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ORIGINAL JURISDICTION OF THE COURTS OF CIVIL
APPEALS TO ISSUE EXTRAORDINARY WRITS

*James R. Norvell**

UNDER the Texas constitutional system, the jurisdiction of both the Supreme Court and the Courts of Civil Appeals is primarily appellate in nature and such courts are not invested with general superintendence of trial courts.¹ Nevertheless, by the constitution and statutory enactments, they are granted the authority to issue original writs under certain circumstances. It has been pointed out that the authority and jurisdiction of the Supreme Court in this regard is much broader than that of a Court of Civil Appeals,² and this seems readily apparent from a comparison of the constitutional and statutory provisions relating to the two species of courts.³ The constitutional provision

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¹ *Milam County Oil Mill Co. v. Bass*, 106 Tex. 260, 163 S. W. 577 (1914); *Texas Employers' Ins. Ass'n. v. Kirby*, 150 S. W. 2d 123 (Tex. Civ. App. 1941).

² *Adams v. Mitchell*, 86 S. W. 2d 884 (Tex. Civ. App.) 1935; *Hidalgo County Water Improvement Dist. No. 2 v. Cameron County Water Control and Improvement Dist. No. 5*, 250 S. W. 2d 941 (Tex. Civ. App. 1952).

³ The constitutional provision relating to the original jurisdiction of the Supreme Court is contained in Article 5, § 3, of the Constitution and reads as follows:

"The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State."
Statutory enactments adopted in accordance with the constitutional grant of power are the following:

"Article 1733. May issue writs.—The Supreme Court or any Justice thereof, shall have power to issue writs of procedendo, certiorari and all writs of quo warranto or mandamus agreeable to the principles of law regulating such writs, against any district judge, or Court of Civil Appeals or judges thereof, or any officer of the State Government, except the Governor."

"Article 1734. May issue mandamus, etc.—Said Court of any judge thereof in vacation may issue the writ of mandamus to compel a judge of the district court

relating to the original jurisdiction of the Courts of Civil Appeals is contained in Article 5, § 6, of the Constitution which, after defining the appellate jurisdiction, simply states that such courts "shall have such other jurisdiction, *original* and appellate as may be prescribed by law."

In accordance with this constitutional provision, the Legislature has adopted two articles reading as follows:

Article 1823.⁴ Writs of mandamus, etc.—Said courts and the judges thereof may issue writs of mandamus and all other writs necessary to enforce the jurisdiction of said courts.

Article 1824. May madamus district courts—Said Courts or any Judge thereof, in vacation, may issue the writ of Mandamus to compel a Judge of the District or County Court to proceed to trial and judgment in a cause, returnable as the nature of the case may require.⁵

It will be seen that the Courts of Civil Appeals are given no authority by the constitution or the statutes to issue the writ of habeas corpus.⁶ Their authority is strictly confined to writs necessary to enforce their jurisdiction and writs directing a District or County Court to proceed to judgment in a case.

to proceed to trial and judgment in a cause agreeably to the principles and usages of law, returnable to the Supreme Court on or before the first day of the term, or during the session of the same, or before any judge of the said Court as the nature of the case may require."

Article 1735 . . . relates to the issuance of the writs of mandamus and injunction against public officials.

Article 1735-a, . . . relates to the issuance of mandamus or other writ against officers of political parties.

"Article 1737. Habeas corpus, —The Supreme Court or any of the Justices thereof, either in term time or in vacation, may issue writs of habeas corpus in any case where any person is restrained in his liberty by virtue of any order, process or commitment issued by any court or judge on account of the violation of any order, judgment or decree theretofore made, rendered or entered by such court or judge in any civil cause. Said Court or any Justice thereof, either in term time or in vacation, pending the hearing of application for such writ, may admit to bail any person to whom the writ of habeas corpus may be so granted."

⁴ Article References are to VERNON'S ANNOTATED TEXAS STATUTES.

⁵ Under the provisions of Article 1735-a, Courts of Civil Appeals, as well as the Supreme Court, are granted the power to issue original writs against officers of a political party. A discussion of this article is however beyond the scope of this paper.

⁶ *Wetz v. Thompson*, 63 S. W. 1050 (Tex. Civ. App. 1901); *Ex parte Hoover*, 245 S. W. 2d 557 (Tex. Civ. App. 1952).

Despite the broader jurisdiction of the Supreme Court, there is a field of concurrent jurisdiction which it occupies with the Courts of Civil Appeals. If the extraordinary relief sought falls within this area of concurrent jurisdiction, it is generally necessary to apply first to the Court of Civil Appeals having jurisdiction of the case.⁷ While the Supreme Court has no appellate jurisdiction over a case originating in the Court of Civil Appeals,⁸ it may nevertheless entertain an original proceeding designed to secure the same relief refused in an original proceeding in the Court of Civil Appeals⁹ or prohibit the carrying out of an order of a Court of Civil Appeals rendered in an original proceeding.¹⁰

Ordinarily before a Court of Civil Appeals will issue an original writ it is necessary that either an order of a Court of Civil Appeals be interfered with or an interference threatened.¹¹ An order or judgment of a trial court becomes in theory an order of the Court of Civil Appeals when the jurisdiction of the latter Court is invoked by appellate proceedings.¹² Consequently, when an order of the trial court is involved, it is generally necessary to perfect an appeal before the Court of Civil Appeals will grant

⁷ *Houtchens v. Mercer*, 119 Tex. 244, 27 S. W. 2d 795 (1930); 69 A. L. R. 1103.

⁸ *Dallas Railway and Terminal Co. v. Watkins*, 126 Tex. 116, 86 S. W. 2d 1081 (1935); *Alexander v. Meredith*, 137 Tex. 37, 152 S. W. 2d 732 (1941).

⁹ *Houtchens v. Mercer*, *supra*; *Dallas Railway and Terminal Co.*, *supra*; *Saenz v. Sanders*, 241 S. W. 2d 316 (Tex. Civ. App. 1951), *Id. Sup. Ct.*, 151 Tex. 10, 245 S. W. 2d 483 (1952).

¹⁰ *Cleveland v. Ward*, 116 Tex. 1, 285 S. W. 1063 (1926).

¹¹ *Cattlemen's Trust Company v. Willis*, 179 S. W. 1115 (Tex. Civ. App. 1915); *National Surety Corporation v. Jones*, 158 S. W. 2d 112 (Tex. Civ. App. 1941); *Harney v. Wood*, 160 S. W. 2d 315 (Tex. Civ. App. 1942); *Clack v. Ewing*, 196 S. W. 2d 53 (Tex. Civ. App. 1946). Ordinarily the filing of a second suit which may be defeated by a plea of *res judicata* is not grounds for the issuance of a writ of prohibition, however, repeated filings of lawsuits upon the same cause of action may form a basis for the issuance of a writ. *Ferguson v. Ferguson*, 189 S. W. 2d 442 (Tex. Civ. App. 1945). As stated in *Milam County Oil Mill Co. v. Bass*, 106 Tex. 260, 163 S. W. 577 (1914), "The proper test of the question therefore is, not whether the suit (sought to be prohibited) recognizes or repudiates the effect of the judgment (of the appellate court), since that does not necessarily involve the jurisdiction of the court, but whether it amounts to an interference with its due enforcement and therefore invades a jurisdiction it is forbidden to trench upon."

As to Supreme Court, see, *Hovey v. Shepherd*, 105 Tex. 237, 147 S. W. 224 (1912).

¹² *Browning-Ferris Machinery Co. v. Thompson*, 55 S. W. 2d 168 (Tex. Civ. App. 1932); *City and County of Dallas v. Cramer*, 207 S. W. 2d 918 (Tex. Civ. App. 1947).

relief by issuing an original writ.¹³ After perfection of appeal an injunction to maintain the status quo or to preserve the corpus of the subject matter of the litigation is considered as a writ in aid of the jurisdiction of the appellate court.¹⁴

In accordance with the general rule that extraordinary writs will not issue if other adequate remedies are available, the writ of mandamus or injunction will not lie if relief by way of appeal may be had,¹⁵ nor may such writs be substituted for the statutory remedy of supersedeas.¹⁶

The mere prevention of damage to the losing party in the court below is likewise an insufficient basis for the issuance of an original writ¹⁷ and ordinarily such writ will not issue when its effect would be to grant injunctive relief which the trial judge has directly considered and refused.¹⁸ A writ of prohibition may be issued to prevent a trial court from interfering with the judgment or subject matter of the suit after the jurisdiction of the Court of Civil Appeals has attached thereto.¹⁹ Although as a general proposition a Court of Civil Appeals has no authority to issue extraordinary writs to trial courts without its territorial jurisdiction, it has been held that when, under the provisions of Article 1824, a Court of Civil Appeals directs a trial court within its territorial jurisdiction to proceed to trial and judgment, it possesses the ancillary power to protect its jurisdiction under Article 1823, and prohibit other trial courts from interfering with the trial of the case as directed, even though such courts may be

¹³ *Texas Employers' Ins. Ass'n. v. Kirby*, 150 S. W. 2d 123 (Tex. Civ. App. 1941).

¹⁴ *Ford v. State*, 209 S. W. 490 (Tex. Civ. App. 1919).

¹⁵ *First Nat. Bank v. Chapman*, 255 S. W. 807 (Tex. Civ. App. 1923); *Yturria Town & Improvement Co. v. Hidalgo County*, 114 S. W. 2d 917 (Tex. Civ. App. 1938).

¹⁶ *Anderson v. Pioneer Building and Loan Ass'n.*, 150 S. W. 2d 445 (Tex. Civ. App. 1941) *error ref. w.o.m.*; *Georgian Oil Corp. v. Chemical Process Co.*, 151 S. W. 2d 280 (Tex. Civ. App. 1941).

¹⁷ *Tipton v. Railway Postal Clerks Inv. Ass'n.*, 170 S. W. 113 (Tex. Civ. App. 1914).

¹⁸ *Shelton v. City of Abilene*, 75 S. W. 2d 934 (Tex. Civ. App. 1934); *Yturria Town and Improvement Co. v. Hidalgo County*, 114 S. W. 2d 917 (Tex. Civ. App. 1938).

¹⁹ *Jackson v. Equitable Trust Co.*, 106 S. W. 2d 729 (Tex. Civ. App. 1937).

beyond the territorial limits of the Supreme Judicial District in which the Court of Civil Appeals is located.²⁰

The authority conferred upon the Courts of Civil Appeals by Article 1824 to direct a district judge to proceed to trial and judgment seems to be a developing jurisdiction, particularly in those cases in which a conflict of jury findings is asserted or denied. This situation is not, however, the only one to which the article has application. It has been invoked in requiring a district judge to proceed to trial in an election contest when his refusal to proceed was based upon a mistaken belief that the effect of a statute was to stay such proceedings.²¹ In a suit tried upon the merits and a plea of privilege at the same time, the district court has been ordered to proceed to judgment on the merits rather than to merely sustain the plea of privilege.²² The propriety of the district judge's action in staying proceedings until a party answers questions propounded to him by deposition may be tested by application for mandamus in the appellate courts.²³ The failure of a district judge to carry out the peremptory instructions of a Court of Civil Appeals in rendering judgment may also be made the basis of mandamus seemingly under the provisions of both Articles Nos. 1823 and 1824.²⁴ Various additional illustrations

²⁰ *Rathbun v. Boyd*, 155 S. W. 2d 385 (Tex. Civ. App. 1941). In connection with prohibition, see *Texas Employers Ins. Ass'n. v. Kirby*, 150 S. W. 2d 123 (Tex. Civ. App. 1941); *Ibid.* Sup. Ct., 137 Tex. 106, 152 S. W. 2d 1073 (1941), holding that potential jurisdiction alone is insufficient to support the issuance of the writ of prohibition, but that the active jurisdiction of the Court of Civil Appeals must be invoked. Also see *South End Development Co. v. Holland*, 248 S. W. 2d 1013 (Tex. Civ. App. 1952), and dissenting opinion of Chief Justice Bond in *Fishbein v. Thornton*, 247 S. W. 2d 404 (Tex. Civ. App. 1952).

²¹ *Gonzales v. Laughlin*, 256 S.W. 2d 236 (Tex. Civ. App. 1953).

²² *Aycock v. Graham*, 250 S. W. 2d 935 (Tex. Civ. App. 1952).

²³ *Saenz v. Sanders*, 241 S. W. 2d 316 (Tex. Civ. App. 1951); *Id.* Sup. Ct., 151 Tex. 10, 245 S. W. 2d 483 (1952).

²⁴ *Brock v. Briggs*, 223 S. W. 2d 645 (Tex. Civ. App. 1949).

could be given,²⁵ however, the usual case is not one in which a trial court has wilfully refused to proceed with a trial, but rather one in which there is a bona fide dispute as to the jurisdiction of the lower court or as to the proper interpretation of a jury's findings. The trial courts are vested with a broad discretion relating to the control and disposition of their dockets and the authority of the appellate courts to order a judge to proceed to trial and judgment is exercised with this extensive discretion in mind. Such authority is also ordinarily restricted to the issuance of an order requiring the judge of the lower court to proceed to trial and judgment agreeable to the principles and usages of law, but not to dictate the terms or nature of the judgment.²⁶ There is one seeming exception to the rule stated. Whenever the rendition of the judgment involves no judicial discretion, but is purely ministerial, the same may be compelled by mandamus.²⁷ The most common

²⁵ A district judge has been ordered to determine a contest relating to a pauper's affidavit in lieu of appeal bond despite his belief that he had no jurisdiction to do so. *Cox v. Hightower*, 47 S. W. 1048 (Tex. Civ. App. 1898). In *Humphrey v. Rawlins*, 88 S. W. 2d 776 (Tex. Civ. App. 1935), and *Citizens State Bank v. Miller*, 115 S. W. 2d 1183 (Tex. Civ. App. 1938), district courts were ordered to proceed to trial despite void orders changing venue and dismissing suit, respectively. *Allied Store Utilities Co. v. Hunt*, 148 S. W. 2d 246 (Tex. Civ. App. 1941), provides an example of a mandatory order to proceed to trial despite an invalid default judgment. While a default judgment cannot be ordered because a judicial function is involved, i.e., that of passing upon the legal sufficiency of the petition, it seems that the question of proper service of citation may be determined by mandamus in certain cases. *Rushing v. Bush*, 260 S. W. 2d 900 (Tex. Civ. App. 1953) *error disp.*; *Harmon & Reed v. Quin*, 258 S. W. 2d 441 (Tex. Civ. App. 1953). The Supreme Court case of *Dallas Joint Stock Land Bank v. Phillips*, 124 Tex. 106, 76 S. W. 2d 1038 (1934), is illustrative of that class of cases in which an order to proceed to trial and judgment despite an invalid statutory order. In the particular case, a moratorium cast was involved.

²⁶ "When an inferior court declines to exercise his jurisdiction, mandamus is an appropriate remedy to compel the judge to act, but the writ can not be used to control his judicial discretion in the manner of the performance of the duty." *First Nat. Bank v. Chapman*, 255 S. W. 807 (Tex. Civ. App. 1923); *Robert v. Monroe*, 193 S. W. 734 (Tex. Civ. App. 1917) *error disp.*; *Pollard v. Speer*, 207 S. W. 620 (Tex. Civ. App. 1918); *Allen v. Strode*, 62 S. W. 2d 289 (Tex. Civ. App. 1933); *Knox v. Craven*, 248 S. W. 2d 955 (Tex. Civ. App. 1952); *Hidalgo County Water Imp. Dist. No. 2 v. Cameron County Water Control & Imp. Dist. No. 5*, 250 S. W. 2d 941 (Tex. Civ. App. 1952).

²⁷ In the technical sense, the "rendition of judgment" is by definition a judicial act. *Coleman v. Zapp*, 105 Tex. 491, 151 S. W. 1040 (1912), but the phrase is herein used as meaning the setting forth the action of a judicial tribunal in proper form.

instance of this use of the writ is the rendition of judgment upon a verdict.²⁸

We here point out a matter of importance which is largely historical in nature. Mandamus will issue only to compel the performance of a ministerial act and can not be used to control judicial discretion. However, the rendition of judgment upon a general verdict was regarded as a ministerial act compellable by mandamus.²⁹ Generally the mandate to render such judgment was tantamount to commanding that judgment be entered either for the plaintiff or the defendant in accordance with the jury's general finding. Strictly speaking, the writ would extend only to an order to proceed to render judgment, and, of course, if some discretionary act was incident to such rendition, the writ of mandamus could not control the same further than to require action.³⁰

The same rule is applied to special issue verdicts. However, as under the special issue practice, those matters established by uncontroverted evidence are not submitted to the jury, the Court of Civil Appeals, if it is to exercise the same authority over a special issue verdict as it does over a general verdict, must at times necessarily determine if a particular issue be established

²⁸ "Ordinarily it is a correct proposition to say that the higher court cannot control the lower court as to the character of the judgment to be entered, though it be conceded that the power exists to order the lower court to proceed to judgment. But where, as in this case, on the verdict of the jury, the entry of the judgment is merely a ministerial act, the power exists to order that judgment be entered in favor of the party entitled to it under the verdict of the jury." *Allen v. Strode*, 62 S. W. 2d 289 (Tex. Civ. App. 1933), following *Gulf, Colorado & Santa Fe Ry. Co. v. Canty*, 115 Tex. 537, 285 S. W. 296 (1926).

Dallas Railway & Terminal Co. v. Watkins, 89 S. W. 2d 420 (Tex. Civ. App. 936), *error ref.*; *Friske v. Graham*, 128 S. W. 2d 139 (Tex. Civ. App. 1939); *Chaffin v. Drane*, 131 S. W. 2d 672 (Tex. Civ. App. 1939); *Texas Employers Ins. Ass'n. v. Stephenson*, 178 S. W. 2d 883 (Tex. Civ. App. 1944); *Montgomery Ward & Co. v. Newman*, 181 S. W. 2d 613 (Tex. Civ. App. 1944); *Willis v. Granger*, 195 S. W. 2d 831 (Tex. Civ. App. 1946); *McGregor v. Allen*, 195 S. W. 2d 945 (Tex. Civ. App. 1946) *error dism.*; *Fredericksburg Hospital and Clinic v. Springall*, 220 S. W. 2d 692 (Tex. Civ. App. 1949); *American Bottling Co. v. Briggs*, 232 S. W. 2d 103 (Tex. Civ. App. 1950); *Aycock v. Graham*, 250 S. W. 2d 935 (Tex. Civ. App. 1952).

²⁹ *Lloyd v. Brinck*, 35 Tex. 1 (1871-2); *Houston & T. C. R. Co. v. Strycharski*, 92 Tex. 1, 37 S. W. 415 (1896); *Williams v. Wyrick*, 151. Tex 40, 245 S. W. 2d 961 (1952).

³⁰ *Aycock v. Clark*, 94 Tex. 375, 60 S. W. 665 (1901).

as a matter of law.³¹ It is not necessarily a defense to the writ of mandamus to show that one or more of the issues necessary to support a judgment is not contained in the jury's special findings. It is only when the evidence relating to the unsubmitted issue is conflicting that a mandamus will not issue commanding the rendition of a judgment for the plaintiff or for the defendant as the case may be.³²

By way of example, we refer to the illustration contained in *Wichita Falls & Oklahoma Ry. Co. v. Pepper*,³³ wherein it is said that the controlling fact issues in a negligence case are: "(1) That the defendant did an act, (2) that the act was an act of negligence, (3) that the act of negligence was the proximate cause of the plaintiff's damages, and (4) that the plaintiff was damaged" in a certain ascertained pecuniary amount. If all these issues are answered by the jury (and assuming no other conflicting issues are involved), mandamus will issue commanding the rendition of judgment upon the verdict, which will be tantamount to the rendition of a judgment for the plaintiff if the jury's findings were all favorable to him or for the defendant if, for instance, the jury's answer to the negligence issue or the proximate cause issue is unfavorable to the plaintiff.³⁴ If one or more of these ultimate fact issues be established as a matter of law and consequently not submitted to the jury, mandamus may nevertheless issue, as for example: (1) It is undisputed that the defendant did an act, (2) it is likewise undisputed that the act was an act of negligence, (3) the jury finds that the act of negligence was a proximate cause of the plaintiff's damages, and (4) the jury finds that plaintiff was damaged in the sum of \$10,000.00.

Implied fact findings upon unsubmitted issues concerning which

³¹ *O'Meara v. Moore*, 142 Tex. 350, 178 S. W. 2d 510 (1944).

³² *O'Meara v. Moore*, *supra*.

³³ *Wichita Falls & Oklahoma Ry. Co. et al, v. Pepper*, 134 Tex. 360, 135 S. W. 2d 79 (1940).

³⁴ *Kincaid v. Long*, 135 S. W. 2d 183 (Tex. Civ. App. 1939).

there is conflicting evidence result from the judgment,³⁵ and a trial judge may not be required to render a judgment which would in effect compel him to make implied findings either for or against a party. The making of findings, either expressed or implied, when the evidence is conflicting is the exercise of a judicial function and is not an act ministerial in nature.

A somewhat different problem would be presented by an application to compel rather than control action upon a request for findings when the evidence is conflicting and certain controlling issues are not submitted to the jury but in theory left to the decision of the trial judge. Could the trial judge refuse either to make express findings or to render judgment (and thus make implied findings) and simply declare a mistrial? No decided case has been found controlling to this particular situation. The circumstances would be admittedly unusual and a litigant might hesitate to apply for an order from an appellate court directing a trial court to decide either for him or against him upon conflicting evidence rather than accept mistrial. However, it would seem that theoretically the power to order the judge to make findings one way or the other under the conditions stated and thus complete the trial, would be vested in the appellate court. However, it should be noted that the provision of Rule 279, relating to findings by the court upon issues not submitted to the jury when the evidence is conflicting, is permissively stated.³⁶

Of course, when the jury has answered the controlling issues

³⁵Rule 279 reads in part as follows:

"Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment."

³⁶ See portion of rule set forth above.

submitted to it and its answers are conflicting, a writ of mandamus to render judgment will not issue,³⁷ and one of the more common questions raised in mandamus cases brought under Article 1824, is whether or not there is a conflict in the jury's findings.

It seems to be generally held that the rendition of judgment favorable to a party litigant and assertedly based entirely upon undisputed facts, whether pleaded or proved, calls for the exercise of judicial discretion. Accordingly, mandamus will not lie compelling the rendition of a judgment by default because the granting of such judgment "depends on whether or not the petition stated a cause of action as against a general demurrer, and the district court was the proper court to determine in the exercise of judicial discretion, whether or not said petition stated a cause of action good against a general demurrer."³⁸ It has also been held that "the determination by the trial court of the question whether or not judgment should be rendered for one party or the other on the undisputed evidence is the performance of an act which is judicial in character, and is not merely the exercise of a ministerial duty."³⁹ Similarly, it has been held that mandamus will not lie to compel the rendition of a judgment non obstante veredicto.⁴⁰

With regard to the distinction between rendition of judgment upon a special issue verdict and the rendition of judgment upon the undisputed evidence, it is perhaps well to point out that as a logical proposition the evaluating of evidence or the allegations

³⁷ *Templeton v. Small*, 37 S. W. 2d 262 (Tex. Civ. App. 1939); *Kincaid v. Long*, 135 S. W. 2d 183 (Tex. Civ. App. 1939); *Texas & N. O. Ry. Co. v. Young*, 148 S. W. 2d 229 (Tex. Civ. App. 1941).

³⁸ *Jackson v. McKinsey*, 12 S. W. 2d 1044 (Tex. Civ. App. 1928); *Yantis v. McCallum*, 121 S. W. 2d 610 (Tex. Civ. App. 1938); 28 Tex. Jur. 576. McDonald points out in his "Texas Civil Practice," Vol. 4, p. 1372, that Rule 90, providing for the waiver of defects in pleading does not apply as to parties against whom a default judgment is rendered, but suggests that as the new rules countenance more general allegations a default will stand and hence may be entered upon a petition which states a claim upon which the substantive law will give relief and gives fair notice to the defendant of the basis of the complaint.

³⁹ *Bussan v. Holland*, 235 S. W. 2d 657 (Tex. Civ. App. 1951).

⁴⁰ *American Bottling Co. v. Briggs*, 232 S. W. 2d 103 (Tex. Civ. App. 1950).

of a pleading in accordance with certain legal standards is essentially a judicial function. Under the general charge system, the judge determines the law applicable to the case and states the same in his instructions to the jury.⁴¹ After a jury in accordance with a general charge has returned a verdict for the plaintiff or the defendant, it may be logically maintained that the rendition for the party having the verdict is ministerial. It may appear upon first impression that this process is reversed when the special issue verdict is used—that the jury determines the facts and thereafter the court applies the law to such facts and renders a proper judgment. However, the trial judge, in the exercise of a judicial function must determine which issues should be submitted to the jury and as a part of such process must necessarily decide if certain issues are established by the undisputed evidence. This function is performed before the case is submitted to the jury, the same as it is when a general charge is used. Upon application for writ of mandamus the Court of Civil Appeals may consider that the trial judge in preparing his special issue charge has already found that certain issues are established by the undisputed evidence. It follows that when the appellate court from an examination of the pertinent record finds that there is no conflict in the evidence as to an unsubmitted issue, it will assume that the trial judge found that the issue was established as a matter of law prior to the time the charge was submitted to the jury. In this instance, the trial judge has already acted in a judicial capacity. This situation is vastly different in principle from the case where the trial judge has not acted but rendition of a judgment for a particular party is sought by mandamus upon the theory that the undisputed facts, either pleaded or proved, show as a matter of law that the plaintiff or defendant should recover.

In connection with the premises stated, which seem supported

⁴¹ This form of submission is seldom used in the Texas State Courts, but a form of the general charge in all its magnificent detail, albeit erroneous in one particular, is set out in *Galveston, Harrisburg & San Antonio Ry. Co. v. Washington*, 94 Tex. 510, 63 S. W. 534 (1901).

by the decided cases, namely, that the rendition of judgment upon either a general or special verdict is a ministerial act but that the rendition of judgment upon the pleadings or evidence, as a matter of law, is a judicial act, the comparatively recent case of *Ellzey v. Allen*,⁴² decided by the Amarillo Court of Civil Appeals in 1943, presents an interesting situation. The plaintiffs asserted three grounds of liability against defendants, the first was founded upon a claim for a partnership accounting, the second was a claim to certain real property, and the third was based upon an asserted contractual liability. As to the first two theories of recovery, the plaintiffs conceded that they had failed to make out a case. Issues relating to the third theory were, however, submitted and the jury was unable to agree upon answers thereto. The trial court refused to render a final judgment but, on the contrary, entered an interlocutory order conclusive of the accounting and title theories only. On application for writ of mandamus the plaintiffs in the district court, speaking on behalf of the respondent district judge, stated and agreed that: "The court (of civil appeals) may assume (a) the case was fully developed; (b) that the pleadings are as good as can be made by us; (c) that the evidence is full and complete." It further appears that plaintiffs, acting on behalf of the respondent, waived any and all technicalities and irregularities found in the record and requested the Court of Civil Appeals to grant the writ if it found the pleadings of plaintiff insufficient or that they had not proved a case. In accordance with this invitation, the Court of Civil Appeals issued the writ and ordered the district judge to render judgment for the relators who were defendants in the district court.

The district judge held that the pleadings relating to the asserted contractual liability were sufficient to justify the submission of this theory to the jury. If we assume this holding to be erroneous, as held by the Court of Civil Appeals, then how was it to be corrected? By an appeal from a final judgment, as, if and when a

⁴² *Ellzey v. Allen*, 172 S. W. 2d 703 (Tex. Civ. App. 1943) *error dismissed*.

judgment against defendants be rendered, or by an original writ of mandamus ordering the district judge to set aside his interlocutory order and render a final judgment for defendants? The rather far-reaching implications of the case are apparent. The invitation of the parties to the appellate court, requesting the exercise of an extensive jurisdiction was met with a correspondingly broad response. The case may stand for the proposition that where the record entitles a party to judgment as a matter of law, the rendition of such judgment may be compelled by mandamus. This is undoubtedly a substantial extension of the authority of the Courts of Civil Appeals beyond that of directing a rendition of judgment on the verdict.⁴³

It has been suggested that the practice followed in *Ellzey v. Allen* would constitute a desirable development in Texas procedure.⁴⁴ On the other hand, the danger of piecemeal trial of cases⁴⁵ is presented with its consequent inefficient use of the judicial organization. It has been said with the undoubted support of experience that trial judges are correct in the overwhelming majority of their rulings and hence for practical purposes a review of asserted errors may best await the final judgment.

The mechanics involved in applying to the appellate courts for extraordinary relief through the use of original writs should be mentioned briefly. In proceedings had under Articles 1823 and 1824, all persons who might be affected by the granting of the writ applied for should be made parties to the action, including the judge of the court below, if request be made for a writ directed against him. The Rules of Civil Procedure provide for the

⁴³ The following decisions seem to support a view contrary to that expressed in *Ellzey v. Allen*, viz., *Jackson v. McKinsey*, 12 S. W. 2d 1044 (Tex. Civ. App. 1928); *Yantis v. McCallum*, 121 S. W. 2d 610 (Tex. Civ. App. 1938); and *Bussan v. Holland*, 235 S. W. 2d 657 (Tex. Civ. App. 1951).

⁴⁴ 29 Tex. Law Review 541 (1951).

⁴⁵ *Phoenix Assur. Co. v. Stobaugh*, 127 Tex. 308, 94 S. W. 2d 428 (1936); *Texas Employers' Ins. Ass'n. v. Lightfoot*, 139 Tex. 304, 162 S. W. 2d 929 (1942).

filing of two pleadings in either the Court of Civil Appeals⁴⁶ or the Supreme Court,⁴⁷ namely, a petition for the extraordinary relief sought, together with a motion for leave to file the same. The purpose of the motion is to afford the Court an opportunity to summarily dispose of ill-founded petitions and prevent such original applications from being utilized for mere harassment purposes. It is only after leave to file has been granted, that the cause is placed on the trial docket and notice issued.⁴⁸ These original writs serve a necessary and effective purpose, but, like all forms of judicial process, they are subject to mis-application and abuse which must be guarded against. It has been necessary at times in the past to wholly discard effective remedies because the fact of their existence brought forth mis-applications which resulted in more evil than the good which they accomplished. Extraordinary remedies should be kept extraordinary, and for this purpose the special rules relating to applications for these special writs have been devised.

⁴⁶ Rule 383. Original Proceedings.—A petition seeking to institute an original proceeding in the Court of Civil Appeals shall be presented to the clerk, accompanied with a motion for leave to file, and such written argument in behalf of the motion as may be desired. The motion shall be filed and, together with the petition and argument, if any, sent at once to the consultation room for the action of the court. If the court should be clearly of the opinion that the facts stated in the petition entitle petitioner to the relief sought, the motion will be granted, the petition filed, and the cause placed upon the trial docket. Otherwise the motion will be denied.

⁴⁷ Rule 474. Original Proceedings.—A petition seeking to institute an original proceeding for writ of mandamus, prohibition, injunction, and other like proceedings in the Supreme Court shall be presented to the Clerk, accompanied with a motion for leave to file, and such written argument in behalf of the motion may be desired. The motion will be filed and, together with the petition and argument, if any, will be sent at once to the consultation room for the action of the court. If the court should be clearly of the opinion that the facts set out in the petition entitle petitioner to the relief sought, the motion will be granted, the petition filed, and the cause placed upon the trial docket. Otherwise the motion will be overruled. * * *

⁴⁸ Rules 383 and 474, *supra*.