for fixed periods during which various steps affecting a judgment could be taken and by prescribing a period after which a judgment would be as final as if the term of court had ended. The constitutionality of the Act was upheld in *Phil H. Pierce Co. v. Watkins*,⁵ decided in 1924.

When first enacted, the Act was embodied in Articles 2092 and 2093 of *Texas Revised Civil Statutes (Vernon, 1925)* and was applicable to "civil district courts in counties having two or more district courts with civil jurisdiction only, whose terms continue for three months or longer."⁶ This provision limited the application of the Act to the counties of Harris, Dallas, and Tarrant. In 1929 Jefferson County was brought within the scope of the Act;⁷ Article 2093a was enacted in 1935 to place Wichita County within portions of its operation;⁸ and in 1939 Article 2092 was amended to broaden the scope of the Act to include Bexar County.⁹

⁴ TEX. CONST. Art. 5, § 7.

⁵ 114 Tex. 153, 158, 263 S. W. 905, 907 (1924). "The law is a valid exercise of legislative authority, and well designed to have a wholesome effect upon the dispatch and finality of litigation in the courts in our congested centers."

⁶ Acts 1923, 38th Leg., c. 105, § 1; TEX. REV. CIV. STAT. (Vernon, 1925) art. 2092.

⁷ Acts 1929, 41st Leg. 2d C. S., c. 84, p. 166.

⁸ Acts 1935, 44th Leg., c. 105, p. 289.

⁹ Acts 1939, 46th Leg., c. 28, p. 205, § 1, provides that the Act shall apply "in the Civil District Courts in counties having two (2) or more District Courts with civil jurisdiction only, whose terms continue three months or longer and in all civil litigation in counties having five (5) or more District Courts with either civil or criminal jurisdiction or both civil and criminal jurisdiction." The latter portion apparently had the effect of placing all civil litigation, including that in the county and justice courts, under the Act in the most populous counties. No cases have been found so applying this provision. Since the adoption of the Texas Rules of Civil Procedure in 1941, this provision is no longer in effect.

When the Texas Rules of Civil Procedure were adopted to take effect in 1941, the Special Practice Act was embodied in Rule 330.¹⁰ The Rule provided that it should "govern and be followed in all civil actions in district courts in counties where the only district court of said county vested with civil jurisdiction, or all the district courts thereof having civil jurisdiction, have successive terms in said county throughout the year, without more than two days intervening between any of such terms, whether or not any one or more of such district courts include one or more other counties within its jurisdiction." The primary requirement of this Rule was that all the civil district courts in the county have continuous terms. It was adopted with the view that there would eventually be continuous terms in all districts.¹¹

The following year there began a statewide campaign to introduce continuous terms in counties which had not previously had them. One of the leading exponents of continuous terms was James P. Alexander, then Chief Justice of the Supreme Court of Texas. In an article in the *Texas Bar Journal* he pointed out the advantages of continuous terms and prescribed a procedure for introducing them into any particular county.¹² A State Bar committee sponsoring the plan decided that the best way to foster its growth would be by a series of local bills for districts favoring continuous terms rather than by one general bill.¹³ The Committee on Legislation prepared a uniform "Continuous Term" bill for use in enacting the local bills. It was agreed that the state should be divided into various sections and that each member of the Committee should contact the judges and lawyers in each area, urging them to take steps to procure the passage of a "Continuous Term" act for their district courts. Each district judge and lawyer was to be

¹⁰ TEX. RULES CIV. PROC. (VERNON, 1942) Rule 330, adopted by the Supreme Court of Texas to take effect September 1, 1941. Future references to these rules will be simply by rule number.

¹¹ James P. Alexander, *Continuous Terms*, 5 Tex. B. J. 43 (1942).

¹² *Ibid.*

¹³ 5 Tex. B. J. 264 (1942).

furnished with a copy of the uniform "Continuous Term" bill.¹⁴ After receiving the approval of the local bar within each of the counties affected and that of the district judges concerned, the bills were introduced into the legislature and were passed without opposition. During the 1943 session, bills providing for continuous terms for 41 district courts encompassing 149 counties were enacted. Additional counties have been added to the list in each of the sessions of the legislature since then, so that today only 36 counties out of 254 do not have completely continuous terms.

The result of this drive has been a significant increase in the number of counties subject to the Special Practice Act. Coupled with this increase has been a growth in the amount of litigation reaching the appellate courts construing and applying the Act. From the reports of this litigation, it is possible now to outline pretty definitely most of the effects of the Act. It is the purpose of this article to examine the decisions to determine, to the extent that it is possible, the counties in which the Act is effective today and to discuss some of the problems that have arisen under its operation.

COUNTIES IN WHICH THE SPECIAL PRACTICE ACT IS APPLICABLE

Rule 330 provides that the Special Practice Act "shall govern and be followed in all civil actions in district courts in counties where the only district court of said county vested with civil jurisdiction, or all the district courts thereof having civil jurisdiction, have successive terms in said county throughout the year, without more than two days intervening between any of such terms, whether or not any one or more of such district courts include one or more other counties within its jurisdiction." Analysis of this provision justifies the following observations:

(1) The Special Practice Act applies only to civil district courts. It does not affect criminal courts, nor does it operate in the county or justice courts.

¹⁴ 6 Tex. B. J. 208 (1943).

(2) For the Special Practice Act to operate, the court must have "continuous terms"—successive terms throughout the year without more than two days intervening between any of such terms.¹⁵

(3) Where a particular county has more than one civil district court, in order for the Special Practice Act to operate, all of them must have continuous terms. If one of the courts does not have continuous terms, then all the courts operate under the general practice.¹⁶ This feature makes it convenient to classify the courts which operate under the Act by counties.

(4) It is possible for a particular district court to operate under the Special Practice Act in one or more counties, and under the general practice in other counties.¹⁷

It is apparent that whether a particular district court operates under the Special Practice Act within a particular county depends upon whether all the courts within the county have continuous terms while sitting within that county. To make this determination, it is necessary to resort to Article 199 of the *Texas Revised Civil Statutes* (Vernon, 1948). This article sets out the terms of court for all the civil district courts in each of the counties in which they operate. Looking to Article 199, if the district court in question has continuous terms in the county involved and all the other district courts within that county also have continuous terms, then it operates under the Special Practice Act.

Unfortunately, there are at least twenty different variations employed in setting out the terms of court for the different districts. Some of these provisions have been interpreted by the courts; others have not. The provisions which have been construed as

¹⁵ The determination of when a court has continuous terms is sometimes difficult. See discussion *infra* at pp. 198-203.

¹⁶ Delta and Hunt Counties offer an example of this feature. The 62d District Court has continuous terms in these counties, but the 8th District Court does not. Consequently, both courts operate under the general practice.

¹⁷ An example of this feature is found in the 112th District Court, which operates under the Special Practice Act in the continuous term counties of Kimble, Sutton and Crockett, but under the general practice in Pecos and Upton Counties.

providing for continuous terms may be conveniently divided into three groups:

(1) Those which provide that each term of court *shall* continue until the date fixed for the beginning of the next term, or until some other date less than two days prior to the beginning of the next term.

(2) Those which provide that each term of court *may* continue until the date fixed for the beginning of the next term, or until some other date less than two days prior to the beginning of the next term.

(3) Those which provide that each term of court shall or may continue *until all the business is disposed of*.

Within the first group there seems to be no doubt that the provision is one for continuous terms. The mandatory character of the language employed is sufficient to make it a provision for "successive terms . . . throughout the year, without more than two days intervening between any of such terms." This group includes such populous counties as Harris, Dallas, Bexar and Nueces.

The second group is the largest in number of counties involved. The language most often used to designate continuous terms is that which was recommended in the "Uniform Continuous Terms" bill sponsored by the State Bar. The first case to construe this provision was *Federal Underwriters Exchange v. Bailey*,¹⁸ a case appealed from the district court of Kaufman County. Article 199 provides that "each term of court in . . . [Kaufman County] may continue until the date herein fixed for the beginning of the next succeeding term therein." The court held that Kaufman County was controlled by the Special Practice Act. No discussion of the question was given, the court merely saying, "Without discussing the question in extenso, we express the conclusion that the statute had the effect of placing Kaufman County under the practice and procedure described in Rule 330. . . ."¹⁹

¹⁸ 175 S. W. 2d 618 (Tex. Civ. App. 1943) *er. ref. w. o. m.*

¹⁹ *Id.* at 619.

In *Magnolia Petroleum Co. v. Klingeman*²⁰ the argument was made that inasmuch as Article 199 provides that the terms of court "may" continue until the next term begins, and since under Rule 19 the court is at liberty to adjourn such terms more than two days before the next term begins,²¹ the Special Practice Act does not apply. The court answered this argument by noting that the same contention had been made in a prior case²² and had been overruled and observed that it saw no reason to conflict with that decision.

The only supreme court decision within this group is *W. C. Turnbow Petroleum Corp. v. Fulton*,²³ which held that Upshur County has continuous terms. No discussion of the provision was given in the opinion. This supreme court holding coupled with the denial of the argument made in the *Klingeman* case indicate that the provisions within this group are clearly continuous terms provisions.

The distinguishing feature of the third group of counties is the provision for continuation of the terms of court *until all the business is disposed of*. In *Wichita Falls & S. R. Co. v. McDonald*²⁴ the supreme court considered the question whether Rule 330 applied to Tarrant County. Article 199 provides:

The terms of said district courts shall be as follows:

* * * * *

Forty-eighth District: On the first Mondays in February, May, August and November and continue until the business is disposed of.

In holding that this subdivision is a provision for continuous terms, the court said:

²⁰ 242 S. W. 2d 950 (Tex. Civ. App. 1951) *er. ref.*

²¹ Rule 19 provides: "Every term of court shall commence and convene by operation of law at the time fixed by statute without any act, order, or formal opening by a judge or other official thereof, and shall continue to be open at all times until and including the last day of the term *unless sooner adjourned by the judge thereof.*" (Emphasis supplied.)

²² *National Life & Accident Ins. Co. v. Collins*, 224 S. W. 2d 285 (Tex. Civ. App. 1949) *er. ref.*, discussed *infra* at note 26.

²³ 145 Tex. 56, 194 S. W. 2d 256 (1946).

²⁴ 141 Tex. 555, 174 S. W. 2d 951 (1943).

All the civil courts of . . . [Tarrant] county have successive terms throughout the year, with not more than two days intervening between any of such terms, and consequently the procedure therein is subject to the provisions of Rule 330, Texas Rules of Civil Procedure.²⁵

No mention was made of the possibility that the business of one term might be disposed of before the date set for the beginning of the next term.

In *National Life & Accident Ins. Co. v. Collins*²⁶ the court considered the provision for terms of court for the 91st District Court of Eastland County. Article 199 provides that the terms of that court shall be held "[o]n the first Mondays in February, April, June, August, October and December, and may continue until the business of the court is disposed of." Citing the provisions of Rule 19, the appellants contended that "if the business of the court is disposed of prior to the expiration of any two months term . . . the judge may adjourn court for the term before the expiration of two months and therefore, R.C.P. 330 does not apply. . . ."²⁷ The court did not offer a logical answer to this argument. It merely noted that the material provisions as to terms of the district courts in Tarrant and Eastland Counties are identical and relied upon the *McDonald* case to hold that Rule 330 is applicable to the district courts of Eastland County.

The most recent case construing this provision is *Bunte v. Flett*,²⁸ which held that the district courts of Galveston County are governed by Rule 330. Article 199 provides that the terms of the district courts of Galveston County shall begin "[o]n the first Monday in February, April, June, October and December and may continue until the business is disposed of." The court of civil appeals certified the question: "Do the provisions of Rule 330, T.R.C.P. govern the practice and procedure in the 56th District

²⁵ *Id.* at 556, 174 S. W. 2d at 952.

²⁶ Cited *supra* note 22.

²⁷ 224 S. W. 2d at 286.

²⁸ _____ Tex. _____, 243 S. W. 2d 828 (1951).

Court of Galveston County, Texas?" In answering this question affirmatively, the supreme court relied upon and expressed its approval of the *Collins* case. In noting that the June term could last four months, whereas the other four terms were for only two months, the court said:

The result merely is to have four terms limited to two months and one (June) limited to four months, with all of them permitted to continue until the business is disposed of. They are successive terms and . . . they are terms "without more than two days intervening between any of them," because the court's business may require that the terms run for the full two months or four months, as the case may be.²⁹

The decisions reviewed have established definitely that district courts in the counties involved and those having identical provisions for terms of court have continuous terms. But what about those counties with similar provisions for which we have no controlling decisions? May we derive any guiding principles from the decisions which have been discussed?

At the outset, it should be noted that these decisions apparently make no attempt to discover whether the courts actually have been in session "for successive terms without more than two days intervening between any of such terms." They merely look to the provisions of Article 199 and decide whether the provision in question is one for continuous terms. Apparently the fact that Rule 19 is subject to the construction that the trial judge may adjourn the term prior to the date at which it would expire by operation of law is not sufficient to take the court out of the provisions of Rule 330. This contention was made and overruled in the *Collins* case, which has received the support of the supreme court in *Bunte v. Flett*. Whether the courts would hold the Special Practice Act applicable in a case in which the trial court actually adjourned the term more than two days before the date set for the beginning of the next term is unknown.

²⁹ 243 S. W. 2d at 829.

The language of the *Bunte* case seems to indicate that a court has continuous terms if by the provisions of Article 199 each term of court is *permitted* to continue until the date set for the beginning of the next term. In its opinion the supreme court noted that the terms in question were successive terms "because the court's business *may* require that the terms run for the full two months or four months, as the case may be."³⁰ If this analysis is a correct one, then it will not matter whether the term is actually adjourned more than two days before the date set for the beginning of the next term.³¹

Let us consider the effect of such an interpretation upon several provisions of Article 199 which have not yet been ruled upon by the courts. Article 199 provides for three terms of court beginning at four-month intervals for the 123rd District Court in Panola and Shelby Counties. It further provides that the terms shall continue in session for seven and eight weeks respectively, "or until the business thereof is disposed of." Four terms of twelve weeks each are prescribed for the 13th District Court of Navarro County, but there is also added the phrase, "or until all the business be disposed of." Both of these subdivisions of Article 199 contain provisions for fixed terms which standing alone would not be continuous terms. Does the addition of the phrase, "or until the business be disposed of," alter this situation and make the terms continuous? This phrase standing alone has been held to amount to a continuous term provision since "the court's business may require that the term run . . . [until the beginning of the next term]."³² The same reasoning should be applicable to the subdivisions of Article 199 under consideration. Such an interpretation would render the district courts of Panola, Shelby and Navarro Counties subject to the provisions of the Special Practice Act.

³⁰ *Ibid.* Emphasis supplied.

³¹ No cases have been found in which a court subject to the Special Practice Act has actually adjourned more than two days before the date set for the beginning of the next term. Such a case would present interesting problems in connection with the filing of motions for new trial.

³² *Bunte v. Flett*, _____ Tex. _____, 243 S. W. 2d 828, 829 (1951).

A similar situation is found in the provisions for terms of the 62nd District Court in Delta, Hunt, Lamar and Franklin Counties. Since the 8th District Court in Delta and Hunt Counties does not have continuous terms, both courts operate under the general practice in these two counties. Article 199 provides for two terms of eight weeks each in Lamar County and for two terms of three weeks each in Franklin County. Standing alone, these provisions would clearly make both counties subject to the general practice. But in a subsequent paragraph there is the following provision: "Each term of court in each of such counties may continue until the date herein fixed for the beginning of the next succeeding term therein." The addition of this sentence would seem to permit continuous terms, so that under the test laid down in the *Bunte* case, both counties should operate under the Special Practice Act.

The tendency of the courts to resolve all doubts in favor of a holding that a particular provision is for continuous terms would seem to justify a prediction that Panola, Shelby, Navarro, Lamar and Franklin Counties will all be held to be within the Special Practice Act.

THE SPECIAL PRACTICE ACT IN OPERATION

Before 1941, the Special Practice Act was embodied in Articles 2092 and 2093 of *Texas Revised Civil Statutes* (Vernon, 1925) and contained 31 different subdivisions. When the Texas Rules of Civil Procedure were enacted, some of these subdivisions were put into general operation, others were discarded, and still others were embodied in Rules 330 and 331, the present Special Practice Act. Rule 330 contains 10 subdivisions, but this article is limited to a discussion of subdivisions (j), (k) and (l). The other provisions are largely directory, and very little litigation arises under them.

(1) SIGNIFICANCE OF TERM TIME

One of the outstanding features of the operation of the Special Practice Act is the manner in which the significance usually at-

tached to the expiration of terms of court is reduced. As indicated previously, one of the requirements for operation under the Act is that the court have continuous terms—terms without more than two days intervening between any of the terms of court. This factor of continuity makes it possible in large measure to ignore the existence of terms of court.

Expiration of term. Under the general practice, if a trial is in process at the end of a term, the expiration of the term causes the court to lose power over the trial, and past trial proceedings become a nullity.³³ When the trial is resumed at a subsequent term, the entire trial must be started over again. Under the Special Practice Act, Rule 330 (j) makes it possible for a trial begun in one term to be completed during the following term. It provides in part:

If a case or other matter is on trial or in process of hearing when the term of court expires, such trial, hearing or other matter may be proceeded with at the next term of court. No motion for new trial or other motion or plea shall be considered as waived or overruled, because not acted on at the term of court at which it was filed, but may be acted on at the succeeding term or at any time which the judge may fix or to which it may have been postponed or continued by agreement of the parties with leave of the court.

Under this provision no extension of term is required in order to continue the proceedings during the subsequent term. The trial may be continued just as though the term had not expired at all.³⁴ However, even under the Special Practice Act, an order entered after the expiration of one term but before the beginning of the next is not a valid order, since the court has no power to act.³⁵

In this connection a word of caution is required when the trial is still not completed by the end of the second term. Consider a

³³ Ordinarily this result may be avoided in district courts by extension of the term under the provisions of TEX. REV. CIV. STAT. (VERNON, 1948) art. 200a or 1923.

³⁴ *Scott v. Gardner*, 159 S. W. 2d 121 (Tex. Civ. App. 1942) *er. ref. w. o. m.*; *Shellhammer v. Caruthers*, 99 S. W. 2d 1054 (Tex. Civ. App. 1936) *er. dismiss.*; *Miller v. Babbs & Hall*, 62 S. W. 2d 165 (Tex. Civ. App. 1933) *er. dismiss.*

³⁵ *Talkington v. Talkington*, 266 S. W. 835 (Tex. Civ. App. 1924).

situation in which a particular court has terms beginning on the first Mondays in January, April, July and October. A trial is begun during the January term, but is not completed by the end of the term. Proceedings are continued during the April term under the authority of the quoted provision of Rule 330 (j). If the trial is still not completed at the end of the April term, may proceedings be continued during the July term? In *British General Ins. Co. v. Ripy*,³⁶ the commission of appeals in an opinion adopted by the supreme court held that Rule 330 (j) gives authority to proceed only during the term immediately following that at which the trial was begun and that the only way to continue the trial thereafter is by extension of the term.

It is arguable that this decision is not a proper construction of Rule 330 (j). That rule provides: "If a case or other matter is on trial or in process of hearing when the term of court expires, such trial, hearing or other matter may be proceeded with at the next term of court." Certainly when the second term expires, the case is still "on trial or in process of hearing" so that Rule 330 (j) should authorize proceeding with the trial at the next or third term of court.

Under the general practice, if a verdict has been reached in the trial and the term expires before judgment is rendered, judgment may be rendered *nunc pro tunc* at a subsequent term, "where the delay in rendition after the case is fully ripe for judgment has resulted solely from the process of the law or the delay of the court, and not from any fault of the prevailing party."³⁷ Under the Special Practice Act, rendition of judgment *nunc pro tunc* is not required, and the court has power under Rule 330 (j) to render judgment at the term immediately subsequent to that at

³⁶ 130 Tex. 101, 106 S. W. 2d 1047 (1937).

³⁷ 4 McDONALD, TEXAS CIVIL PRACTICE (1950) 1325 and cases cited therein. McDonald indicates that, since old Rule 66 requiring rendition of judgment during the term at which the case was tried was not carried into the new rules, the court may have inherent power to render judgment at a subsequent term. But he says that "until the effect of the change is authoritatively declared, it may be advisable to comply with the procedure of a *nunc pro tunc* rendition where the delay is due to the action or inaction of the court."

which the trial was begun. If the *Ripy* case is sound, then a judgment *nunc pro tunc* is probably necessary when a trial starts in one term, a verdict is returned in the second, and judgment is rendered after expiration of the second term.

Under the general practice, if a motion for new trial is not decided during the term at which it is filed, the motion is overruled by operation of law when the term expires. Under the Special Practice Act, Rule 330 (j) provides: "A motion for new trial filed during one term of court may be heard and acted on at the next term of court." As a result of this provision, the expiration of the term has no effect upon a motion for new trial. Under the *Ripy* case, apparently a motion for new trial filed in a term subsequent to that in which the trial was begun would be overruled if it had not been acted upon at the expiration of the second term. A subsequent section deals with the problem of when a motion for new trial is overruled by operation of law.

District courts have power to extend a term in an appropriate case under either of two statutes.³⁸ Does the fact that a district court operates under the Special Practice Act affect this power? In *Jones v. Campbell*³⁹ the court said that when a court operates under the Special Practice Act "no necessity could arise for the extension of any term of . . . court."⁴⁰ The court said that "any unfinished matter pending before the court may be carried over to and the hearing thereof postponed to some day certain."⁴¹ It is believed that this reasoning is consistent with the language of Rule 330 (j). However, if the *Ripy* case is sound, necessity for extension of the term subsequent to that at which the trial begins may be necessary if the proceedings are not yet completed by the end of such subsequent term. That such extension would be required is recognized expressly by the court in the *Ripy* case.

Finality of judgments. The term "final judgment" has been used

³⁸ TEX. REV. CIV. STAT. (VERNON, 1948) arts. 200a and 1923.

³⁹ 188 S. W. 2d 679 (Tex. Civ. App. 1945) *er. ref.*

⁴⁰ *Id.* at 683.

⁴¹ *Ibid.*

with several different meanings by the courts.⁴² In this section the term is used to refer to the situation wherein a judgment, which has effectively taken the cause from the trial court's docket, and which has determined the merits with sufficient certainty to support an appeal, is nevertheless within the control of the trial court, which may modify it upon direct proceedings in the same cause or upon its own motion. Attention will be directed to determining when such a judgment becomes "final"—i.e., when the trial court loses power to modify or set aside the judgment by proceedings in the same cause.

Under the general practice, a judgment becomes "final" at the end of the term. Until the term ends, the trial court has power to modify the judgment or to set it aside and grant a new trial. Because the terms of court in the populous counties are generally three to six months long, the Special Practice Act contains a provision making the judgment "final" at a fixed time without reference to the expiration of the term. Rule 330 (1) provides: "Judgments of such civil district courts shall become as final after the expiration of 30 days after the date of judgment or after a motion for a new trial is overruled as if the term of court had expired."⁴³ Under this provision, after expiration of the prescribed thirty-day period, the judgment becomes as final as if the term of court had expired. In the language of *Dallas Storage & Warehouse Co. v. Taylor*, "the term is as to the case at an end. . . ."⁴⁴ After this period has expired and the judgment has become "final," the trial court no longer has the power to grant a new trial in the cause and an order which thereafter purports to grant a new trial is a nullity.⁴⁵

Rule 330 (1) provides for measurement of the thirty-day period

⁴² 4 McDONALD, TEXAS CIVIL PRACTICE (1950) § 17.03.

⁴³ "This provision of the statute was necessary in order to prevent an unreasonable delay to a litigant in reaping the fruits of his victory in a suit won by him in a court the term of which extends for six months. . . ." *Fox v. First Nat. Bank of Houston*, 23 S. W. 2d 888, 889 (Tex. Civ. App. 1929), *rev'd*, 121 Tex. 7, 39 S. W. 2d 1085 (1931).

⁴⁴ 124 Tex. 315, 321, 77 S. W. 2d 1031, 1034 (1934).

⁴⁵ *Bridgman v. Moore*, 143 Tex. 250, 183 S. W. 2d 705 (1944).

either from the date of judgment or from the date a motion for new trial is overruled. If there is no motion for new trial, then the judgment becomes final 30 days after the date of the judgment. Rule 306a provides that the date of judgment "shall be deemed to be the date upon which the written draft thereof was signed by the trial judge as stated therein" and that "[i]n event the date of signing of a judgment is not shown therein . . . , then the date of rendition shall be otherwise shown of record." If the judgment is rendered *nunc pro tunc*, the 30-day period is measured from the date of the *nunc pro tunc* judgment.⁴⁶

When a motion for new trial is duly filed, then the judgment becomes "final" thirty days after the motion for new trial is overruled, whether by order of the court or by operation of law. This result is reached even in those cases in which a motion for new trial is not required as a prerequisite to appeal.⁴⁷

Ordinarily the ruling of the court on an interlocutory matter made at one term may be set aside or altered at a subsequent term of court, provided the case has not been previously disposed of on the merits. The fact that the court is operating under the Special Practice Act does not change this result.⁴⁸ But a ruling on a plea of privilege, though interlocutory, is final insofar as it disposes of the issue of venue. Under the Special Practice Act, following a hearing on a plea of privilege, the ruling on the plea of privilege becomes "final" thirty days after the date of the interlocutory judgment.⁴⁹ No motion for new trial is allowed from an interlocutory order.⁵⁰

⁴⁶ Rule 306b.

⁴⁷ *Neely v. Tarrant County*, 132 Tex. 357, 124 S. W. 2d 101 (1939); *Kilian v. Kilian*, 185 S. W. 2d 611 (Tex. Civ. App. 1945). *But see* *Wichita Falls & S. R. Co. v. McDonald*, 141 Tex. 555, 174 S. W. 2d 951 (1943), in which the court held that no motion for new trial could be filed after an interlocutory order entered after hearing on a plea of privilege, citing Rule 385.

⁴⁸ *Hudler v. Hudler*, 229 S. W. 2d 853 (Tex. Civ. App. 1950).

⁴⁹ *Wichita Falls & S. R. Co. v. McDonald*, 141 Tex. 555, 174 S. W. 2d 951 (1943).

⁵⁰ Rule 385; *Wichita Falls & S. R. Co. v. McDonald*, *supra* note 49.

(2) MOTION FOR NEW TRIAL

Since the enactment of the Texas Rules of Civil Procedure, the motion for new trial has become of increasing importance. In most cases it is a prerequisite to appeal.⁵¹ Times for filing the appeal bond and the transcript and statement of facts are measured from the rendition of judgment or the overruling of a motion for new trial, whichever comes later.⁵² Those requirements of the Special Practice Act which govern the filing of motions for new trials should be carefully observed, since the right of appeal may be jeopardized by a failure to meet them.

Before entering upon a detailed discussion of these provisions, attention should be directed to the landmark case in this field, *Dallas Storage and Warehouse Co. v. Taylor*,⁵³ decided by the Supreme Court of Texas in 1934. Prior to the decision in this case and its companion cases, the supreme court had held that the provisions of the Special Practice Act with respect to the amendment of motions for new trial and the presentation and ruling on such motions were directory rather than mandatory.⁵⁴ In an amendment to the Special Practice Act in 1930, the Legislature stated that the fact that the court in these cases had construed the provisions to be directory created an emergency necessitating amendment of the statute.⁵⁵ With this background, the court in the *Taylor* case held that the provisions were no longer directory, but were mandatory. In making its decision, the court took occasion to list in detail the effect of the provisions of the Special Practice Act upon the filing, amendment, presentation and decision of motions for new trial. The principles set out in this decision together with those in two companion cases have served as a guide

⁵¹ Rule 324.

⁵² Rules 356 and 386.

⁵³ 124 Tex. 315, 77 S. W. 2d 1031 (1934).

⁵⁴ *Nevitt v. Wilson*, 116 Tex. 29, 285 S. W. 1079 (1926); *Diamond Ice & Cold Storage Co. v. Strube*, 115 Tex. 515, 284 S. W. 935 (1926); *Townes v. Lattimore*, 114 Tex. 511, 272 S. W. 435 (1925).

⁵⁵ Acts 1930, 41st Leg. 5th C. S., c. 70, § 1, p. 227.

for later cases in this field, and have been followed almost without exception.⁵⁶

Filing. Under the general practice, the motion for new trial must be filed within two days after the rendition of judgment.⁵⁷ After the expiration of this two-day period, the trial court may alter, modify or set aside the judgment in the exercise of its inherent power during term time, but may not extend the period for filing a motion for new trial.⁵⁸ A motion filed after the expiration of the term in which the judgment is rendered is a nullity.⁵⁹

Under the Special Practice Act, the period for filing a motion for new trial is governed by Rule 330 (k), which provides that "a motion for new trial where required shall be filed within ten (10) days after the judgment is rendered or other order complained of is rendered. . . ." Thus, within ten days following rendition of the judgment, either party may file a motion for new trial as a matter of right. One effect of filing a motion for new trial is to extend automatically the period during which the trial court has power over the judgment and the period for filing an appeal bond, since these periods will thereafter be measured from the date the motion for new trial is overruled. This extension results even when the motion is filed in a suit in which no motion for new trial is required as a prerequisite to appeal.⁶⁰

What is the result if no motion for new trial is filed during the ten-day period following judgment, but one is filed during the 30-day period before the judgment becomes "final"? Since the court still has control over the judgment, it clearly has the power to set it aside and grant a new trial.⁶¹ If the court grants permission to file such a belated motion, but then overrules it, does the motion have any effect? In considering this point, the supreme

⁵⁶ Anyone beginning a study of the Special Practice Act would do well to use the rules laid down in headnotes 1 through 8 in 77 S. W. 2d at 1034 as a starting point.

⁵⁷ Rule 320.

⁵⁸ *A. F. Jones & Sons v. Republic Supply Co.*, _____ Tex. _____, 246 S. W. 2d 853 (1952).

⁵⁹ *Green v. Green*, 288 S. W. 406 (Tex. Comm. App. 1926).

⁶⁰ Cases cited *supra* note 47.

⁶¹ *Dallas Storage & Warehouse Co. v. Taylor*, 124 Tex. 315, 77 S. W. 2d 1031 (1934).

court in the *Taylor* case held that "the court may in its discretion, within such 30-day period [after judgment], entertain a motion filed after the 10 days but within the 30 days, and if it does so and overrules it, the judgment does not become final until the expiration of 30 days from the time the motion was overruled."⁶² Following this holding, later cases have held that the time for filing the appeal bond is dated from the date the belated motion is overruled.⁶³

Since the decision in the *Taylor* case, Rule 5 has been adopted, providing that the trial court "may not enlarge the periods for taking any action under the rules relating to new trials . . . except as stated in the rules relating thereto." Since the adoption of Rule 5, two cases have ignored the Rule and have followed the *Taylor* case in allowing the trial court to entertain and overrule a motion filed after the ten-day period prescribed by Rule 330 (k).⁶⁴ Neither of these cases has a writ of error history. In the recent case of *A. F. Jones & Sons v. Republic Supply Co.*⁶⁵ the supreme court applied Rule 5 to a case appealed from a county court. Judgment in that case was entered on January 30, 1951, and no motion for new trial was filed during the two-day period allowed by Rule 320. Thereafter, before expiration of the term, the trial court entertained and overruled a belated motion for new trial. The question on appeal was whether the time for filing an appeal bond could date from the day the belated motion was overruled. Applying Rule 5, the court held that "the trial court's inherent power resides only in the right of altering its former judgment and since it does not have the power on its own initiative to extend the period for appellate procedure, neither does it have the power to grant leave to file and then overrule a tardy motion

⁶² *Id.* at 320, 77 S. W. 2d at 1034.

⁶³ *Senter v. Shanafelt*, 233 S. W. 2d 202 (Tex. Civ. App. 1950); *Kilian v. Kilian*, 185 S. W. 2d 611 (Tex. Civ. App. 1945); *Christner v. Mayer*, 123 S. W. 2d 715 (Tex. Civ. App. 1938) *er. dism. judgm. cor.*

⁶⁴ *Senter v. Shanafelt* and *Kilian v. Kilian*, *supra* note 63.

⁶⁵ _____ Tex., _____, 246 S. W. 2d 853 (1952).

for new trial. . . ."⁶⁶ This case was decided under the general practice, but there seems to be no reason why the same rule should not apply to procedure under the Special Practice Act, since Rule 5 is equally applicable in both instances. For this reason it is believed that the two cases which ignored Rule 5 will not be followed, and that a belated motion filed after the ten-day period allowed by Rule 330 (k) will have no effect to extend the period during which the trial court has control over the judgment or to extend the period for complying with the other steps in appellate procedure.

In some of the early cases there was often difficulty in determining when to start counting the ten-day period. The difficulty arose chiefly in those cases in which a motion for new trial was filed prior to the time the judgment was rendered. This difficulty was eliminated by the adoption in 1946 of Rule 306c. This Rule provides that motions for new trial filed prematurely "shall be deemed to have been filed on the date of but subsequent to the rendition of the judgment the motion assails. . . ." If the judgment is rendered *nunc pro tunc*, the ten-day period for filing a motion for new trial is measured from the date of rendition of the *nunc pro tunc* judgment.⁶⁷

The provisions of the Special Practice Act for filing of a new trial have no application to the filing of such a motion in a suit in which citation was by publication.⁶⁸ The time periods in such cases are prescribed by Rule 329.

Amendment. Under the general practice, an amended motion for new trial may be filed at any time during the term, provided the court has not ruled upon the original motion.⁶⁹ Under the Special Practice Act, Rule 330 (k) provides that "a motion for new trial . . . may be amended by leave of the court at any time

⁶⁶ 246 S. W. 2d at 855.

⁶⁷ Rule 306b.

⁶⁸ *Hunsinger v. Boyd*, 119 Tex. 182, 26 S. W. 2d 905 (1930); *Gahagan v. Texas & P. Ry.*, 231 S. W. 2d 762 (Tex. Civ. App. 1950); *Smith v. Higginbotham*, 112 S. W. 2d 770 (Tex. Civ. App. 1937).

⁶⁹ 4 McDONALD, TEXAS CIVIL PRACTICE (1950) 1447; Rule 320(a).

before it is acted on within twenty (20) days after it is filed." Prior to the 1930 amendment to the Special Practice Act, the courts had held that this provision was directory only and that the motion for new trial could be amended so long as the court had power over the judgment.⁷⁰ The 1930 amendment did not change the language of Rule 330 (k). It merely amended Rule 330 (j) to provide that motions and amended motions for new trial *must* be presented within thirty days after the original motion or amended motion is filed and *must* be determined within not exceeding forty-five days after the original or amended motion is filed. The only change in the previous wording was that the word "shall" was changed to "must" in the two places indicated by the italicized words. At first blush it is difficult to see how this change is sufficient to bring about the result that the period for amendment of the original motion is limited to twenty days from the filing of the original motion, since the word "may" in Rule 330 (k) remains unchanged. But the court in the *Taylor* case, reasoning from the language of the emergency clause and the mandatory language of the provision for presentation and determination, held that the twenty-day period was mandatory. In the companion case of *Independent Life Ins. Co. v. Work*⁷¹ Justice Greenwood was even more emphatic in speaking of this requirement. He said that an amended motion filed too late is of no effect and that no more than one amended motion may be filed. This language has been repeated in many later decisions.⁷²

In discussing the amendment of motions for new trial, the court in the *Taylor* case set out the following conditions upon which a motion for new trial may be amended: "First, that leave of court

⁷⁰ Cases cited *supra* note 54.

⁷¹ 124 Tex. 281, 77 S. W. 2d 1036 (1934).

⁷² *Jordan v. Madison*, 241 S. W. 2d 193 (Tex. Civ. App. 1951); *Bowman v. Traders & General Ins. Co.*, 219 S. W. 2d 148 (Tex. Civ. App. 1949) *er. ref.*; *Erwin v. Welborn*, 207 S. W. 2d 124 (Tex. Civ. App. 1947) *er. ref. n.r.e.*; *Traders & General Ins. Co. v. Scott*, 189 S. W. 2d 633 (Tex. Civ. App. 1945) *er. ref. w.o.m.*; *Tunstall v. Scott*, 182 S. W. 2d 734 (Tex. Civ. App. 1944) *er. ref. w.o.m.*; *Freedman Packing Co. v. Harris*, 160 S. W. 2d 130 (Tex. Civ. App. 1942) *er. ref. w.o.m.*

must be obtained; second, that it can be amended only before it is acted upon; and, third, that the amendment must be made within 20 days after the filing of the motion."⁷³ Regarding the first requirement, the supreme court in the case of *W. C. Turnbow Petroleum Corporation v. Fulton*⁷⁴ said that "an amended pleading or motion filed without first obtaining leave [of court] is not always to be treated as of no effect whatever."⁷⁵ The court held that the effect of the trial court's order overruling the amended motion for new trial was to determine that the movant was entitled to file the amended motion, or thus, after the motion was filed, to give permission for its filing. But an amended motion which has never been ruled upon may not furnish a basis for appeal unless it appears that leave to file the amended motion was granted by the trial court.⁷⁶

Of all the provisions of the Special Practice Act, the requirement that an amended motion be filed within 20 days following the filing of the original motion has probably been the one causing most difficulty. Ordinarily, the filing of an original motion for new trial is a mere formality, the grounds of error alleged usually being quite general. It is the amended motion which contains all the errors the movant relies upon in his attempt to obtain a new trial or to obtain a reversal in the appellate courts. Because of the importance of this amended motion, the litigant desires an opportunity to examine the record of the trial thoroughly and to brief the points involved in order to be certain that his rights on appeal are preserved.⁷⁷ This process may require considerable time, especially if there is any delay in obtaining the statement of facts from the court reporter. In complex cases in which the record

⁷³ 124 Tex. at 321, 77 S. W. 2d at 1034.

⁷⁴ 145 Tex. 56, 194 S. W. 2d 256 (1946).

⁷⁵ *Id.* at 61, 194 S. W. 2d at 258.

⁷⁶ *Combined American Ins. Co. v. Morgan*, 214 S. W. 2d 145 (Tex. Civ. App. 1948).

⁷⁷ "The grace period allowed—the right to file an amended motion—is to give the losing party time to prepare his appeal; to investigate the facts and the law in order to present to the trial court his grounds of error." *Richmond v. Champagne's Bakery*, 118 S. W. 2d 493, 495 (Tex. Civ. App. 1938) *er. ref.*

is lengthy, the twenty-day period allowed may be insufficient. And yet there is nothing that the parties or the courts may do. The trial court is without power to extend the time in which the motion for new trial may be amended.⁷⁸ The parties may not even by agreement extend the period for amendment. Apparently the only remedy is to delay rendition of the judgment until it appears that the statement of facts will be available. It appears that this practice is being followed in some courts, but even here there are instances in which the litigant just does not have sufficient time in which to prepare an adequate motion.

Presentation. Under the general practice, a motion for new trial is overruled by operation of law at the end of the term if it has not been presented and decided before the term expires.⁷⁹ Under the Special Practice Act, Rule 330 (j) provides that "all motions and amended motions for new trials must be presented within thirty (30) days after the original motion or amended motion is filed. . . ." This requirement for presentation within thirty days after the filing of the original or amended motion is mandatory and may not be extended by order of the court or by agreement of the parties.⁸⁰ If the requirement is not met, the motion is overruled by operation of law thirty days after the original or amended motion is filed.⁸¹

In this area the chief controversy seems to revolve around the meaning of the word "presented." A recent civil appeals decision held that the motion had been presented when the court entered an order "passing" the cause at the request of the movant, when

⁷⁸ *Millers Mut. Fire Ins. Co. v. Wilkerson*, 124 Tex. 312, 77 S. W. 2d 1035 (1934); *Traders & General Ins. Co. v. Scott*, 189 S. W. 2d 633 (Tex. Civ. App. 1945) *er. ref. w.o.m.* Rule 5 grants the trial court authority to extend the time for many procedural steps, but provides that "it may not enlarge the period for taking any action under the rules relating to new trials . . . except as stated in the rules relating thereto. . . ."

⁷⁹ Rule 320 (d); *Fitzgerald v. Lane*, 137 Tex. 514, 155 S. W. 2d 602 (1941).

⁸⁰ *Independent Life Ins. Co. v. Work*, 124 Tex. 281, 77 S. W. 2d 1036 (1934); *Richmond v. Champagne's Bakery*, 149 S. W. 2d 304 (Tex. Civ. App. 1941) *er. dism. judgm. cor.*

⁸¹ *Thomas v. Murphy*, 125 Tex. 105, 81 S. W. 2d 59 (1935); *Dallas Storage & Warehouse Co. v. Taylor*, 124 Tex. 315, 77 S. W. 2d 1031 (1934).

the only matter pending was the motion for new trial.⁸² On the other hand, the Subcommittee on Interpretation of the Rules of Civil Procedure has indicated that the presentation must be unqualified and without reservation.⁸³ Probably the best decision on the matter is that in the recent case of *Texas Livestock Marketing Assn. v. Rogers*,⁸⁴ decided by the San Antonio Court of Civil Appeals in 1951. The opinion contains a thorough discussion of the problem and indicates that a liberal construction of the word to favor the right of appeal should be given. "When an attorney for the party appealing files his motion or amended motion for a new trial and calls it to the attention of the trial court, and informs him that he is ready to present it for the court's action, he has done about all that he can do."⁸⁵ After the motion has been presented without qualification or reservation within the thirty-day period, the court may after the expiration of the thirty-day period hear argument and consider authorities in support or denial of the motion.⁸⁶ But if evidence must be presented, as in a motion for new trial on the ground of jury misconduct, the evidence must be presented within the thirty-day period and may not be presented thereafter.

Once there has been an unqualified presentation within the thirty-day period, the court has until forty-five days after filing of the original or amended motion in which to decide the motion.⁸⁷ But if there has been no presentation of the motion within the prescribed thirty-day period, the motion is overruled by operation of law at the expiration of the thirty-day period.⁸⁸

Decision. Rule 330 (j) provides that "all motions and amended

⁸² *Cohen v. Cohen*, 194 S. W. 2d 273 (Tex. Civ. App. 1946).

⁸³ Interpretations Subcommittee Opinion, 5 Tex. B. J. 427 (1942), 8 Tex. B. J. 26 (1945).

⁸⁴ 244 S. W. 2d 859, *er. ref. n.r.e.*

⁸⁵ *Id.* at 861.

⁸⁶ The appellate court may consider supplemental evidence of presentation on appeal. *Smith v. Basham*, 227 S. W. 2d 853 (Tex. Civ. App. 1950), *aff'd*, _____ Tex. _____, 233 S. W. 2d 297 (1950).

⁸⁷ Rule 330 (j).

⁸⁸ *Dallas Storage & Warehouse Co. v. Taylor*, 124 Tex. 315, 77 S. W. 2d 1031 (1934).

motions for new trials . . . must be determined within not exceeding forty-five (45) days after the original or amended motion is filed, unless by written agreement of the parties in the case, the decision of the motion is postponed to a later date." As the language of the Rule indicates, this requirement is mandatory in the absence of the written agreement provided for, and the court may not, without the prescribed agreement, extend the time for determination of the motion.⁸⁹ If the motion has been timely presented but has not been decided within the forty-five day period, the motion is overruled by operation of law at the expiration of that period.⁹⁰

The rule provides for extension of the time for deciding the motion by written agreement of the parties. To be effective the agreement must be one for postponement of the *determination* of the motion; the time for *amendment* or *presentation* of the motion may not be so extended.⁹¹ Further, the agreement to be effective must be in writing⁹² and must extend the date for decision for a definite period; a mere agreement waiving the 45-day requirement will not suffice.⁹³ If no definite period is prescribed, the agreement is of no effect, and the motion is overruled by operation of law at the expiration of the forty-five day period after filing.⁹⁴ Even where the extension is for a fixed period, if the motion is not determined within that period, it is overruled by operation of law at the expiration of the extended period.⁹⁵

The time periods set out for determining when a judgment is "final," when the appeal bond must be filed, and when the tran-

⁸⁹ Highland Farms Corp. v. Fidelity Trust Co., 125 Tex. 474, 82 S. W. 2d 627 (1935).

⁹⁰ Dallas Storage & Warehouse Co. v. Taylor, 124 Tex. 315, 77 S. W. 2d 1031 (1934); Donnelly v. Donnelly, 241 S. W. 2d 754 (Tex. Civ. App. 1951); Gillespie v. Rossi, 238 S. W. 2d 547 (Tex. Civ. App. 1951) *er. ref. n.r.e.*

⁹¹ Independent Life Ins. Co. v. Work, 124 Tex. 281, 77 S. W. 2d 1036 (1934); Alexander Mtr. Co. v. Pruitt, 198 S. W. 2d 947 (Tex. Civ. App. 1946) *er. ref.*

⁹² An oral agreement is insufficient. Jones v. Campbell, 188 S. W. 2d 679 (Tex. Civ. App. 1945) *er. ref.*

⁹³ Pierce v. Loyd, 131 Tex. 401, 114 S. W. 2d 867 (1938); Highland Farms Corp. v. Fidelity Trust Co., 125 Tex. 474, 82 S. W. 2d 627 (1935).

⁹⁴ Pierce v. Loyd, *supra* note 93.

⁹⁵ Highland Farms Corp. v. Fidelity Trust Co., cited *supra* note 93; Greer v. Poulter, 189 S. W. 2d 883 (Tex. Civ. App. 1945) *er. ref. w.o.m.*

script and statement of facts must be filed are all measured from the date of judgment or from the date an original or amended motion for new trial is overruled. A motion for new trial may be expressly overruled by order of the court, or it may be overruled by operation of law. In either event, the legal consequences are the same, so that matters presented in a motion for new trial which is overruled by operation of law may still furnish a basis for appeal even though never expressly passed upon by the trial court.⁹⁶ Even after a motion for new trial has been overruled, whether by order of the court or by operation of law the court still has control of the judgment and power to grant a new trial until the expiration of 30 days from the date on which the motion was overruled.⁹⁷

(3) PERFECTING THE APPEAL

The Special Practice Act has no provisions for perfecting an appeal, the rules for district and county courts generally prevailing.⁹⁸ But because of the close relationship of the perfection of appeal to the matters which are governed by the Special Practice Act, a consideration of the requirements is given herein.

Notice of Appeal. The first step in perfecting the appeal is by giving notice of appeal. It was formerly required that such notice of appeal be given in open court within two days following rendition of judgment. Rule 353 now provides that notice of appeal may be given "(1) in open court, noted on the docket or embodied in the judgment, order overruling motion for new trial, or other minute of the court, or (2) filed with the clerk." The notice in either instance must be given or filed within ten days after the judgment or order overruling motion for new trial is rendered. Under the Special Practice Act, this provision operates to require notice of appeal whenever there is no motion for new trial, or

⁹⁶ Christner v. Mayer, 123 S. W. 2d 715 (Tex. Civ. App. 1938).

⁹⁷ Dallas Storage & Warehouse Co. v. Taylor, 124 Tex. 315, 77 S. W. 2d 1031 (1934); Union City Transfer v. Kenna, 210 S. W. 2d 431 (Tex. Civ. App. 1948).

⁹⁸ Rule 331.

when the motion for new trial is expressly overruled by the trial court. This requirement is a jurisdictional prerequisite to appeal and cannot be waived.⁹⁹ But when the motion or amended motion for new trial is overruled by operation of law, either by failure to present within the prescribed time or failure to have the motion determined within the required period, no notice of appeal is required.¹⁰⁰ Notice of appeal is not required when appeal is taken from an interlocutory order.¹⁰¹

Cost Bond. The second step in perfecting the appeal is the execution of a bond for costs of appeal. Rule 354 prescribes the requirements of the bond, and a note to the Rule lists those cases in which the appellant is exempted from filing a bond. Whenever a bond is required, it must be filed within thirty days after the date of rendition of judgment or the order overruling a motion for new trial.¹⁰² When the motion or amended motion for new trial is overruled by operation of law, the time for filing the appeal bond is measured from the date the motion is overruled by operation of law.¹⁰³ When the appellant files an affidavit in lieu of bond, it must be filed not more than twenty days after the date of rendition of the judgment or order overruling motion for new trial.¹⁰⁴ Where used, a supersedeas bond has the same effect as an appeal bond, so that if it is filed within the period prescribed for the filing of the appeal bond, the jurisdictional requirement is met.¹⁰⁵ Appeals from interlocutory orders are governed by Rule 385. In such appeals, the appeal bond or supersedeas bond must be filed within twenty days after the order appealed from is entered.

The importance of a timely filing of the appeal bond cannot be

⁹⁹ 4 McDONALD, TEXAS CIVIL PRACTICE (1950) 1505 and cases cited therein.

¹⁰⁰ *Houston Life Ins. Co. v. Dabbs*, 125 Tex. 100, 81 S. W. 2d 42 (1935); *Combined American Ins. Co. v. Morgan*, 207 S. W. 2d 701 (Tex. Civ. App. 1947).

¹⁰¹ *Walker v. Cleere*, 141 Tex. 550, 174 S. W. 2d 956 (1943).

¹⁰² Rule 356 (a).

¹⁰³ *Thomas v. Murphy*, 125 Tex. 105, 81 S. W. 2d 59 (1935).

¹⁰⁴ Rule 356 (b); *Hubbard v. Faulks*, 159 S. W. 2d 919 (Tex. Civ. App. 1942).

¹⁰⁵ *Garvin v. Huft*, 243 S. W. 2d 391 (Tex. Civ. App. 1951) *er. ref. n.r.e.*

overemphasized. Timely filing is a jurisdictional requirement, prerequisite to the acquisition of jurisdiction by the court of civil appeals.¹⁰⁶ Furthermore, the time periods prescribed by the rules for filing the appeal bond may not be extended either by the trial court or by the court of civil appeals.¹⁰⁷ Most of the questions concerning the operation of the Special Practice Act arise on a motion by the appellee to dismiss the appeal because of lack of jurisdiction due to failure to file the appeal bond within the prescribed period.

Transcript and Statement of Facts. Rule 363 provides that "the appeal is perfected when the notice of appeal is given and the bond or affidavit in lieu thereof has been filed. . . ." However, Rule 386 provides that "the appellant shall file the transcript and statement of facts with the clerk of the Court of Civil Appeals within sixty days from the rendition of the final judgment or order overruling motion for new trial. . . ." This requirement has been held to be jurisdictional, so that even if the notice of appeal and appeal bond have been timely filed, the court of civil appeals may still be unable to act if the transcript and statement of facts are not filed within the 60-day period required.¹⁰⁸ When the appellant files the transcript within the prescribed time, but is late in filing the statement of facts, the absence of the latter does not affect the right to appeal, but merely limits the extent of review by preventing the consideration of assignments of error based upon matters that should appear in the statement of facts.¹⁰⁹

The Rule makes provision that if the appellant "by motion filed

¹⁰⁶ Walker v. Cleere, 141 Tex. 550, 174 S. W. 2d 956 (1943); Barnes v. Raymer, 224 S. W. 2d 516 (Tex. Civ. App. 1949); Alexander Mtr. Co. v. Pruitt, 198 S. W. 2d 947 (Tex. Civ. App. 1946) *er. ref.*

¹⁰⁷ Garvin v. Hufft, cited *supra* note 105. In Masterson v. Bingham, 84 S. W. 2d 295 (Tex. Civ. App. 1935) *er. ref.*, a motion to dismiss the appeal was granted because of lack of jurisdiction even though the appellate court had already heard the appeal and had reversed and rendered judgment for the appellant.

¹⁰⁸ Donnelly v. Donnelly, 241 S. W. 2d 754 (Tex. Civ. App. 1951); Tunstill v. Scott, 182 S. W. 2d 734 (Tex. Civ. App. 1944) *er. ref. w.o.m.*

¹⁰⁹ Fair Stores, Inc. v. Lane, 240 S. W. 2d 373 (Tex. Civ. App. 1951), *rev'd on other grounds*, _____ Tex. _____, 243 S. W. 2d 683 (1951).

before, at, or within a reasonable time, not exceeding fifteen days after the expiration of such sixty-day period, . . . [shows] good cause to have existed within such sixty-day period why said transcript and statement of facts could not be so filed, the Court of Civil Appeals may permit the same to be thereafter filed upon such terms as it shall prescribe.”

The usual procedure to follow whenever the transcript and statement of facts are not filed within the required time is for the appellee to make a motion to affirm on certificate under the provisions of Rule 387.

CONCLUSIONS AND RECOMMENDATIONS

An attorney in a court whose procedure is governed by the Special Practice Act must observe carefully the time periods prescribed therein in order to preserve the right of appeal. It seems fundamental that he should be able to know at any time whether the court in which he is practicing is subject to the provisions of the Act. In a matter as basic as this, there is no reason why there should ever be any doubt about its applicability. Yet the large number of cases in which the question has been raised indicates that such doubt does exist. Even after a review of all the cases, the status of such counties as Panola, Shelby and Navarro remains in doubt. As recently as November, 1951, the Galveston Court of Civil Appeals certified a question to the supreme court asking whether the district courts of Galveston County were subject to the Act,¹¹⁰ despite the fact that Rule 330 had been in effect for ten years.

The primary reason for the existence of doubt is the fact that Article 199 contains so many widely varying provisions for terms of court. A further reason is that some courts deciding early cases did so without consideration of some of the problems involved, and later courts have felt bound by these decisions.

The most desirable solution to this problem is for the Texas

¹¹⁰ Bunte v. Flett, _____ Tex. _____, 243 S. W. 2d 828 (1951).

Legislature to provide for continuous terms in all district courts throughout the state. Such a solution would bring the advantages of continuous terms to all district courts and would achieve uniformity throughout the state. Even if this suggestion is not adopted, it is believed that portions of Article 199 should be amended to make it clear whether or not they constitute provisions for continuous terms.

One problem which the courts have heretofore brushed off may return to plague them. Consider a situation in which a court in a county such as Kaufman, which had been held to operate under the Special Practice Act, adjourns a term more than two days prior to the date fixed for the beginning of the next term. When the succeeding term begins in the same year, is the court operating under the Special Practice Act? Rule 330 requires successive terms *throughout* the year without more than two days intervening between *any of such terms*. A literal application of this requirement would require that the Special Practice Act be held inapplicable in this situation. On the other hand, the courts in their decisions have laid little or no stress on whether the terms actually were continuous, and have merely looked to the appropriate subdivision of Article 199 to determine whether the terms might be continuous. It is apparent that such a situation could make it extremely difficult for an attorney to know for certain which set of procedural rules to follow. One possible solution for this situation would be to amend Rule 19 to provide that when the statute sets no fixed date for the end of the term of a district court, the term shall end on the date fixed for the beginning of the next succeeding term, and the judge shall have no power to adjourn the term prior to that date.

In the discussion of the provisions relating to the filing of amended motions for new trial, it was noted that the time allowed by Rule 330 may be insufficient in complex cases, especially when there is delay in getting the statement of facts from the court reporter. Under the general practice, the district courts are em-

powered to extend the term to allow additional time for amendment of motions for new trial. Yet in the courts operating under the Special Practice Act, in which most of the litigation in the state arises, no such power exists. It is believed that Rule 5 should be amended to allow the trial court, for good cause shown, to extend the period for the filing of an amended motion for new trial.

The situation in which a trial begins in one term, continues through a second, and is still not completed at the expiration of the second term has been discussed. The *Ripy* case held that such a trial could not be continued without extension of the second term. It is believed that this case is an incorrect interpretation of Rule 330 (j) and that it should be overruled by the supreme court at its first opportunity. Amendment of Rule 330, to leave no doubt that the trial can be continued into a third term, is another possibility.

The Special Practice Act was adopted for the purpose of expediting litigation in courts with crowded dockets. It is believed that the suggestions made herein are consistent with that purpose. Rules of procedure are intended as means to an end—the orderly disposition of litigation. The changes suggested herein would do much to bring certainty into a field of law about which there should be no uncertainty.

APPENDIX

The following tables contain a listing of the counties in which it is believed that the Special Practice Act is applicable and those in which the general practice is followed. There is no difficulty in classifying most of the counties, especially those in which the term provisions are identical with provisions already construed as continuous terms. Others which have not been construed present some difficulties. Footnotes refer to discussions of some of the problems involved in determining whether specific counties are under the Special Practice Act. Further clouding the picture is the problem

of whether a particular court would be held to be under the Special Practice Act if the judge should adjourn the term more than two days before the beginning of the next term. As to this point see the discussion *supra* at page 222.

COUNTIES UNDER THE SPECIAL PRACTICE ACT

Anderson	Coryell	Hardin	Lubbock
Andrews	Cottle	Harris	Lynn
Angelina	Crane	Harrison	Madison
Aransas	Crockett	Hartley	Marion
Archer	Crosby	Haskell	Martin
Armstrong	Dallam	Hays	Mason
Atascosa	Dallas	Hemphill	Matagorda
Austin	Dawson	Henderson	Maverick
Bailey	Deaf Smith	Hockley	McCullough
Bandera	Denton	Hood	McLennan
Bastrop	DeWitt	Houston	McMullen
Baylor	Dickens	Howard	Medina
Bee	Dimmitt	Hutchinson	Menard
Bell	Donley	Jack	Midland
Bexar	Duval	Jackson	Milam
Blanco	Eastland	Jasper	Mills
Borden	Ector	Jefferson	Mitchell
Bosque	Edwards	Jim Hogg	Montague
Brazoria	Ellis	Jim Wells	Moore
Brazos	Erath	Johnson	Morris
Briscoe	Falls	Karnes	Motley
Brooks	Fannin	Kaufman	Nacogdoches
Brown	Fayette	Kendall	Navarro ¹¹²
Burleson	Floyd	Kenedy	Newton
Burnet	Fort Bend	Kent	Nolan
Caldwell	Franklin ¹¹¹	Kerr	Nueces
Calhoun	Freestone	Kimble	Ochiltree
Cameron	Frio	King	Oldham
Camp	Gaines	Kinney	Orange
Carson	Galveston	Kleberg	Palo Pinto
Castro	Garza	Knox	Panola ¹¹²
Chambers	Gillespie	Lamar ¹¹¹	Parker
Cherokee	Glasscock	Lamb	Parmer
Childress	Goliad	Lampasas	Potter
Clay	Gonzales	LaSalle	Randall
Cochran	Gray	Lavaca	Real
Coleman	Grayson	Lee	Reeves
Collin	Gregg	Leon	Refugio
Collingsworth	Grimes	Liberty	Roberts
Colorado	Guadalupe	Limestone	Robertson
Comal	Hale	Lipscomb	Rockwall
Comanche	Hall	Live Oak	Runnels
Concho	Hamilton	Llano	Rusk
Cooke	Hansford	Loving	

¹¹¹ See text at p. 203.

¹¹² See text at p. 202.

Sabine	Stonewall	Upshur	Wichita
San Augustine	Sutton	Uvalde	Willacy
San Patricio	Swisher	Val Verde	Wilson
San Saba	Tarrant	Van Zandt	Winkler
Scurry	Terrell	Victoria	Wise
Shelby ¹¹²	Terry	Walker	Wood
Sherman	Throckmorton	Ward	Yoakum
Smith	Titus	Washington	Young
Somervell	Tom Green	Webb	Zapata
Starr	Trinity	Wharton	Zavala
Stephens	Tyler	Wheeler	

COUNTIES NOT UNDER THE SPECIAL PRACTICE ACT

Bowie	Foard	Jones	Schleicher
Brewster	Hardeman	Montgomery	Shackelford
Callahan	Hidalgo	Pecos	Sterling
Cass	Hill	Polk	Taylor
Coke	Hopkins	Presidio	Travis
Culberson	Hudspeth	Rains	Upton
Delta	Hunt	Reagan	Waller
El Paso	Irion	Red River	Wilbarger
Fisher	Jeff Davis	San Jacinto	Williamson

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