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Texas Civil Procedure

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TEXAS CIVIL PROCEDURE

THE purpose of this survey is to present the various modifications, interpretations, and trends that were evidenced in Texas Civil Procedure within the past year. This survey shall deal with amendments to the Rules of Texas Civil Procedure and with the case law decided by the Texas Supreme Court. It should be pointed out that the new amendments to the Rules[1] shall only be briefly commented upon, for this facet of the law has been recently dealt with fully by Mr. Wilmer D. Masterson, Jr., Professor of Law, Southern Methodist University.[2] Herein, the case law will be stressed and the most important decisions shall be noted.

PART I. RULE CHANGES

These amendments became effective January 1, 1955.

RULE 86: PLEA OF PRIVILEGE

The amendment to this rule provides for service of the plea of privilege on the plaintiff or his attorney of record by actual delivery or by registered mail. The amendment does not specifically make the service on the plaintiff or his attorney jurisdictional so that a court would have no power to act upon the plea until notice had been given to the plaintiff or waived. It is believed that service will be held to be jurisdictional.[3]

RULE 329 (b): TIMES FOR FILING AND DISPOSING OF MOTIONS FOR NEW TRIAL

This new rule does away with the difference between the times for filing and disposing of motions and amended motions for new trial under the General Practice Act and those applicable under the Special Practice Act. The times applicable to these motions under the Special Practice Act are now applicable in all district courts of the State by virtue of Rule 329 (b),[4] except with refer-

[1] References hereinafter made to various "Rules" will be understood as relating to the Texas Rules of Civil Procedure.

[2] *Texas Court Rule Amendments which Will Become Effective January 1, 1955*, 8 Sw.L.J. 377.

[3] *Id.* at p. 378.

[4] *The Special Practice Act in Texas*, 6 Sw.L.J. 193.

ence to the matter of presenting the motion. It is important to note, however, that Rule 329 (b) applies only to times for filing motions and amended motions for new trial. It is still essential to determine if the district court is under the Special or the General Practice Act because under the General Practice Act a suit which is being tried when the term of court runs out will be rendered a nullity unless the term of court is extended.

A bill now before the legislature will, if passed, provide for continuous terms in all district courts for all purposes. If it is not passed, then the term times of courts under the General Practice Act still must be extended to preserve a suit in progress.

PART II: CASE LAW

APPEAL

A recent decision illustrates the inclination from technicality to practicality in procedure and an exception to the rule that reversal on appeal by one party does not justify reversal in favor of non-appealing parties.[5]

An interstate carrier sued other interstate carriers alleging that they had conspired to suspend their deliveries to and from the complaining carrier because of alleged coercion by a labor union. The labor union intervened and appealed when the trial court granted the injunction, but the defending carriers did not appeal. The Supreme Court decided that there had been no coercion by the union and that the injunction would be set aside not only as to the union, but also as to the carriers who had not appealed. The rule that reversal upon appeal by a party does not justify reversal in favor of non-appealing parties is not invariable. To leave the injunction in effect against the non-appealing parties would be to ignore substance in deference to form.

IRREGULAR COMMUNICATION TO JURY

Rules 285 and 286 provide that the jury may communicate with the trial judge only in prescribed ways. However, the Su-

[5] Truck Drivers, Chauffeurs, Warehousemen and Helpers, Local No. 941 v. Whitfield Transportation, Inc., ...Tex....., 273 S.W. 2d 857 (1954).

preme Court recently held that a communication to a juror in an unprescribed way did not require a reversal in the absence of a showing of probable harm.[6] The Court stated that Rule 434, the harmless error rule, was to be applied in this case and that the communication did not (reasonably) cause harm. It added that Rules 434, 503, 327, and 1 were to be construed in the light of the objectives of the new rules as stated in Rule 1 and that this communication was harmless error.

The Court in this decision expressly rejects the authority and holding of the Court of Civil Appeals.[7] The position of the petitioner and Court of Civil Appeals was that a person seeking a new trial on the ground of irregular communication with the jury would have to show probable harm if such communication was between counsel and juror, but would not have to show probable harm if the communication was between judge and juror. There is no ground for the distinction and the cases holding that communication between judge and juror requires an automatic reversal are overruled. Note that the Court also applies Rule 434 and 503 in conjunction with Rule 327 which applies expressly to irregular communications with juries.

Master in Chancery

Rule 171 was taken in part from repealed Article 2320 and in part from Rule 53 of the Federal Rules of Civil Procedure.[8] The Supreme Court held in construing Rule 171 that since the second paragraph was taken verbatim from Federal Rule 53, it is presumed that it was adopted in the light of decisions construing it. Therefore, a Master appointed by a Travis County District Court in a receivership hearing to take testimony in Bexar County had the authority to exercise subpoena powers and compel the attendance of witnesses so long as such action did not require the witnesses to leave the county of their residence and appear in the county where the cause was pending. Where a witness refused to appear before the Master, he could be held in contempt of court.[9]

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[6] Ross v. Texas Employers' Ins. Assn'., ___Tex.___, 267 S.W. 2d 541 (1954).
[7] Texas Employers' Ins. Ass'n. v. Ross, ___Tex.___, 267 S.W. 2d 547 (1954).
[8] 28 U.S.C.A.
[9] *Ex parte* L. H. Odem, ___Tex.___, 271 S.W. 2d 796 (1954).

PARTIES AND SEVERABILITY OF CAUSES

The Supreme Court, under Rule 503, established that a minor's suit for personal injuries brought by a next friend could be severed from a suit for medical expenses by the next friend, in whose custody the minor had been for a time.[10] In the trial court, the lawyers and the next friend filed a motion for judgment on the verdict of the jury that the child take nothing and that the next friend recover medical expenses. The court overruled the motion and denied recovery in both actions. The Supreme Court reversed the decision in the personal injury suit because the jury found contrary to the evidence. However, it severed the cause for medical expenses and affirmed the judgment of the trial court that the next friend should take nothing because he was guilty of contributory negligence. The Court held that the lawyers could not waive the child's rights or acquiesce in the jury finding that the child take nothing under these circumstances. This case is a graphic illustration of the very dominant principle in Texas law to the effect that *all persons* are guardians of minors and incompetents.

SUMMARY JUDGMENTS

In a case that establishes the rule in Texas in accord with federal holdings, the Supreme Court stated that each motion for summary judgment must stand or fall on its own merits and the granting of the motion does not depend upon one party's failure to sustain the burden of proof.[11] When both parties move for a summary judgment, the burden is upon each to prove clearly his right thereto, and neither party can prevail because of the failure of the other to discharge his burden. The federal law on the subject requires that to be entitled to summary judgment, each person must meet the "slightest doubt" test, i.e., a litigant has a right to a trial where there is the slightest doubt as to the facts and a denial of that right is reviewable. The court is not bound to grant a summary judgment merely because one has been requested.[12]

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[10] Lowery v. Berry, ___Tex.___, 269 S.W. 2d 795 (1954).

[11] Tigner v. First National Bank of Angleton, ___Tex.___, 264 S.W. 2d 85 (1954).

[12] Steinberg v. Adams, 90 F. Supp. 604 (S. D. N.Y. 1950); Walling v. Richmond Screw Anchor Co., 154 F. 2d 780 (2d Cir. 1946).

SPECIAL ISSUES

In the field of special issues, which consistently offers many detailed problems, any decision by the Supreme Court is of import. However, space allows only a brief treatment of the most consequential decisions within the past year.

An interpretation of a portion of Rule 279 was handed down by the Court.[13] A petitioner contended that since the only ground of liability submitted to the jury was not supported by the evidence judgment should therefore be rendered that the respondent take nothing. The petitioner based his request upon the theory that since the respondent did not request the submission of a special issue on any other ground of liability, he thereby waived his right of recovery upon any other ground under Rule 279. The Supreme Court stated that Rule 279 was one of procedure only, and waiver under the rule pertains only to the particular trial involved in the appeal. The respondent on remand of the cause can raise new issues not permissible under Rule 279 in *this* appeal.[14]

Perhaps the most significant case in this area depicted the necessity for the plaintiff to specially except to a general pleading of affirmative defenses.[15] In this case an exception would have avoided a reversal. In the cause, the defendant pleaded contributory negligence only generally, and such pleading was not excepted to by the plaintiff. Evidence of specific acts of contributory negligence came in during the trial. The court in its tentative charge submitted the issue of contributory negligence in the general language of the defendant's answer. The defendant did not object to this, but he did request specific submissions of contributory negligence which were refused by the court, and this, the defendant charged as error. The Supreme Court agreed with the defendant's contention and held that a general pleading of contributory negligence would support either general submissions

[13] Rule 279—"Upon appeal all independent grounds of recovery * * * not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived * * *".

[14] Hicks v. Matthews, ____Tex.____, 266 S.W. 2d 846 (1954).

[15] Agnew v. Coleman County Electric Cooperative, ____Tex.____, 272 S.W. 2d 877 (1954).

of the defense or submissions in such groups of issues as may be made by the evidence if the defendant requested them. The fact that the trial court had a general submission in its tentative charge did not deprive the defendant of the right to his specific submission. It was therefore error to refuse the specific issues requested. If in fact both the general submission of the court and the specific submission requested by the defendant had been given, the plaintiff would have had to object to this double submission before the charge went to the jury or he would have waived the error. But, the defendant did not waive his rights to the specific submission by failing to object to the general submission. The Court held that his request for the specific issues was sufficient to inform the court that he did not want the general submission given by the court.

A strong dissent by Justice Smith states that the mere request for the defendant's own specific issues is not sufficient to inform the court of the defendant's objection to the court's general submission. Therefore, when the defense has been submitted fairly, as in this case, in a general form, the defendant cannot complain that he has suffered any harmful error by reason of the fact that his request for a specific issue was refused.

The plaintiff could have avoided this situtaion by special exceptions to the defendant's general answer in the outset.

In another decision, the Court, in applying the harmless error rule, stated that the respondent's contention that the special issue was an implied comment on the evidence was far from fanciful, but yet was too theoretical to justify a reversal.[16] "Especially in an already complicated field like that of special issues, we cannot strain too hard for perfection without damage to the whole jury system in civil cases."[17]

The statement of this belief by the Supreme Court illustrates the modern approach to all phases of procedure, and it is within the spirit in which the New Rules were adopted. The court seeks continually to broaden the application of the harmless error rule,

[16] Mason v. Yellow Cab and Baggage Co., ____Tex.____, 269 S.W. 2d 329 (1954).
[17] *Ibid.*

and to reach a practical result. The *emphasis* clearly is upon the *de-emphasis* of form and technicality.

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