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# From Verdict to Judgment

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the *Christopher* case. Adoption of the change would in no way interfere with the use of the deposition for purposes of discovery. There would be no interference with the use of a deposition when offered at the trial to impeach a witness who has testified. A party would still be able to preserve testimony as insurance against the possibility that the witness would not be available at the time of the trial. It could still be used to "pin a witness down" before trial. It is submitted that the change would simplify the problem of the use of depositions at trials and bring about a fairer result in situations similar to that arising in the *Christopher* case.

*John E. Banks.*

## FROM VERDICT TO JUDGMENT

**W**HEN the jury has made its findings and the verdict is returned, the cause is not lost (or won) conclusively at this point. Nor is there a time lapse until after judgment is entered during which there is no opportunity for action. Between verdict and judgment the parties must make certain moves or stand the chance of waiving relief from error. A seemingly trivial choice of remedies may have far-reaching results.

This paper is intended to cover the various motions open to the parties between verdict and judgment, their respective requisites and effects, and the remedies from adverse rulings thereon. The scope of this Comment will not extend beyond the period between verdict and judgment. The motions to be discussed are motion for judgment on the verdict; motion for judgment non obstante veredicto; motion to set aside certain findings; motion for mistrial; and motion for new trial.

## MOTIONS

*For Judgment on the Verdict.* Rule 300 of the Texas Rules of Civil Procedure<sup>1</sup> states:

Where a special verdict is rendered, or the conclusions of fact found by the judge are separately stated the court shall render judgment thereon unless set aside or a new trial is granted, or judgment is rendered notwithstanding verdict or jury finding under these rules.

It thus appears that if the other motions discussed below do not lie, the motion for judgment on the verdict is proper. Clearly, a judgment should be rendered in harmony with the verdict if it is sufficient in law to support the judgment.<sup>2</sup> Unless one or more of the exceptions in Rule 300 apply, mandamus will lie to direct the trial court to render judgment on the verdict,<sup>3</sup> if the verdict supports the judgment.

It is appropriate at this point to suggest that the term "new trial" used in Rule 300 is a misnomer and that "mistrial" was actually intended. At any rate, it is suggested that "new trial" was meant to include mistrial. This matter of meaning will be discussed later.<sup>4</sup>

*For Judgment Non Obstante Verdicto.* A judgment notwithstanding the verdict is provided for in Rule 301.<sup>5</sup> While a motion for a directed verdict is not a prerequisite,<sup>6</sup> the rules determining

<sup>1</sup> TEX. RULES CIV. PROC. (VERNON, 1942). References hereafter made to the "Rules" will be understood to relate to the Texas Rules of Civil Procedure, unless otherwise noted.

<sup>2</sup> *Allen v. Strode*, 62 S.W. 2d 289 (Tex. Civ. App. 1933).

<sup>3</sup> See *MANDAMUS*, *post*.

<sup>4</sup> See *Mistrial, New Trial*, *post*.

<sup>5</sup> "Provided, that upon motion and reasonable notice the court may render judgment non obstante verdicto if a directed verdict would have been proper..."

<sup>6</sup> There appears to be possible conflict on this point. Support for the text is to be found in 4 McDONALD, TEX. CIV. PRACTICE (1950) § 17.32, wherein *Electric Express & Baggage Co. v. Ablon*, 110 Tex. 235, 218 S.W. 1030 (1920), and *Navar v. First Nat. Bank*, 254 S.W. 126 (Tex. Civ. App. 1923) are cited. However, neither of these cases is directly in point. *Rodriguez v. Higginbotham-Bailey-Logan Co.*, 138 Tex. 476, 160 S.W. 2d 234 (1942), holds that where a directed verdict would not have been proper, the motion for judgment non obstante verdicto will not lie. There had been no motion for directed verdict in that case, and the court apparently did not consider it a prerequisite for the later motion, although decision on the precise point was not neces-

whether an instructed verdict should be granted are applied here.<sup>7</sup> Thus, the grounds for a judgment under Rule 301 are: (1) the evidence proves conclusively the truth of fact propositions which establish the right of the party moving, or negative the right of his opponent, or (2) the evidence is insufficient to raise an issue as to one or more fact propositions which must be established for the opponent to be entitled to judgment.<sup>8</sup>

It is well settled that the test as to these grounds is whether reasonable men may differ as to the truth of controlling facts; if so, a jury issue is present.<sup>9</sup> Obviously, if there is a proper jury issue, the motion for judgment notwithstanding the verdict will not lie. Rule 301 does not allow the rendition of a judgment non obstante veredicto when the verdict, having support in the evidence, is contrary to the great preponderance of the evidence.<sup>10</sup> The Rule is also inapplicable where the jury fails to answer issues submitted to them when such issues were raised by the evidence.<sup>11</sup>

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sary. The exact reading of Rule 301 ("if a directed verdict would have been proper") seems to support Mr. McDonald. But if this is a correct statement of the law, the motion for directed verdict has virtually no purpose. As Mr. McDonald points out, the motion for directed verdict must specifically state the ground upon which it is based, thus giving to the opponent the opportunity to cure omissions and defects. A party would therefore be in a much better position if he does not move for a directed verdict but waits and ambushes his adversary after the verdict (when the case cannot be reopened) with a motion for judgment non obstante veredicto. Dicta contrary to Mr. McDonald is found in *Hall v. Barrett*, 126 S.W. 2d 1045 (Tex. Civ. App. 1939). There it is stated that the action of the trial court in sustaining a motion for judgment notwithstanding the verdict for defendant on special issues and entering judgment for the plaintiff could not be upheld on the theory that the peremptory instruction should have been given for plaintiff where the record disclosed that no request for a directed verdict had been made. It is noted that Rule 50 (b) of the Federal Rules of Civil Procedure requires the motion for instructed verdict as a prerequisite for a judgment non obstante veredicto. It would appear that the conflict is important enough to warrant early resolution.

<sup>7</sup> With the exception of the ground of insufficient pleading to support a judgment. A defect in pleadings constitutes no ground for a judgment non obstante veredicto. *Citizens State Bank v. Giles*, 145 S.W. 2d 899 (Tex. Civ. App. 1940) *er. disp.*

<sup>8</sup> 3 McDONALD, TEX. CIV. PRACTICE (1950) § 11.28.

<sup>9</sup> *Fort Worth v. Lee*, 143 Tex. 551, 186 S.W. 2d 954 (1945); *Cartwright v. Canode*, 106 Tex. 502, 171 S.W. 696 (1914).

<sup>10</sup> *Rodriguez v. Higginbotham-Bailey-Logan Co.*, 138 Tex. 476, 160 S.W. 2d 234 (1942); *Happ v. Happ*, 160 S.W. 2d 227 (Tex. Civ. App. 1942) *er. ref. w.o.m.*

<sup>11</sup> *Wagstaff v. North British & Mercantile Ins. Co.*, 88 S.W. 2d 550 (Tex. Civ. App. 1935) *er. disp.*

The fact that the movant had requested special issues does not bar his motion for judgment non obstante veredicto,<sup>12</sup> nor will a motion for judgment on the verdict in the alternative bar him.<sup>13</sup>

Where a judgment under Rule 301 is desired, the procedure prescribed must be followed.<sup>14</sup> There must be a written motion and a hearing set after written notice to the opposing party,<sup>15</sup> or, in lieu of such notice, waiver thereof.<sup>16</sup> Compliance with these requirements must be recited in the judgment, or reversible error may be committed.<sup>17</sup> If the motion for judgment non obstante veredicto is erroneously granted or refused, the remedy is by appeal.

*To Set Aside Certain Findings.* Rule 301 also provides for a motion to "disregard any Special Issue Jury Finding that has no support in the evidence." There are two grounds on which this motion should be granted: (1) there is no evidence to support the finding, or (2) the contrary finding is established by the undisputed evidence. To be safe, it is advisable to use each ground, in the alternative, in the motion to set aside certain findings. The motion should never be granted if the question is one of preponderance. A contention that the finding has no support in the evidence will not support an assignment on appeal that the finding is against the great preponderance of the evidence,<sup>18</sup> and the converse is true as well.<sup>19</sup> It is to be emphasized that Rule 301 does not apply where the verdict, though having support in the evidence, is contrary to the great preponderance of the evidence.<sup>20</sup> The relief here is a new trial, which may or may not be granted by the court after judgment.

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<sup>12</sup> Myers v. Crenshaw, 134 Tex. 500, 137 S.W. 2d 7 (1940).

<sup>13</sup> Rogers v. Cook, 115 S.W. 2d 1148 (Tex. Civ. App. 1938) *er. dism.*

<sup>14</sup> Hines v. Parks, 128 Tex. 289, 96 S.W. 2d 970 (1936).

<sup>15</sup> Gentry v. Central Motor Co., 100 S.W. 2d 215 (Tex. Civ. App. 1936).

<sup>16</sup> Hines v. Parks, cited *supra* note 14. Appearance at the hearing operates as a waiver of notice. Ford v. Ross, 150 S. W. 2d 144 (Tex. Civ. App. 1941).

<sup>17</sup> Copeland v. Lampton, 125 S.W. 2d 1110 (Tex. Civ. App. 1939).

<sup>18</sup> Liberty Film Lines v. Porter, 136 Tex. 49, 146 S.W. 2d 982 (1941).

<sup>19</sup> Hall Music Co. v. Robinson, 117 Tex. 261, 1 S.W. 2d 857 (1928).

<sup>20</sup> Cases cited *supra* note 10.

There is little doubt that the motion to set aside certain findings is proper when filed after verdict but prior to rendition of judgment.<sup>21</sup> This motion, like the motion for judgment non obstante veredicto, requires the procedure set forth in Rule 301 to be followed strictly.<sup>22</sup>

*For Mistrial.* A mistrial is the same as if no trial had taken place,<sup>23</sup> and is not a judgment or order in favor of one of the parties but is a failure of trial.<sup>24</sup> An order for a new trial recognizes that a trial has been completed, which for some sufficient reason has been set aside so that the issues may be litigated de novo. By contrast, a mistrial is a nugatory trial.<sup>25</sup> From the definition it would appear that the motion for mistrial is proper before judgment, whereas the motion for new trial lies only after judgment. The present discussion will be limited to a consideration of incomplete verdict and irreconcilable conflict in the verdict as grounds for mistrial.<sup>26</sup> Other grounds for the motion may exist between verdict and judgment, but they are not discussed because they are not peculiar to this period.<sup>27</sup>

Although Rule 300 appears to omit the motion for mistrial from consideration after verdict, it is undoubted that the motion for mistrial will lie between verdict and judgment.<sup>28</sup> It has been held that where the verdict is conflicting on material issues, it will not support a judgment for either party, but is tantamount to a mistrial.<sup>29</sup>

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<sup>21</sup> Wichita Falls v. Brown, 119 S.W. 2d 407 (Tex. Civ. App. 1938) *er. dismiss.*

<sup>22</sup> See *Judgment Non Obstante Veredicto, ante.*

<sup>23</sup> Wiley v. Joiner, 223 S.W. 2d 539 (Tex. Civ. App. 1949).

<sup>24</sup> Lowrance v. Kenworthy, 138 Tex. 132, 157 S.W. 2d 879 (1942).

<sup>25</sup> Stern v. Wabash R. Co., 32 Misc. 12, 101 N.Y. Supp. 181 (1906).

<sup>26</sup> These grounds are elaborated upon under MANDAMUS, *post.*

<sup>27</sup> Among the causes for mistrial are communication with jurors during deliberations (see 3 McDONALD, TEX. CIV. PRACTICE (1950) §§ 14.03-14.05), improper contacts with the jury during trial (*id.*, §§ 11.21-11.23), improper argument (*id.*, § 13.16), improper remarks in opening statement (*id.*, § 11.15), misconduct of jury (*id.*, §§ 11.21 and 14.15) and witness' violation of the rule (*id.*, § 11.17).

<sup>28</sup> Texas & N. O. R. Co. v. Young, 148 S.W. 2d 229 (Tex. Civ. App. 1941).

<sup>29</sup> King v. Hill, 167 S. W. 2d 628 (Tex. Civ. App. 1942), *aff'd*, 141 Tex. 294, 172 S.W. 2d 298 (1943).

Where a motion for mistrial is erroneously denied, the remedy is by appeal after judgment is rendered. Where the motion is erroneously granted, however, the injured party's remedy may be by mandamus.<sup>30</sup> It is submitted that where a motion for new trial is filed prior to judgment, the terminology should be disregarded and the motion treated as a motion for mistrial if the latter motion is appropriate.

*For New Trial.* Although at common law the motion for new trial was filed after verdict and before judgment, the usual practice in Texas is to file such motion after judgment. It is believed that the better rule is to allow the motion for new trial only after rendition of judgment. Rule 320 provides:

New trials may be granted and judgments set aside on motion for good cause, on such terms as the court shall direct. Each such motion shall:

(a) Be made within two days after the rendition of *judgment* if the term of court shall continue so long, if not, then before the end of the term, and may be amended under leave of the court except where otherwise expressly provided in these rules.

(b) Be in writing and signed by the party or his attorney.

(c) Specify each ground on which it is founded, and no ground not specified shall be considered.

(d) Be determined at the term of the court at which it is made except where otherwise expressly provided in these rules. (Emphasis added.)

It is important to note that Article 2232 of the *Texas Revised Civil Statutes (Vernon, 1936)*, which was repealed by the Rules of Practice Act<sup>31</sup> and which was the source of the present Rule 320, was couched in terms of after "verdict," rather than after "judgment".<sup>32</sup> This change would appear to signify the intent to limit a motion for new trial until after judgment has been rendered.

In *National Consolidated Bond Corp. v. Burks*<sup>33</sup> the court held

<sup>30</sup> See *MANDAMUS, post*.

<sup>31</sup> Acts 1939, 46th Leg., p. 201, § 1.

<sup>32</sup> Article 2232 stated in part: "(1) Be made within two days after the rendition of *verdict* if the term of court shall continue so long..." (Emphasis added.)

<sup>33</sup> 134 Tex. 236, 132 S.W. 2d 851 (1939). *Accord*, *Houston Lighting & Power Co. v. Boyd*, 131 Tex. 323, 115 S.W. 2d 593 (1938).

that a motion for new trial filed before rendition of judgment was premature and insufficient to support a complaint on appeal. Although Rule 306c<sup>34</sup> has removed the penalty, it is still true that the filing of a motion for new trial is out of order unless filed after the rendition of judgment.

The leading case holding the motion for new trial proper when filed after verdict but prior to judgment is *Missouri-K. T. R. Co. v. Brewster*.<sup>35</sup> This case and others in accord with it<sup>36</sup> were decided prior to the present Rules and while Article 2232 was in effect. These decisions may be valid for other purposes but probably are no longer declaratory of the proper use of the motion for new trial.

It seems that the only present authority for allowing the motion before judgment is the expression in Rule 300 stating that ". . . the court shall render judgment . . . unless . . . a new trial is granted. . . ." As previously noted,<sup>37</sup> it is submitted that the term "new trial" is a misnomer and that "mistrial" was intended. This belief is based upon the present rules<sup>38</sup> and decisions discussed above which indicate a disallowance of the motion for new trial before judgment is rendered. It is not believed that the Texas Supreme Court intended to modify the clear terms of Rule 320, dealing with new trials, by an inference from Rule 300, dealing with another subject (judgments).

While it is submitted that a motion for new trial should not be ruled upon between verdict and judgment, it must be recognized that a question exists on the matter. Assuming that the motion is proper between verdict and judgment, the same requirements

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<sup>34</sup> "No motion for new trial or appeal bond or affidavit in lieu thereof shall be held ineffective because prematurely filed, but every such motion shall be deemed to have been filed on the date of but subsequent to the rendition of the judgment the motion assails. . . ." This Rule was effective February 1, 1946.

<sup>35</sup> 124 Tex. 244, 78 S.W. 2d 575 (1934).

<sup>36</sup> *Anchor v. Martin*, 116 Tex. 409, 292 S.W. 877 (1927); *Chaffin v. Drane*, 131 S.W. 2d 672 (Tex. Civ. App. 1939).

<sup>37</sup> *Judgment on the Verdict*, ante.

<sup>38</sup> Especially Rule 306c, quoted *supra* note 34, which implies that a motion for new trial will not be considered until after rendition of judgment.



would exist therefor as are present where the motion for new trial is filed after judgment.<sup>39</sup>

If a motion for new trial is erroneously denied, the proper remedy is by appeal; indeed, one of the primary purposes of the motion is to make assignments of error upon which to predicate the appeal. If, however, a motion for new trial is erroneously granted, appeal is not proper because no final order has been entered.

### MANDAMUS

In the early case of *Arberry v. Beavers*<sup>40</sup> it was held with reference to mandamus:

This process, in modern practice, is regarded as an action by the party on whose relation it is granted to enforce a private right, when the law affords no other adequate means of redress.

It lies to compel public officers and courts of inferior jurisdiction to proceed to do those acts which clearly appertain to their duty. But it does not lie to instruct them as to the manner in which they shall discharge a duty which involves the exercise of discretion or judgment. The distinction seems to be that if the inferior tribunal has jurisdiction, and refuses to act or to entertain the question for its decision, in cases where the law enjoins upon it to do the act required, or if the act be merely ministerial in its character, obedience to the law will be enforced by *mandamus* where no other legal remedy exists. But if the act to be performed involves the exercise of judgment, or if the subordinate public agent has a discretion in regard to the matter within his cognizance, and proceeds to exercise it according to the authority conferred by law, the superior court cannot lawfully interfere to control or govern that judgment or discretion by *mandamus*.

This is a fair and clear statement of the function of mandamus today. The sole question presented here is whether mandamus will lie to direct the trial court to render judgment nunc pro tunc upon a verdict returned by the jury.

*Jurisdiction.* Article 1824 of the *Texas Revised Civil Statutes*

<sup>39</sup> For a good discussion of these requirements see 4 McDONALD, TEX. CIV. PRACTICE (1950) c. XVIII.

<sup>40</sup> 6 Tex. 229, 232, 233 (1851).

(*Vernon, 1948*) grants to the court of civil appeals or any judge thereof the power to issue a writ of mandamus directed to a district or a county judge.<sup>41</sup> Previous to this statute, only the supreme court had such jurisdiction. The court still has jurisdiction to grant the writ<sup>42</sup> but generally declines to do so unless the petitioner has applied to the court of civil appeals without avail.<sup>43</sup> The fact that the court of civil appeals has denied the writ is not conclusive, and the supreme court may grant mandamus.<sup>44</sup> When this occurs, the proceeding is an original action in the supreme court and not an appeal from the denial of the writ by the lower court.<sup>45</sup>

*General Verdict.* It has long been settled that mandamus will lie directing the trial court to render a judgment nunc pro tunc on a general verdict.<sup>46</sup> No such positive rule can be stated, however, where there has been a finding on special issues.

*Special Issue Verdict; Mistrial.* *Gulf, C. & S. F. Ry. Co. v. Canty*<sup>47</sup> is the leading case on the problem. Judge Canty had ordered that plaintiff's motion to set aside the verdict and declare a mistrial be granted "for the sole and only" reason that there was an irreconcilable conflict in the answers of the jury to the special issues submitted to it. At the same time defendant's motion for judgment on the verdict had been denied.

In awarding the mandamus, the supreme court held that there was no conflict in the answers and that in the absence thereof, the rendition of judgment on the verdict required no exercise of judicial discretion. Accordingly, the trial judge was under a ministerial duty to enter judgment for defendant. The court pointed out that although this was a verdict on special issues, the jury failed to convict the defendant of the only count of negligence

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<sup>41</sup> *Cortimeglia v. Davis*, 116 Tex. 412, 292 S.W. 875 (1927); *Allen v. Strode*, 62 S.W. 2d 289 (Tex. Civ. App. 1933).

<sup>42</sup> TEX. REV. CIV. STAT. (VERNON, 1948) art. 1734.

<sup>43</sup> *Dallas Railway & Terminal Co. v. Watkins*, 126 Tex. 116, 86 S.W. 2d 1081 (1935).

<sup>44</sup> *Cleveland v. Ward*, 116 Tex. 1, 285 S.W. 1063 (1926).

<sup>45</sup> *Houston v. Palestine*, 114 Tex. 306, 267 S.W. 663 (1924).

<sup>46</sup> *Lloyd v. Brinck*, 35 Tex. 1 (1871).

<sup>47</sup> 115 Tex. 537, 285 S.W. 296 (1926).

submitted and that the verdict was just as effective for the defendant as would have been a general verdict.<sup>48</sup>

A study of the cases following the *Canty* decision discloses that for mandamus to lie against a granting of a mistrial, the duty of the trial court must be ministerial, rather than discretionary, and the order must not be subject to an immediate appeal.<sup>49</sup> It appears that mandamus will be awarded where the trial court's ruling is arbitrary<sup>50</sup> and the findings are clearly for one party,<sup>51</sup> provided that all material issues establishing the defense or cause of action are answered<sup>52</sup> and the verdict is sufficient to support the judgment.<sup>53</sup>

Where a mistrial is granted, apparently the only situation in which mandamus can be used is that in which the mistrial was declared on an insufficiency of the verdict to support the judgment.<sup>54</sup> This situation would be manifest if the trial court erroneously believed that there was no theory under the findings to support the judgment;<sup>55</sup> or if it found a conflict in the verdict on a mistaken interpretation;<sup>56</sup> or if it held erroneously that an unanswered issue was material.<sup>57</sup> The specific ground must be expressed as the sole cause in the order granting the mistrial,<sup>58</sup> or the implication of the order must be to that effect.<sup>59</sup> Otherwise, it will be assumed that the mistrial was granted for reasons within the discretion of the trial court, and mandamus will not be awarded.<sup>60</sup>

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<sup>48</sup> *Accord*, *Nalle v. Walenta*, 102 S.W. 2d 1070 (Tex. Civ. App. 1937).

<sup>49</sup> *Rhodus v. Miller*, 139 S.W. 2d 316 (Tex. Civ. App. 1940) *er. dism. judgm. cor.*

<sup>50</sup> *Cortimeglia v. Davis*, 116 Tex. 412, 292 S.W. 875 (1927).

<sup>51</sup> *Stewart v. Gibson*, 154 S.W. 2d 1002 (Tex. Civ. App. 1941).

<sup>52</sup> *Rush v. Klapproth*, 81 S.W. 2d 257 (Tex. Civ. App. 1935).

<sup>53</sup> *Missouri-K.-T. R. Co. v. Price*, 116 Tex. 241, 288 S.W. 415 (1926).

<sup>54</sup> *Missouri-K.-T. R. Co. v. Brewster*, 124 Tex. 244, 78 S.W. 2d 575 (1934).

<sup>55</sup> *McGregor v. Allen*, 195 S.W. 2d 945 (Tex. Civ. App. 1946) *er. dism.*

<sup>56</sup> *Gulf, C. & S. F. Ry. Co. v. Canty*, cited *supra* note 47.

<sup>57</sup> *Leonard v. Young*, 186 S.W. 2d 81 (Tex. Civ. App. 1945).

<sup>58</sup> *Missouri-K.-T. R. Co. v. Price*, cited *supra* note 53.

<sup>59</sup> *McGregor v. Allen*, cited *supra* note 55.

<sup>60</sup> *Missouri-K.-T. R. Co. v. Price*, cited *supra* note 53.

Immaterial findings may be disregarded<sup>61</sup> or left unanswered by the jury.<sup>62</sup> Mandamus may lie even though there is a conflict in other material issues, for the findings as to one defense (or one cause of action, as the case may be) may give one party the right to relief.<sup>63</sup>

As the *Canty* case points out, the existence of reasonable doubt as to whether a conflict in the verdict exists is sufficient to invoke the discretion of the court and to bar mandamus. It has also been indicated that an apparent conflict in the findings is treated similarly.<sup>64</sup>

In *Missouri-K.-T. R. Co. v. Cheek*<sup>65</sup> the court construed Article 2209 of *Texas Revised Civil Statutes (Vernon, 1936)*<sup>66</sup> as requiring the trial court to render judgment on a special verdict regardless of errors (if any) made by the jury. These errors could be reviewed on the motion for new trial after judgment. It is noted, however, that at the time of this decision, the period allowed to file a motion for new trial or an appeal was measured from the date as of which the judgment nunc pro tunc was effective. It becomes apparent that by the time the mandamus was granted, the time for filing a motion for new trial or an appeal had elapsed, and even though there had been errors during the trial, the injured party was without any relief.<sup>67</sup>

Mandamus may be awarded even though the term in which the case was tried has ended.<sup>68</sup> But the time element may affect the rendition of judgment nunc pro tunc.<sup>69</sup>

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<sup>61</sup> Rule 301.

<sup>62</sup> *Rawleigh Co. v. Sims*, 108 S.W. 2d 337 (Tex. Civ. App. 1937).

<sup>63</sup> *Southland-Greyhound Lines v. Richardson*, 126 Tex. 118, 86 S.W. 2d 731 (1935); *Stewart v. Bush*, 53 S.W. 2d 842 (Tex. Civ. App. 1932).

<sup>64</sup> See dissenting opinion in *Dallas Ry. & Terminal Co. v. Watkins*, 89 S.W. 2d 420 (Tex. Civ. App. 1935) *er. ref.*

<sup>65</sup> 18 S.W. 2d 804 (Tex. Civ. App. 1929) *er. disp.*

<sup>66</sup> This statute was repealed in 1939 but is the source of Rule 300.

<sup>67</sup> This point has become moot, however, by the adoption of Rule 306 (b), which provides that the right of appeal shall begin from the date of the rendition of the judgment nunc pro tunc.

<sup>68</sup> *Gulf, C. & S. F. R. Co. v. Canty*, cited *supra* note 47; *Allen v. Strode*, 62 S.W. 2d 289 (Tex. Civ. App. 1933).

<sup>69</sup> See *Judgment Nunc Pro Tunc*, *post*.

The right to the mandamus may be waived. In *Walling v. Harndt*<sup>70</sup> the trial court granted a new trial, and the defendant abided by the ruling. At the new trial defendant's motion to have the verdict of the former trial determinative of the issues on the new trial was overruled. The court of civil appeals affirmed the judgment, holding that the defendant's acts constituted a waiver of his right to mandamus. *Woodmen of the World Life Ins. Co. v. Davenport*<sup>71</sup> held that in the absence of any motion for mistrial or new trial by either party, the discretionary power of the trial court is not invoked, and rendition of judgment on the findings is a ministerial act, compellable in a mandamus action.<sup>72</sup>

*Special Issue Verdict; New Trial. Missouri-K.-T. R. Co. v. Brewster*<sup>73</sup> is the leading case holding that mandamus will not lie where the trial court refused to render judgment on the jury finding but granted a new trial instead. The court distinguished the situations in the *Canty* and *Cortimeglia* cases,<sup>74</sup> in which new trials were not requested. It was held that the granting or denial of a motion for new trial is within the authorized discretion of the trial court and is not subject to the writ of mandamus.

This rule has been followed in *Swann v. Wheeler*<sup>75</sup> and in *Chaffin v. Drane*.<sup>76</sup> In these cases much weight was placed on distinguishing between motions for mistrial and for new trial. In the *Chaffin* case emphasis was placed upon the wording of Rule 300, which states that judgment must be rendered in accordance with the jury finding "unless . . . a new trial is granted." This argument has much merit, but it is believed that the expression should be construed as meaning "unless a mistrial would be proper."<sup>77</sup>

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<sup>70</sup> 37 S.W. 2d 280 (Tex. Civ. App. 1931) *er. disp.*

<sup>71</sup> 159 S.W. 2d 913 (Tex. Civ. App. 1941).

<sup>72</sup> But if there is a clear conflict in the findings and no motion for mistrial is filed, should the trial court render judgment on the verdict anyway? and for which party?

<sup>73</sup> 124 Tex. 244, 78 S.W. 2d 575 (1934).

<sup>74</sup> Cited and discussed *supra* at notes 47 and 50.

<sup>75</sup> 126 Tex. 167, 86 S.W. 2d 735 (1935).

<sup>76</sup> 131 S.W. 2d 672 (Tex. Civ. App. 1939).

<sup>77</sup> See *Mistrial, ante*.

Several cases have been decided, however, that have allowed mandamus even though a motion for new trial, rather than mistrial, had been filed.<sup>78</sup> It is noted that these cases did not make a point of which motion had been filed but assumed the unimportance of the distinction. Perhaps this view is the best, as the mandamus should be directed at the trial court's refusal to render judgment on the verdict, and not against the granting of a motion for new trial or mistrial.

It is submitted that between verdict and judgment the motion for new trial and the motion for mistrial serve the same general purpose, and there appears no justification for distinguishing the two with different rules of practice. The inconsistency could be cured by disallowing the motion for new trial until after rendition of judgment. In the alternative, it is suggested that where a motion for new trial is submitted at a time when a motion for mistrial is proper, the court should treat the motion as one for a mistrial and disregard terminology.

*Judgment Nunc Pro Tunc.* As a general rule, a judgment or order must have actually been rendered at some prior time, and such judgment or order must still be in force and effect, in order for a judgment nunc pro tunc to be proper.<sup>79</sup> The usual purpose of this proceeding is to record correctly the prior decision of the court.

In the case of a jury trial, where the court refuses to render a judgment until compelled to do so by writ of mandamus, it now seems settled that a judgment nunc pro tunc is proper even though no prior judgment was rendered.<sup>80</sup> This exception to the general rule may be restated as follows: 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 the fault

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<sup>78</sup> *Gulf, C. & S. F. R. Co. v. Seydler*, 132 S.W. 2d 453 (Tex. Civ. App. 1939); *Dixie Service Company v. Leaverton*, 76 S.W. 2d 530 (Tex. Civ. App. 1934).

<sup>79</sup> *Reed v. Robertson*, 106 Tex. 56, 156 S.W. 196 (1913).

<sup>80</sup> *Gulf, C. & S. F. R. Co. v. Canty*, cited *supra* note 47; *Stewart v. Gibson*, 154 S.W. 2d 1002 (Tex. Civ. App. 1941).

of the prevailing party, rendition of judgment nunc pro tunc is proper.<sup>81</sup>

Inasmuch as the requirement that judgment be rendered at the term during which the case was tried has been eliminated,<sup>82</sup> the use of judgment nunc pro tunc becomes unnecessary. It will be noted, however, that the courts are still prone to use this device, and the power to utilize it has not been taken away.

#### SUMMARY

After the verdict has been returned by the jury, the parties should move for action by the trial court. If the verdict is against one party, he may make a motion for judgment notwithstanding, and/or a motion to set aside certain findings.

Should the findings be in conflict, then either of the parties may move for a mistrial. There is also the possibility of a motion for new trial at this point, and if it is allowed, the moving party eliminates the possible overturning of the order by writ of mandamus.

If the verdict is clearly in favor of one party and the evidence supports the verdict, then that party is entitled to have his motion for judgment on the verdict granted. Mandamus may lie against the trial court's refusal to render judgment thereon.

The importance of the choice of motions may readily be seen from a study of the results of ill-advised motions. It is to be remembered that the failure to assert the motion desired may operate as a waiver of the relief to which the party would otherwise be entitled.

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<sup>81</sup> *Gulf, C. & S. F. R. Co. v. Canty*, cited *supra* note 47; *Nalle v. Wallenta*, cited *supra* note 48.

<sup>82</sup> Former Rule 66 of the District and County Courts, which provided that judgment must be rendered in the term in which the cause was tried, was not carried forward into the new Rules in 1941.