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JURY TRIAL IN CIVIL CASES — A PROBLEM IN CONSTITUTIONAL INTERPRETATION

*"Nisi per legale iudicium parium suorum vel
per legem terrae."*—Magna Carta.

*Whitney R. Harris**

IN the January, 1841, Term of the Supreme Court of the Republic of Texas the decision in *Bailey v. Haddy* was handed down in an opinion by Judge Hutchinson.¹ The action was in trespass for the burning of a dwelling. In refusing to reverse the decision of the trial court based upon a jury verdict the court paid this tribute to the jury system:

... The institution of jury trial has, perhaps, seldom or never been fully appreciated. It has been often eulogized in sounding phrase, and often decried and derided. An occasional corrupt, or biased, or silly verdict is not enough for condemnation; and when it is said the institution interposes chances of justice and checks against venality and oppression, the measure of just praise is not filled. Its immeasurable benefits, like the perennial springs of the earth, flow from the fact that considerable portions of the communities at stated periods are called into the courts to sit as judges of contested facts, and under the ministry of the courts to apply the laws. There the constitution and principles of the Civil Code are discussed, explained and enforced, and the jurors return into the bosom of society instructed and enlightened, and disseminate the knowledge acquired; and *do we not* perceive, without further illustration, that to these nurseries of jurisprudence and of the rights of man, more than to all other causes, the Anglo-Saxon race has been pre-eminent for free institutions and all the political, civil and social virtues that elevate mankind! Let us then preserve

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¹ Dall, Dec. 35.

and transmit this mode of trial not only inviolate, but if possible, purified and perfected.²

That this statement may have been the inspiration for the language used in the Bill of Rights of the 1876 Constitution of Texas is suggested by Article I, Section 15, which provides, in part, as follows:

The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.

This may be called the Bill of Rights section on the right of trial by jury.³

The Judiciary Article of the Constitution contains in Article V, Section 10, the further provision:

In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury. . . ."

This may be called the Judiciary section on the right of trial by jury.

The reconciliation of these constitutional provisions gives rise to a problem of some difficulty and of considerable importance. The language in the Bill of Rights section suggests that the right of trial by jury, as it existed at the time of the adoption of the Constitution in 1876, shall be preserved; it does not purport to extend that right to cases in which parties were not entitled to trial by jury at the time of the adoption of the Constitution, nor to cases based upon rights established after that date. The lan-

² *Id.* at 40, 41. This praise of the jury system in civil cases was restated in the following words by Judge Ridgell of the Eastland Court of Civil Appeals in *Northcutt v. Northcutt*, 287 S. W. 515, 516 (Tex. Civ. App. 1926): "This valuable right of trial by jury is one of the greatest and most blessed securities afforded to free men. It is a landmark in our constitutional guaranties, and the abridgement of same would bring dire results to our form of government. To have the property right and the liberty passed upon by a jury of one's peers is a privilege born in necessity and nurtured in justice."

³ In 1935 this section was amended to enable the Legislature to provide for the temporary commitment, for observation and treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety days by order of the county court without trial by jury.

guage in the Judiciary section, on the other hand, purports to accord the right of trial by jury in the trial of every cause in the district courts, without regard to whether the right existed at the time of the adoption of the Constitution or came into the law after the adoption of the Constitution.⁴ That this analysis, based upon the literal language of these constitutional provisions, has not been accepted by the courts in all respects is apparent from the decisions hereinafter discussed. In spite of long judicial experiences in applying these sections to cases in which the right to trial by jury has been contested, a formula of interpretation which gives full effect to the terminology and purposes of each section has yet to appear in the decisions. The objective of this inquiry is to examine the theories of construction which have been applied heretofore and to suggest principles of interpretation which may be useful in determining rights of such significance to personal liberty and to judicial integrity.⁵

It is clearly established in Texas that the Legislature may not deprive parties of any right to jury trial in civil cases which

⁴ As to trials in the county courts the Judiciary Article does no more than recognize the right to trial by jury as otherwise guaranteed under the Bill of Rights. Article V, Section 17, provides in part as follows: "A jury in the County Court shall consist of six men; but no jury shall be empaneled to try a civil case unless demanded by one of the parties. . . ."

⁵ The Constitution of the State of Texas of 1845 provided for trial by jury in all criminal prosecutions. Art. I, § 8. This provision has been carried forward through all subsequent Constitutions to the present Constitution, where it appears as Article I, Section 10. CONST. 1861, Art. I, § 8; CONST. 1866, Art. I, § 8; CONST. 1869, Art. I, § 8. See SAYLES, *THE CONSTITUTIONS OF THE STATE OF TEXAS* (3d ed. 1888).

The 1845 Constitution contained a general provision that the right of trial by jury shall remain inviolate. Art. I, § 12. In its original setting, this right seemed likewise to relate to criminal prosecutions: "No person, for the same offense, shall be twice put in jeopardy of life or limb, nor shall a person be again put upon trial for the same offense after a verdict of not guilty; and the right of trial by jury shall remain inviolate." It was continued in that context in the Constitutions of 1861, 1866, and 1869. In the present Constitution it is retained, but without any context showing limitation to criminal prosecutions.

The Constitution of 1845 contained a provision that in the trial of all causes in equity in the district courts the parties shall have the right of trial by jury, to be governed by the rules and regulations prescribed in trials at law. Art. IV, § 16. This provision was carried over into the 1861 Constitution and to the 1866 Constitution, in which, however, the Judiciary Article was revised somewhat to provide that in all cases of law or equity, where the matter in controversy shall be valued at, or exceed, twenty dollars, the right of trial by jury should be preserved. CONST. 1861, Art. IV, §

existed at the time of the adoption of the Constitution. In *White v. White*⁶ the supreme court held unconstitutional the 1913 lunacy statute⁷ which permitted judgment of lunacy to be entered upon the unanimous report of six physician-commissioners without trial by jury. The court, speaking through Judge Hawkins, noted that the provision that "the right of trial by jury shall remain inviolate," had formed a part of every Constitution of the State and even of the Republic of Texas, as well as of the constitutions of many other states, with a well-established import and meaning that a party to a civil proceeding is "entitled to a trial by jury, in the full constitutional sense, if that practice prevailed in this State, according to then existing laws, at the time of the adoption of said provisions as portions, of our present State Constitution of 1876."⁸ The court observed that at common law the trial of a charge of insanity was before a jury, and that under the law of the State of Texas and the practice existing when the jury provision was adopted as a part of the present Constitution, "one charged with insanity was, it seems certain, entitled to and was given, a trial by jury."⁹ The privilege existing in other states under which the legislature may dispense with a jury in certain cases was declared inapplicable to our judicial system and laws and "obnoxious to our Constitution when it is read in the light of preexisting Texas laws relating to jury trials in lunacy cases."¹⁰ The court held that "[t]he asserted right having existed at com-

16; Const. 1866, Art. IV, § 20. In the 1869 Constitution the Judiciary Article was revised to provide that in all cases of law or equity, when the matter in controversy shall be valued at, or exceed, ten dollars, the right of trial by jury should be preserved, unless waived by the parties or their attorneys, except in defaults where the cause of action is liquidated and proved by an instrument in writing; and it was further provided that in the trial of all causes in the district court the parties should have the right of trial by jury. Art. V, §§ 16, 26. The present Constitution does not provide expressly for a right of jury trial in equity cases.

⁶ 108 Tex. 570, 196 S. W. 508 (1917).

⁷ Acts 1913, c. 163, pp. 341-347.

⁸ 108 Tex. at 581, 196 S. W. at 512.

⁹ *Id.* at 582, 196 S. W. at 512. The court noted that jury trial in lunacy cases was provided by the Act of February 5, 1858, and that the provision stood as law when the present Constitution was ratified.

¹⁰ *Id.* at 587, 196 S. W. at 515.

mon law and in various American States and especially in Texas prior and down to the adoption of our present Constitution," so much of the act as provided for a hearing before a commission, "in lieu of the time-honored trial by jury" was invalid.¹¹

It is equally well-established that the Bill of Rights section does not confer a right to trial by jury in a proceeding in which that right was not accorded at the time of the adoption of the Constitution. In *Cockrill v. Cox*,¹² decided by the supreme court in 1886, the court, speaking through Justice Robertson, observed that a provision preserving the right of trial by jury, expressed in substantially the same language as the Bill of Rights section, "is to be found in all the state constitutions, and it has been uniformly construed to perpetuate the right in the cases in which it exists, under the laws in force and practice prevailing at the date of the adoption of the particular constitution."¹³ Under the system of probate practice existing at the time of the adoption of the Constitution of 1876 a jury trial was not accorded in the county court, and the court saw "no constitutional objection to the refusal of a jury in the contest in the county court."¹⁴

Texas is exceptional in allowing, as of constitutional right, trial by jury in equitable actions.¹⁵ In *Ex parte Allison*,¹⁶ which involved the validity of an act of the Legislature authorizing the

¹¹ *Ibid.*

¹² 65 Tex. 669.

¹³ *Id.* at 674.

¹⁴ *Id.* at 673. In this same case, however, the court noted that at the time of the adoption of the Constitution the uniform practice was to accord the right of trial by jury in will contests tried in the district courts. And it concluded that, under the Bill of Rights and Judiciary sections of the Constitution the parties were entitled, as a matter of constitutional right, to trial by jury of contested fact issues in will contests in the district court.

¹⁵ Right to trial by jury usually is not accorded in equity actions. See 50 C. J. S., *Juries*, § 23, p. 737. And this is true even where law and equity have been merged into a single form of action. *Hasty v. Pierpont*, 146 Kan. 517, 72 P. 2d 69 (1937). In such cases right to jury trial will depend upon whether the action is equitable in nature. *Bettencourt v. Bank of Italy Nat. Trust & Savings Ass'n*, 216 Cal. 174, 13 P. 2d 659 (1932).

¹⁶ 99 Tex. 455, 462, 90 S. W. 870, 871, 2 L. R. A. (N. S.) 1111 (1906).

State or any citizen thereof to bring suit to enjoin the use of a building for gambling, Chief Justice Gaines observed that in those jurisdictions in which legal and equitable remedies are separately administered, parties are generally entitled to have fact issues determined by a jury in courts of law, but not in courts of equity. "But," he said, "under our system in which law and equity are blended and the right of trial by jury exists, whether the remedy be legal or equitable, the difficulty vanishes. Before the injunction could be made perpetual under the statute in question it is the right of the defendant to have the jury pass upon the facts."¹⁷ Of course, suits for injunctions were well known at the time of the adoption of the Constitution. Furthermore, previous Constitutions had provided expressly for right to jury trial in equity actions in the district courts.¹⁸ But the type of equitable proceeding involved in *Dallas Joint Stock and Bank of Dallas v. State*¹⁹ had not been recognized at the time of the adoption of the Constitution. The action was an independent suit in the nature of a bill of discovery. As the court said, "a bill of discovery as an independent action, was unknown to our jurisprudence until authorized by the Legislature in 1923."²⁰ Yet, without distinguishing the Bill of Rights and Judiciary sections, the court held, on the basis of the reasoning of Chief Justice Gaines in the *Allison* case, that the parties were entitled to have controverted issues of fact that tended to establish or defeat the right to a discovery determined by jury.

The plain language of the Judiciary section conferring the right of trial by jury in all causes in the district courts would seem to

¹⁷ "The distinctions between law and equity have never obtained in Texas. They were not recognized in the earliest times when the civil law of Mexico was administered. They were unknown to the Constitution of Coahuila in Texas. After independence the Constitution of the Republic ignored them. Each succeeding Constitution of the state has expressly denied their existence. At most, the distinction in this state is a very narrow one. In some respects it may be said to be more one of form than of substance." *City of Dallas v. McElroy*, 254 S. W. 599, 601 (Tex. Civ. App. 1923).

¹⁸ See note 5 *supra*.

¹⁹ 133 S. W. 2d 827 (Tex. Civ. App. 1939).

²⁰ *Id.* at 829.

entitle parties to jury trials irrespective of whether that right existed at the time of the adoption of the Constitution. This construction was placed upon that section by the supreme court, speaking through Chief Justice Gaines, in the 1907 decision of *Tolle v. Tolle*,²¹ where it was held that an applicant for letters of administration upon the estate of a deceased person was entitled to a trial by jury in the district court. The court noted that the Judiciary section provides for trial by jury of all "causes" in the district courts. "Language cannot be more comprehensive than this. Hence, if a probate proceeding is properly styled a 'cause,' this section undoubtedly gives a right of trial by jury. Bouvier defines a 'cause' as: 'a suit or action. Any question civil or criminal contested before a court of justice.' The questions in this case are certainly questions contested before a court."²² The court did not refer to any right of jury trial in contests over letters of administration in the district courts at the time of the adoption of the Constitution, although an analogy was drawn to will contests as to which the right to jury trial in the district courts had been recognized in *Cockrill v. Cox*. The case might have been sustained under the Bill of Rights section of the Constitution; but the court placed it expressly within the "comprehensive language" of the Judiciary section.

Notwithstanding the decision of the supreme court in the *Tolle* case, exceptions to trial by jury in the district courts have been recognized and approved. In most cases consideration has not been given to the different scope and effect of these sections, which their terminology seems to require. Sometimes an exception has been justified on the ground that one section does not apply, without regard to possible right of jury trial under the other section; sometimes both sections have been construed as one. Illustrative of the categories of actions in which jury trial has been refused in the district courts on such grounds are the following: (1) election contests; (2) contempt proceedings; (3)

²¹ 101 Tex. 33, 104 S. W. 1049.

²² *Id.* at 33, 34, 104 S. W. at 1050.

proceedings for child custody; (4) adoption proceedings; (5) review of administrative decisions.

1. *Election contests.* The supreme court has held that trial by jury is not guaranteed under the Judiciary section in election contest cases because such contests are not "causes" within the meaning of Article V, Section 10. *Hammond v. Ashe*²³ involved the trial in the district court of the contest of a primary election for sheriff. The court, speaking through Justice Williams, said: "In this case we think it clear that the right of trial by jury does not exist. The statute does not allow it, and the provision of the Constitution (art. V, sec. 10) has no application. The language of the latter does not embrace contested elections as 'causes' in which the right of trial by jury is secured."²⁴ The decision of the court constitutes a reasonable construction of the word "cause." The proceeding is statutory, and the issue is essentially political. It is sound to assume that civil proceedings of this kind were not contemplated as "causes" within the meaning of Article V, Section 10, when adopted. But nothing was said in the opinion as to the possibility of a right to jury trial under Article I, Section 15.

2. *Contempt proceedings.* It is interesting to note that the denial of trial by jury in civil contempt proceedings in the district courts was supported by Chief Justice Gaines in spite of his opinion in the *Tolle* case. Ex parte *Allison*²⁵ involved the constitutionality of an act of the Legislature authorizing the State or any citizen thereof to enjoin the habitual, actual, contemplated, or threatened use of any premises for the purpose of gaming. Chief Justice Gaines held that whereas a party would be entitled to trial by jury on the issuance of the injunction, he would not be entitled to jury trial in contempt proceedings thereafter invoked against him. Chief Justice Gaines did not contend that the pro-

²³ 103 Tex. 503, 131 S. W. 539 (1910).

²⁴ *Id.* at 504, 131 S. W. at 539. To the same effect, see *McCormick v. Jester*, 115 S. W. 278 (Tex. Civ. App. 1908).

²⁵ 99 Tex. 455, 90 S. W. 870 (1906).

ceedings on contempt in the district court would not constitute the trial of a cause within the meaning of the Judiciary section. He did not discuss that section at all. Instead he concluded that there was no constitutional right to trial by jury because the Bill of Rights section only protects such rights as they "existed at the time the constitution went into effect."²⁶ Of course, he correctly observed that "no such right exists at common law in proceedings for contempt."²⁷ The rule of the *Allison* case has been uniformly followed, even where violation of the contempt order may constitute a criminal act.²⁸

3. *Proceedings for child custody.* That the Judiciary section does not guarantee right of jury trial in habeas corpus cases for custody of minor children was first declared in *Pittman v. Byars*, decided in 1908.²⁹ In the court's words, "on the 19th of June said cause came on for trial, whereupon defendants presented exceptions and demurrers to plaintiffs' petition, which were sustained by the court and the suit was dismissed."³⁰ By their first assignment of error appellants urged that the district court erred in refusing to grant them a trial by jury, as they had requested. The court observed that the language of the Constitution granting the right of trial by jury to every party in all cases in the district court "is sufficiently broad and expansive to grant the right here contended for, unless it be held that prior to and at the time of the adoption of our Constitution this character of action was not such a one as entitled the parties thereto to the right of trial by jury."³¹ It noted that in other jurisdictions jury trials were gen-

²⁶ *Id.* at 462, 90 S. W. at 870, 871.

²⁷ *Ibid.*

²⁸ *Ex parte Houston*, 87 Tex. Crim. Rep. 8, 219 S. W. 926 (1920). Better reasoning for the rule was stated by the court of criminal appeals, through Judge Ramsey, in *Ex parte Roper*: "Nor can it be maintained that the Act in question is invalid because it denies the right of trial by jury. The right of trial by jury in respect to the offense against the law is not controverted by this Act. The matter inquired into by the court in this proceeding relates strictly to the matter of contempt, and to the violation of the court's order." 61 Tex. Crim. Rep. 68, 78, 134 S. W. 334, 339 (1910).

²⁹ 112 S. W. 102 (Tex. Civ. App.).

³⁰ *Id.* at 103.

³¹ *Id.* at 105.

erally refused in habeas corpus cases, and that this practice had prevailed in Texas under earlier Constitutions. "Therefore," the court concluded, "we are inclined to follow the beaten path of the common law as well as the uniform practice by our own courts, and hold that the court below did not err in refusing to grant appellants a trial by jury."³² The court thus construed the Judiciary section as having precisely the same scope as the Bill of Rights section. It was recognized however, that "the court or judge sitting on the return to a writ of habeas corpus may in its discretion order any controverted fact in the matter to be tried by a jury."³³

The rule of *Pittman v. Byars* was followed by the commission of appeals in *Burckhalter v. Conyer*⁴³ and *Duckworth v. Thompson*,⁵⁵ both of which were habeas corpus proceedings for custody of minor children. But in the *Burckhalter* case, while approving *Pittman v. Byars*, the court based its decision upon the unique features of the habeas corpus proceeding itself. "The writ of habeas corpus is a writ of right, designed to protect the individual against any character of illegal restraint. The efficacy of this writ lies in the prompt and speedy hearing given an applicant seeking the protection of its beneficent provisions. If the hearing under such writ can be delayed by the demand for a jury, its effectiveness would be largely impaired." In effect, the court held that the proceeding of habeas corpus is not a "cause" within the meaning of the Judiciary section, and it concluded: "We therefore hold that where the custody and possession of a child is not sought merely through an ordinary suit, but by invoking the writ of habeas corpus, neither party thereto is entitled to a jury trial as a matter of right."³⁶

³² *Id.* at 106.

³³ *Id.* at 105. And see *Joseph v. Puryear*, 273 S. W. 974 (Tex. Civ. App. 1925).

³⁴ 9 S. W. 2d 1029 (1928).

³⁵ 37 S. W. 2d 731 (1931).

³⁶ 9 S. W. 2d at 1029. See also *Strode v. Silverman*, 217 S. W. 2d 454 (Tex. Civ. App. 1949).

Unfortunately, the matter cannot be left there because problems of custody of children may arise in ordinary suits, as well as in habeas corpus proceedings. In *Northcutt v. Northcutt*³⁷ a jury was impaneled in a divorce action in which both parties sought custody of a minor child. After evidence had been offered, the court stated that it was of the opinion that the parties were each entitled to a divorce, and by agreement that issue was withdrawn from the jury.³⁸ Appellant insisted that the issue of custody of the minor child should then be submitted to the jury. The court denied the request and rendered judgment granting the divorce and determining custody of the child. The court of civil appeals held that the trial court properly removed the custody issue from the jury on the theory that the Legislature had authority under Article V, Section 8, of the Constitution (which gives to the district courts original jurisdiction over minors "under such regulations as may be prescribed by law") to empower the court, in all divorce suits, to give the custody of children to the father or mother as the court shall deem right and proper.³⁹ The difficulty with this reasoning is that it would subject to legislative determination the right to trial by jury in many other instances in which Article V, Section 8, confers similar jurisdiction upon the district courts.⁴⁰ Denial of jury trial in this case might have been based upon the responsibility which the State has for the well-being of

³⁷ 287 S. W. 515 (Tex. Civ. App. 1926).

³⁸ Parties to a contested divorce action are entitled to trial by jury. TEX. REV. CIV. STAT. (Vernon, 1948) art. 4632. And it is proper to submit to the jury a single issue as to whether the acts and conduct of one spouse toward the other constituted such excess, cruel treatment or outrage, if any, of such a nature as to render their further living together as husband and wife insupportable. *Howell v. Howell*, 147 Tex. 14, 210 S. W. 2d 978 (1948). Notwithstanding a jury verdict finding grounds for divorce, both trial and appellate courts may independently determine whether the evidence is full and satisfactory to support a decree for divorce. *Train v. Train*, 209 S. W. 2d 212 (Tex. Civ. App. 1948).

³⁹ TEX. REV. CIV. STAT. (Vernon, 1948) art. 4639.

⁴⁰ The district courts have original jurisdiction and general control over executors, administrators, guardians and minors, and appellate jurisdiction over the county commissioners court, under such regulations as may be prescribed by law. TEX. CONST. Art. V, § 8. It is difficult to believe that the provision "under such regulations as may be prescribed by law" was intended to affect in any way the right to trial by jury guaranteed under other provisions of the Constitution.

minor children — the courts, rather than juries, performing the function historically assumed by the chancellor in the protection of minor children. It is everywhere accepted that “the interest and future of the child is paramount to all other considerations.”⁴¹ It could be said that this interest lies exclusively within the courts to protect and that, in this sense, a child custody case is not a “cause” within the meaning of the Judiciary section.

4. *Adoption proceedings.* The theory by which the courts may determine custody of children without trial by jury applies with particular force to adoption proceedings. In such cases the parents have, in effect, relinquished their claim in the child to the State and to the adopting parents, and the courts, representing the State, and charged with the protection of the welfare of the child, may determine fitness to adopt without reference to a jury. It may be contended, as in the custody cases, that such a proceeding is not a “cause” within the meaning of Article V, Section 10. In the 1951 decision of the Austin Court of Civil Appeals in *Hickman v. Smith*,⁴² however, the court failed to distinguish between the Bill of Rights section and the Judiciary section in approving the action of the trial court in denying a jury in an adoption proceeding. The court said: “The right to trial by jury as guaranteed by Art. 1, Sec. 15, of the Bill of Rights to the Texas Constitution, and Art. 5, Section 10, of such Constitution, Vernon’s Ann. St., is limited to the right of trial by jury as it existed at common law or as provided by statutes in effect at the time of the adoption of our Constitution in 1876.”⁴³

5. *Review of Administrative Decisions.* The right of jury trial on review of administrative orders of the Liquor Control Board came under consideration recently in *Texas Liquor Control Board v. Jones*,⁴⁴ where, on appeal from an order of the Texas Liquor

⁴¹ *Northcutt v. Northcutt*, 287 S. W. 515, 516 (Tex. Civ. App. 1926).

⁴² 238 S. W. 2d 838.

⁴³ *Id.* at 839.

⁴⁴ 112 S. W. 2d 227 (Tex. Civ. App. 1937).

Control Board cancelling the license of appellee, the granting of a jury trial by the trial court was held to be error in view of the statute which provides expressly that upon trial of the cause in the district court "neither party shall be entitled to a jury."⁴⁵ The court declared: "It is definitely settled in Texas that the right of trial by jury as provided in the foregoing provisions [Article I, Section 15, and Article V, Section 10] means the right of trial by jury as it existed at common law or by statutory provisions at the time of the adoption of our Constitution in 1876. . . . From an examination of the statutes, we find that a proceeding such as an appeal from the action of an administrative body either granting or revoking a license to sell intoxicating liquor was unknown to the law of Texas at the time of the adoption of our present Constitution, and hence we had no statutes at that time which provided for a jury trial in a proceeding of this nature."⁴⁶ This treatment of both sections as one cannot be justified upon their express language. But the court did observe and hold that "the cancellation of a permit to sell liquor under the Liquor Control Act and the principle of law governing such matters is not a civil suit or cause of action."⁴⁷

The right to jury trial in Texas on judicial review of administrative decisions is complicated by the wide use of the substantial evidence rule.⁴⁸ Under this rule decisions of administrative agencies will be sustained if reasonably supported by substantial evidence in the record considered as a whole.⁴⁹ Whether an order of an administrative agency is reasonably supported by substan-

⁴⁵ TEX. PEN. CODE (Vernon, 1948) art. 666-14.

⁴⁶ 112 S. W. 2d at 229.

⁴⁷ *Ibid.* Cf. *State v. De Silva*, 105 Tex. 95, 145 S. W. 330 (1912).

⁴⁸ The scope of the rule and exceptions thereto appear in *Harris, The Administrative Law of Texas*, 29 Tex. L. Rev. 213, 227 (1950). In recent state legislation further exceptions have been enacted: Texas Real Estate Commission, TEX. REV. CIV. STAT. (Vernon, 1950 Supp.) art. 6573a, § 15; Railroad Commission, TEX. REV. CIV. STAT. (Vernon, 1950 Supp.) art. 6053; County Herbicide Inspectors, TEX. REV. CIV. STAT. (Vernon, 1952 Supp.) art. 135b-3, § 25.

⁴⁹ *Larson, The Substantial Evidence Rule: Texas Version*, 5 Southw. L. J. 152 (1951).

tial evidence is said to be a question of law.⁵⁰ The strong opposition of Chief Justice Alexander to the substantial evidence rule in the *Trapp* case was based in part on his contention that under this rule parties would be deprived of their right to trial of the issues before a jury,⁵¹ since the constitutional guarantee of jury trial relates solely to fact issues⁵² and not to questions of law.⁵³

Where the substantial evidence rule is not applied by the courts on review of administrative decisions, the right to jury trial should depend upon whether the right is conferred, or denied, by the Legislature. Some statutes provide expressly for trial by jury on judicial review of administrative decisions⁵⁴ The only statute expressly denying trial by jury is the one governing appeals from decisions of the Texas Liquor Control Board.⁵⁵ Most statutes are silent as to the right of parties to have fact issues determined by a jury on appeal from administrative decisions. Nevertheless, juries have been impaneled under such statutes,⁵⁶ even in the most complicated rate cases where the value of jury trial is at least open to serious question.⁵⁷

⁵⁰ *Hawkins v. Texas Co.*, 146 Tex. 511, 209 S. W. 2d 338 (1948); *Thomas v. Stanolind Oil & Gas Co.*, 145 Tex. 270, 198 S. W. 2d 420 (1946).

⁵¹ *Trapp v. Shell Oil Co.*, 145 Tex. 323, 352, 198 S. W. 2d 424, 442 (1946).

⁵² *Thorne v. Moore*, 101 Tex. 205, 210, 105 S. W. 985, 987 (1907): "The right of trial by jury exists only with respect to disputed issues of fact."

⁵³ *Ward v. State ex rel. Carman*, 200 Okla. 51, 196 P. 2d 856, 4 A. L. R. 2d 436 (1947).

⁵⁴ *E.g.*, Texas State Board of Dental Examiners, TEX. REV. CIV. STAT. (Vernon, 1952 Supp.) art. 4549; Texas Real Estate Commission, TEX. REV. CIV. STAT. (Vernon, 1950 Supp.) art. 6573, § 15.

⁵⁵ The legislative proscription against trial by jury on review of decisions of the Liquor Control Board may be of little legal significance in view of the application of the substantial evidence rule to judicial review of orders refusing, cancelling or suspending liquor permits, notwithstanding the statutory requirement of trial *de novo* "under the same rules as ordinary suits," TEX. PEN. CODE (Vernon, 1948) arts. 666-14 and 667-6. *Ramos v. Austin*, 220 S. W. 2d 528 (Tex. Civ. App. 1949); *Louder v. Texas Liquor Control Board*, 214 S. W. 2d 336 (Tex. Civ. App. 1948) *er. ref. n.r.e.*; *State v. Peeler*, 200 S. W. 2d 874 (Tex. Civ. App. 1947); *Texas Liquor Control Board v. Floyd*, 117 S. W. 2d 530 (Tex. Civ. App. 1938); *Texas Liquor Control Board v. Jones*, 112 S. W. 2d 227 (Tex. Civ. App. 1937); *Bradley v. Texas Liquor Control Board*, 108 S. W. 2d 300 (Tex. Civ. App. 1937). *Contra*, *Texas Liquor Control Board v. Saiz*, 220 S. W. 2d 502 (Tex. Civ. App. 1949).

⁵⁶ *United Gas Public Service Co. v. Texas*, 303 U. S. 123, 141 (1937).

⁵⁷ *St. Louis Southwestern Ry. v. State*, 255 S. W. 390 (Tex. Comm. App. 1923).

In *United Gas Public Service Co. v. Texas*⁵⁸ an appeal was taken from a rate order of the Railroad Commission to the district court under a statute which was silent as to the right of jury trial.⁵⁹ In the district court trial was to a jury on the general question of whether the rate fixed by the Commission was unreasonable and unjust as to the public utility. It does not appear that any objection was raised to the trial by jury at that time. The verdict was that the rate was not unreasonable, and the judgment of the trial court based thereon was affirmed in the court of civil appeals. The Supreme Court of the United States granted certiorari, however, and in that Court the contention was advanced that the granting of trial by jury on judicial review of the order of the Railroad Commission was contrary to procedural due process. In holding to the contrary, the Supreme Court stated: "The state is entitled to determine the procedure of its courts, so long as it provides the requisite due process. And on that question we have never held that it is beyond the power of the state to provide for the trial by a jury of questions of fact because they are complicated."⁶⁰ No consideration was given by the court of civil appeals or by the Supreme Court of the United States to the fact that trial by jury was not, in this case, called for by statute. Nor can it be determined whether the trial court, in impaneling the jury, did so in the belief that either party was entitled to jury trial as a matter of constitutional right. Proceedings for judicial review of administrative decisions were not known to the law at the time of the adoption of the Constitution; nor are they properly to be regarded as "causes" within the meaning of the Judiciary section. While the courts may impanel juries to assist them in arriving at fact findings in these, as in other cases, the right to jury trial on review of administrative decisions is not prescribed by the Constitution but is to be found, if at all, in the applicable statutes.

⁵⁸ 89 S. W. 2d 1094 (Tex. Civ. App. 1935).

⁵⁹ TEX. REV. CIV. STAT. (Vernon, 1948) art. 6059.

⁶⁰ 303 U. S. 123, 140 (1937).

Difficulty encountered by trial courts in deciding whether parties are entitled as of constitutional right to trial by jury in actions established since the adoption of the Constitution may have been the result of inadequate analysis of the Bill of Rights and the Judiciary sections, respectively. Such analysis should give appropriate effect and weight to each section, separately considered. The following simple rules comprise a formula of interpretation, within the wording of these vital provisions of the Constitution, as related to the trial of civil actions in the district courts which may be of assistance in determining the constitutional right of jury trial in future cases.

1. There is a constitutional right of trial by jury in any action or proceeding in which that right was accorded at the time of the adoption of the Constitution.

2. There is a constitutional right of trial by jury in any ordinary cause of action in the district courts whether or not such right was accorded at the time of the adoption of the Constitution.

3. There is no constitutional right of trial by jury in special civil proceedings in the district courts, other than ordinary causes of action, unless jury trial was accorded in any such proceedings at the time of the adoption of the Constitution.

4. In the absence of any constitutional right of trial by jury the Legislature may provide for jury trial in any action or proceeding, or the court at its discretion may seek the advisory opinion of a jury.

Rule 1 follows directly from the Bill of Rights section which declares that the right of trial by jury shall remain inviolate. Clearly, under that section every person is entitled to jury trial in all actions and proceedings in which that right was accorded at the time of the adoption of the Constitution. The right cannot be impaired by any act of the Legislature.⁶¹

⁶¹ *White v. White*, 108 Tex. 570, 196 S. W. 508 (1917).

Rule 2 follows directly from the Judiciary section, which declares that parties shall be entitled to a jury in the trial of every cause in the district courts. In the *Tolle* case Chief Justice Gaines quoted one of the definitions given by Bouvier of the word "cause." That definition was the broad usage under which "cause" is considered as equivalent to "action" or "suit" or "any question . . . contested before a court of justice." But Bouvier also treats "cause" as meaning, in some usages, the "cause of action" which arises upon the breach of a duty or the violation of a right recognized in the law.⁶² "Cause" could not have been intended by the framers of the Constitution to be equivalent to every "suit" or "action," for even at the time the Constitution was adopted, there were some cases in which trial by jury was not accorded in the district courts.⁶³ Therefore, it must have been intended to refer to the ordinary "causes of action."

Rule 3 is based upon the construction of the word "cause," as used in the Judiciary section, to mean ordinary "causes of action." This usage permits the differentiation therefrom of other "civil proceedings." Such a distinction has long been recognized in the legal theory which has developed about the right to trial by jury.⁶⁴ The Judiciary section should not be construed as embracing special civil proceedings.⁶⁵ Constitutional right to trial by jury in any such proceedings must be found under the Bill of Rights section, as having been accorded by the courts at the time of the adoption of the Constitution.

⁶² 1 BOUVIER'S L. DICT. (3d rev. 1914) 436.

⁶³ *B. B. Brazos and Colorado R. R. Co. v. Ferris*, 26 Tex. 588 (1863), condemnation proceedings; *Pelham v. The State*, 30 Tex. 422 (1867), proceeding to determine validity of land patents.

⁶⁴ See 50 C. J. S., *Juries*, § 50, p. 761, *et seq.*; 35 C. J., *Juries*, § 62, p. 178, *et seq.*

⁶⁵ CORPUS JURIS SECUNDUM lists the following civil proceedings in which trial by jury generally is not accorded: mandamus, habeas corpus, enforcement of health regulations, administration of estates of decedents, probate and contest of wills, guardianship, insolvency, proceedings for assessments for public improvements, condemnation proceedings, proceedings against public officers, enforcement of bonds and recognizances, revocation or cancellation of licenses and permits, disbarment and other proceedings against attorneys, seizures, penalties, forfeitures, and miscellaneous other proceedings. 50 C. J. S., *Juries*, p. 762 *et seq.*

Rule 4 is adequately supported by judicial precedent. Trial by jury is not a requisite of due process of law;⁶⁶ nor is it a privilege or immunity which states are forbidden to abridge.⁶⁷ In *Janes v. Reynolds' Adm'rs*⁶⁸ Chief Justice Hemphill declared that a trial according to the "law of the land" had never been interpreted "to enjoin in all cases a trial by jury as a requisite indispensable to the validity of a judgment."⁶⁹ He noted numerous instances of trials without jury, including the rendition of judgment by default, or on confession of the party, or on demurrer, or in cases of contempt, and he observed that "under the common law of England, all causes in the courts of equity and admiralty, in courts military and ecclesiastical, are determined without the intervention of a jury."⁷⁰ The extent to which trial by jury will be allowed as of right in various actions may be, and frequently is, provided by statute.⁷¹

The formula of interpretation based upon these four rules may be applied to actions or proceedings established by law since the adoption of the Constitution. Under these rules the two most recent cases, *Hickman v. Smith*⁷² and *Texas Liquor Control Board v. Jones*,⁷³ seem to have been correctly decided. Neither an adoption proceeding nor the review of orders of the Liquor Control Board constitutes an ordinary cause of action; and in neither was trial by jury accorded at the time of the adoption of the Constitution. It is doubtful whether *Dallas Joint Stock and Bank of Dallas v. State*⁷⁴ would be decided in the same way under this formula. The independent suit for discovery is not an ordinary cause of action, and it was unknown at the time of the adoption

⁶⁶ *Hawkins v. Bleakly*, 243 U. S. 210 (1917).

⁶⁷ *Maxwell v. Dow*, 176 U. S. 581 (1900).

⁶⁸ 2 Tex. 250 (1847).

⁶⁹ *Id.* at 252.

⁷⁰ *Ibid.*

⁷¹ *Meigs v. Theis*, 102 Conn. 579, 129 Atl. 551 (1925).

⁷² 238 S. W. 2d 838 (Tex. Civ. App. 1951).

⁷³ 112 S. W. 2d 227 (Tex. Civ. App. 1937).

⁷⁴ 133 S. W. 2d 827 (Tex. Civ. App. 1939).

of the Constitution. It seems, rather, to be a special proceeding, equitable in nature, as to which no right of jury trial is guaranteed under either the Bill of Rights or the Judiciary section of the Constitution. On the other hand, *Ex parte Allison*,⁷⁵ an ordinary suit for injunction to restrain use of premises for gambling, would seem to call for jury trial under both sections. The rules may be applied to actions and proceedings hereafter created by the Legislature. Under them full effect can be given to each section of the Constitution relating to trial by jury in civil actions in the district courts. At the same time, exceptions to trial by jury, long-recognized in the law, can be adequately accommodated thereunder.

A learned King's Counsel once said: "The more I see of trial by judge, the more highly I think of trial by jury."⁷⁶ Whether facetious or not, the statement reflects the emotional attachment which all of us who have been schooled in the common law feel for the institution of the jury. There is, seemingly, security in the sometimes-prejudiced, sometimes-confused, sometimes-inaccurate verdicts of jurors. They have a way of reaching a just result, even if they fail now and then to make a right decision. In a recent debate in the House of Lords over the question of the abolition of special juries in England, Lord Simon quoted from Sir Patrick Hastings, one of England's most eminent barristers, the following: "I am satisfied that in the end twelve ordinary English men and women sitting together form the best tribunal that civilization has yet devised, and any legislator who seeks to curtail the activities of juries does a great disservice to the nation."⁷⁷ Sir Patrick probably spoke of criminal trials; yet one may doubt whether he would have agreed with Holmes that trial judges may decide fact issues in civil cases more competently than jurors. "A judge who has long sat at *nisi prius* ought gradually to acquire a

⁷⁵ 99 Tex. 455, 90 S. W. 870 (1906).

⁷⁶ The late Mr. B. R. Wise, quoted by P. A. Jacobs, *Trial by Jury — Its Origin and its Merits*, 21 Aust. L. J. 462 (1948).

⁷⁷ Hollander, *A Change in the Old Order: England Streamlines Her Jury System*, 36 A. B. A. J. 455, 456 (1950).

fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury. He should be able to lead and to instruct them in detail, even where he thinks it desirable, on the whole, to take their opinions. Furthermore, the sphere in which he is able to rule without taking their opinion at all should be continually growing.⁷⁸

No issue has been drawn here as to the faults and merits of the jury system in civil actions and proceedings. The jury is not widely used outside of the United States and Canada. Even in England its use in civil cases has been sharply limited by law.⁷⁹ But the jury system is a vital and established part of the administration of civil justice in this country. And the province of the jury, in fundamental law, ought, therefore, to be clearly defined. The rules of construction proposed herein suggest a formula of interpretation which may be helpful to that end in Texas.

⁷⁸ HOLMES, *THE COMMON LAW* (1881) 124.

⁷⁹ In civil causes in England there is a right to a jury in the Queen's Bench Division only if a charge of fraud is made against the party making application for a jury, or if a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction, or breach of promise of marriage is in issue, unless the court or judge is of the opinion that the trial requires a prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury; in all other cases it lies within the discretion of the court or judge to order trial with or without jury. In the Probate, Divorce and Admiralty Division a jury may be obtained in probate actions and matrimonial causes. 13 HALSBURY'S STAT. OF ENG. (2d ed. 1949) 387.