Part II: Procedural Law - Texas Civil Procedure

William VanDercreek

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PART II: PROCEDURAL LAW

TEXAS CIVIL PROCEDURE

by

William VanDercreek*

SINCE every proceeding involves some aspect of procedure, the matter of case selection for review necessarily reflects some choices by the writer which others would omit, and vice versa. Because it would not be feasible to present a discussion of all of the reported decisions, the treatment here centers upon decisions which are thought to be of particular interest. In addition to the case material, the new amendments to the Texas Rules of Civil Procedure are discussed.

I. SERVICE OF PROCESS AND JURISDICTION OVER THE PERSON

Until the advent of Texas rule 120a a party who wished to question the propriety of service of citation had, in essence, two choices: a motion to quash which, even if sustained, constituted a general appearance and merely extended the time in which to answer, or a direct attack by motion for new trial, appeal, or writ of error upon a default judgment which again, even if successful, resulted in a general appearance for the new trial. The defaulting party generally would not have a good excuse for purposes of Bill of Review, and the judgment, if valid on its face, would not be subject to collateral attack in a Texas court. Thus, where the party had a good defense, it was more expeditious to answer and waive the defective service. Rule 120a, authorizing a special appearance, broadens the choice by affording a suitable remedy for those parties who are not "amenable" to process. Presumably because of the rule's express language, a party who

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* B.S., Iowa State University; J.D., University of Iowa; LL.M., Yale University. Associate Professor of Law, Southern Methodist University.

1 Special Appearance. See 2 MacDONald, TEXAS CIVIL PRACTICE § 9.05 (Supp. 1965).

1 Id. at 770.

2 Anglo Mexicana de Seguros, S.A. v. Elizondo, 401 S.W.2d 722, 725 (Tex. Civ. App. 1966) error ref. n.r.e. "The question relating to service of process will no longer be present in this case because the defendant by prosecuting this writ of error proceeding has entered its appearance not only in this Court but for future proceedings in the trial court as well." See also McKanna v. Edgar, 388 S.W.2d 927 (Tex. 1965).

3 See Thode, In Personam Jurisdiction; Article 2031B, the Texas "Long Arm" Jurisdiction Statute; and the Appearance To Challenge Jurisdiction in Texas and Elsewhere, 42 Texas L. Rev. 279, 311-13 (1964).

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is "amenable" to service but is improperly served cannot avail himself of the new provision.

In a court of civil appeals case the nonresident defendant was served in Arkansas under Texas rule 108. The court held that since the action to recover a monetary sum upon a contract of sale involving Texas real property was in personam and not in rem, it was subject to his plea to the jurisdiction. The action was, therefore, dismissed. Although rule 108 provides fair notice and thus meets the requirement of procedural due process, it is not a long-arm statute by which a state may acquire in personam jurisdiction over nonresidents if there are certain "minimum contacts" which supply the necessary substantive due process. Interestingly, the plaintiff did not seek to invoke article 2031 (b) which might have resulted in jurisdiction.

Another intriguing problem to which rule 120a might be applicable is that of service procured by fraud. In one case a former husband, under the guise of taking his former wife on a trip to Disneyland, decoyed her into a trip to Texas wherein she was served. Although the general rule is that service procured by fraud is invalid, there seems to be no Texas case authority.

Unfortunately there is still none, because defendant-wife failed to request any "findings of fact or conclusions of law" from the trial court's overruling of her motion to quash. Consequently, the appeal rested on the premise that all disputed facts must be resolved against the existence of fraud. Presently there is no reported holding on whether a special appearance could be made to attack service procured by fraud.

Although rule 120a was promulgated because of problems arising under article 2031 (b), until its application is judicially revealed, the rule is pref

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8 If the proceeding had been in rem or quasi in rem, then there would be no question as to the court's power over the controversy provided fair notice was given. Mulane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1910).
9 City of Houston v. Fore, 401 S.W.2d 921 (Tex. Civ. App. 1966) error granted, which held paving assessment lien void because notice by publication was not sufficient to comply with federal constitutional due process requirements. See also Armstrong v. Manzo, 380 U.S. 545 (1965), 19 Sw. L.J. 413 (holding divorced father who did not contribute to child's support and did not have custody was entitled to reasonable notice of adoption proceeding).
11 The opinion does not discuss sufficient facts to definitely determine it applicable. The plaintiff apparently chose to rest jurisdiction on an in rem theory. See note 8 supra.
13 See 2 McDonald, Texas Civil Practice, § 9.12 (1950).
15 "[W]e are required to test the validity of the court's action on the assumption that the trial court found every disputed fact in such a way as to support the judgment. . . . And to indulge every reasonable inference in favor of the judgments. . . . And to affirm if there is any evidence of probative force to support the judgment upon any theory authorized by law." 402 S.W.2d at 573.
erable, in this writer’s opinion, to the motion to quash. Much still remains to be decided in reference to rule 120a, and the same may be said of article 2031(b). But one Fifth Circuit case makes it clear that there are no serious federal constitutional issues—even if broadly construed. Judge Brown, speaking for the court in Atwood Hatcheries v. Heisdorf & Nelson Farms, stated:

Article 2031b authorizes the exercise of jurisdiction over a foreign corporation where it is ‘doing business’ in Texas. And ‘doing business’ is defined to include ‘entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State...’. Since the exigencies of the case as a prelude to the discussion of the Federal question require it, we now declare... that ‘the Texas purpose [in enacting article 2031b] was to exploit to the maximum the fullest permissible reach under federal constitutional restraints.’

Now posed is the second question—whether the Texas statute as thus applied offends the Federal Constitution. Constitutional restrictions on the power of a state to acquire jurisdiction over a foreign corporation have been the subject of several recent and far-reaching decisions of the Supreme Court. The more restrictive notions of Pennoyer v. Neff, 1877, 95 U.S. 714, 24 L.Ed. 565, were discarded in International Shoe Co. v. State of Washington, 1945, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95, and replaced by the ‘minimum contacts’ principle...

We... hold that a Court of Texas may, consistent with the Federal Constitution and without offending ‘traditional notions of fair play and substantial justice,’ assert jurisdiction over a foreign corporation under the circumstances of this case.

On the general question of the mechanics of service of citation, a civil appeals decision discussed the essential elements of a sheriff’s return and

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16 Nothing is gained by a motion to quash except a delay of time in which to answer on the merits. See note 2 supra.
17 Subsections 2 and 3 of rule 120a imply that it could be proper for the court in entering “an appropriated order” to include findings of facts and conclusions of law; indeed findings would be required in federal court as to jurisdictional fact issues. McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936). If a party has the right to such findings, does the failure to request more result in all presumption being indulged in favor of this judgment? See Cornell v. Cornell, 402 S.W.2d 571 (Tex. Civ. App. 1966) error granted, which applied those rules to a motion to quash. There is still considerable dispute as to who has the burden of proof under rule 120a and what facts must be proved. Compare Thode, note 6 supra, with Counts, More on Rule 120a, 28 TEXAS B.J. 95 (1965). See 2 McDonald, TEXAS CIVIL PRACTICE, § 9.05 (Supp. 1961). See also Carpenter Body Works v. Mullay, 389 S.W.2d 331 (1965) error ref., holding rule 120a to be interlocutory.
18 Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847 (5th Cir. 1966). For further discussion see Charmatz, Conflict of Laws, this Survey at footnote 5.
19 Compare, however, the holding with New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966), which held that first amendment considerations required more than a bare minimum of contracts in order to justify the application of the Alabama long-arm statute. See dissenting opinion by Judge Lynn, Id. at 580-82.
20 337 F.2d 842 (5th Cir. 1966).
21 Id. at 852, 814.
reversed, in a direct attack, a default judgment obtained. The sheriff's return on the citation recited that a copy of the citation along with the petition had been delivered to the defendant. The blank form for the return did not contain a place for describing the manner of service, and none was inserted. This was held to violate rule 107.33
Cases involving service of a counterclaim upon an incompetent plaintiff arose.

This answer by Roy Jones asserting a counter-claim was a cross-action setting up an action different from that plead on behalf of the plaintiff Elnora Bly by her next friend. Elnora Bly was as to this cross-action a defendant. Rule 85. A plaintiff of unsound mind, represented at the time of judgment in a suit by next friend as authorized by Rule 44, Vernon's Ann. Tex. Rules, when cast into the position of a defendant by a cross-action in the suit must be served with citation on the cross-action in accordance with the provisions of Rule 106, else the judgment rendered it voidable and may be set aside in a bill of review proceeding directly impeaching the judgment...44

In another decision involving service for a hearing on juvenile delinquency it was determined that:

In the absence of the voluntary appearances of the required parties, the section requires the service of a summons on the person or persons having the 'custody or control' of the child. In addition, where such person is not the parent or guardian of the child, 'then the parent or guardian or both, shall be notified of the pendency of the case by personal service before the hearing.' This provision for notice is vague and indefinite...

II. VENUE

The vast volume of venue appeals is attributable not only to a preference for the location of trial but also to the tactical consideration of delay. The latter situation is illustrated by the number of venue appeals which involve well settled legal issues.

With reference to the pleading and procedural aspects of the plea of privilege and controverting plea, the cases reflect no change in the judicial
adherence to strict compliance. Thus a plaintiff must file a controverting affidavit to prevent transfer of venue as requested by defendant's plea of privilege. To constitute waiver of the plea, it must appear that the defendant sought a determination of its special exceptions to the petition prior to the venue transfer. A court of civil appeals, in a suit upon a written contract, applied the rule that when a venue fact is one which can be put in issue only by a verified denial, the failure of the defendant to do so obviates the plaintiff's necessity to prove the issue by independent evidence. Likewise, the discovery rules may be sufficient to establish venue facts. However, although the failure of one defendant to respond to a rule 169 request for admission that he was a resident of a certain county constitutes an admission, it is not binding upon the co-defendant as to such venue fact.

For venue purposes it is important to note the difference between the existence of a cause of action and the existence of a defense which would defeat a cause of action. The former, when a venue fact, must be established, while the latter, e.g., statute of limitations, is not relevant to the venue hearing. Joinder of claims and joinder of parties continue to produce venue problems. Where there is a single defendant and related claims are joined, if the plaintiff can maintain venue as to one claim then the entire proceeding will be tried in that county, except when the other claims concern mandatory venue provisions, such as Subdivision 14, involving suits for recovery of lands. Where there is joinder of parties subdivisions 4 and 29a must be considered. Subdivision 29a applies only when venue as to one defendant is properly maintainable in the county under one of the exceptions to the general venue rule contained in article 1995,

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26 See Leonard v. Maxwell, 165 S.W.2d 340 (1963); 1 McDonald, Texas Civil Practice §§ 4.43.1, 4.47, 4.49 (1965).
30 Pioneer Cas. Co. v. Miller, 399 S.W.2d 389 (Tex. Civ. App. 1966), holding under "no action" clause in insurance policy which provided insurer would not be liable to injured party until amount of insured's obligation to pay was determined by judgment or agreement, venue would not be under 9(a), 23, 29a, against an insurance company who filed plea of privilege, since plaintiff had no cause of action against insurance company until the insured liability became fixed. While the plaintiff must always allege a cause of action, whether or not he must prove a cause of action depends on the venue facts that must be established under the particular subdivision of article 1995 involved.
32 Burke v. Scott, 400 S.W.2d 181 (Tex. Civ. App. 1966) error dismissed, applying the Middlebrook doctrine, which allows venue to lie in a county of proper venue as to one cause of action when that cause of action is properly joined to another cause of action under which venue may be maintained in another county. The suit was on a promissory note joined with a suit on a contract out of which the note arose. See Middlebrook v. David Bradley Mfg. Co., 86 Tex. 706, 26 S.W. 935 (1894).
33 See 1 McDonald, Texas Civil Practice § 4.38 (1961).
and the joined defendant is a necessary (not merely proper) party to such claim. Subdivision 4 applies when one of the defendants is a resident of the county in which suit is brought. The confusion in the application of subdivision 4 occurs because some courts require the joined non-resident party to be a necessary party. To this writer, the test should be resolved on the basis of whether the joined party is a proper party to the claim asserted against the resident defendant. If so, venue exists. When there is a joinder of claims and a joinder of defendants so that the non-resident defendant is a mere proper party to the lawsuit under the joinder rule (e.g., plaintiff can join claim against resident defendant with a separate claim against a non-resident if common questions of law and fact are presented), but not a proper party to the cause of action or claim against the resident defendant, subdivision 4 should not apply. The ancillary venue concepts existing where several claims are asserted against a single defendant do not govern subdivision 4.

Suits upon written contracts are maintainable under subdivision 5 in the county of performance, providing that the contract unequivocally designates a place within one county. The supreme court in Southwest Inv. Co. v. Shipley emphasized the rule by its holding that a contract performable in the city of Amarillo would not suffice because that city is located in two counties. Although subdivision 5 does not apply to oral contracts or contracts that are part written and part oral, it will apply to a subsequent written confirmation of a prior oral agreement.

Other cases of interest under subdivision 5 held: that a foreclosure suit on a mechanic's lien which arose out of a contract to be performed in a particular county may be maintained in that county; that suit on note...
against a partner and co-partner may be maintained in county of
performance as to the co-partner who did not sign note; and that it is
sufficient to allege that a note was payable in the county and not necessary
to prove the validity of the cause of action as a venue fact. Two cases under the negligence exception, subdivision 9a, concerning a continuing violation of a statute that occurred in the county of the accident and elsewhere, upheld venue in county where the accident occurred.

The policy in favor of the venue in suits involving title is reflected in the mandatory provisions of subdivision 14. Being a mandatory subdivision either the plaintiff can maintain venue thereunder, or the defendant can have the suit transferred to such county. Illustrative of the defendant's right is a court of civil appeals decision which held that the plaintiff must establish the inapplicability of the subdivision. When the plaintiff relies on subdivision 14, he need not prove as a venue fact that damage to the land occurred but only that that suit is for damage to land. It is the nature or the character of the suit and not whether the alleged cause of action exists that is determinative. And in determining the nature of the suit it is not merely the form of action or relief that controls if it appears from the pleading that the real controlling issue is that of title.

Difficulties of venue under subdivision 23, governing corporations, are all too familiar to those who have sought its utilization. One civil appeals decision noted that when an offer is made by mail, telegram or telephone to a person in another county and accepted by him a contract is deemed to have been made in the county where the offer is accepted and not in the county where the offer was made. Where a contract is breached by an offeree in the county of the offeree's residence, venue will lie in that county. A civil appeals case dealt with an agency problem and concluded

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47 Mason Feed Store v. Starks, 398 S.W.2d 392 (Tex. Civ. App. 1966) error dismissed, where store violated article 911b which required a permit to carry goods on Texas highways by allowing trucker with no permit to haul grain for them, this was negligent per se. The driver who had no permit was an agent of the store which did have a permit to come under paragraph 2 of 9a. Venue would lie in county of accident by virtue of 9a and case interpretation in Cardinal Petroleum Co. v. Robinson, 394 S.W.2d 116 (Tex. Civ. App. 1965), where violation of state statutes requiring placement of reflectors to the rear and side of a stalled tractor-trailer was sufficient to maintain venue in county where accident occurred.
52 See cases cited 1 McDonald, Texas Civil Practice § 4.30.1 (1965).
that the terms "agent or representative" in subdivision 23 do not necessarily include employees or servants. Whether a person is an "agent or representative" is shown by proof of a situation in which the business of the company is actually conducted in the county of suit, or is shown by proof that one who possesses broad powers from the defendant resides in the county.

III. Special Issues

It is beyond the ambit of this paper to discuss the jurisprudential values of the Texas special issue system or even to comment upon the motive of various segments of the practicing bar in supporting or opposing the Texas system. Suffice it to say that the number of cases in which persons lost or gained valuable rights, not because of the merits of their cause, but because of the skill or lack thereof in the legal profession in relationship to special issues suggests the need for finding means to improve the practice.

Special issue practice requires the correlation of three matters: the pleadings, the proof, and the issues to be submitted. Thus the careful practitioner, prior to trial, will review the issues he plans to submit with the evidence he plans to offer and with the existing pleading, which if found lacking will be appropriately amended. For even if the evidence comes in, the requested issue must be supported by a pleading. Likewise where there is a failure of proof, there is no error in the refusal to submit special issues although the issue of failure usually prompts an appeal.

With reference to the proof problem it is essential to distinguish between legal insufficiency (no evidence of probative force to support the special issue finding) and factual insufficiency (evidence is so weak, or contrary to overwhelming weight of other evidence). The supreme court in Garza v. Alviar discussed this problem and clarified an important rule,

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56 See, e.g., Frank, Law and the Modern Mind 181 (1936); Farley, Instructions to the Juries—Their Role in the Judicial Process, 42 Yale L.J. 194 (1912); Morgan, A Brief History of Special Verdicts and Special Interrogatories, 32 Yale L.J. 575 (1923); Staton, The Special Verdict as an Aid to the Jury, 13 Am. Jud. Soc. 176 (1930).

57 For excellent articles see Stout, Our Special Issue System, 36 Texas L. Rev. 44 (1957); Green, Blindfolding the Jury, 33 Texas L. Rev. 273 (1956); Gay, "Blindfolding" the Jury: Another View, 34 Texas L. Rev. 368 (1956); Green, A Rebuttal, 34 Texas L. Rev. 382 (1956); Gay, A Rejoinder, 34 Texas L. Rev. 514 (1956).

58 A good treatment of special issue practice is contained in Hodges, Special Issues in Texas (1919).


60 Maso v. Stanbury, 399 S.W.2d 396 (Tex. Civ. App. 1966) error ref. n.r.e.; Bourgue v. Towers, 399 S.W.2d 222 (Tex. Civ. App. 1966) error ref n.r.e. (no error to refuse submission of discovered peril if evidence is uncontested); Frasier v. Pierce, 398 S.W.2d 955 (Tex. Civ. App. 1966) error ref. n.r.e. (similarly, in absence of proof inferring defendant was aware of plaintiff's perilous position).


62 Ibid.

63 Ibid.
A contention that an issue should not have been submitted, or that a finding of the jury should be disregarded, because of the insufficiency of the evidence is subject to only one construction. It can mean only that there is no evidence to warrant submission of the issue or support the jury's finding. In Garza the court of appeals had reversed because the evidence was factually insufficient to support the findings. Although the supreme court does not have jurisdiction to review whether the evidence was factually insufficient, it does have jurisdiction to determine whether the point of error of factual insufficiency was properly raised. The supreme court reversed on this latter ground holding that the plaintiff had by urging that "there was insufficient support in the evidence to warrant the submission of such issues to the jury" raised a no evidence point and had not thereby raised the factual insufficiency point. As a correlative rule, factual insufficiency of the evidence is not a basis on which to object to submission of a special issue: "The court may not, however, properly refuse to submit an issue or disregard the jury's answer thereto merely because the evidence is factually insufficient to support same." The lesson of the Garza case that the objection to submission raises only a no evidence point is a significant one.

The importance of proper objections to special issues is again reflected by two recent court of civil appeals opinions. In one the court held that an objection to the court's charge for failure to submit a special issue, which set forth an omitted issue but improperly placed the burden of proof, does not constitute a request for a submission as required by rule 279. In the other case an employee did not object to the submission of special issues that were conditioned upon an affirmative response to an unnecessary (undisputed) issue. When the jury answered the undisputed issue in the negative, the trial court applied the omitted issue rule to the conditioned and thus unanswered, issue and ruled against the employee.

A continuing problem in the form of special issues concerns the use of evidentiary terms and the use of a global inquiry. In a civil appeals case

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64 Id. at 824.
65 Ibid.
66 Ibid.
67 Schad v. Williams, 398 S.W.2d 603 (Tex. Civ. App. 1966) error ref. n.r.e.
69 Id. at 833. "Special Issue No. 1 should not have been submitted. Appellant did not object...."
70 Id. at 833.
71 Having thus acquiesced in the manner of submission, and since the condition on which such issues were to be answered did not come to pass, appellant must be held to have waived his right to jury findings on such issues. The court, therefore, was authorized to make and file written findings on such unanswered issues in support of its judgment. In the absence of written findings the omitted issue or issues are deemed as found by the court in such manner as to support the court's judgment.
the issue was whether a truck's rear reflectors "had mud or dirty water... so that the reflectors were not visible." In approving the issue the court correctly observed that the inclusion of evidentiary facts does not make the issue multifarious or duplicatous where it involves only one ultimate issue. The inherent problem of including evidentiary facts is the inherent danger of having the issue constitute a comment on the evidence.

The problem of a global or overly broad and general special issue was authoritatively discussed by the supreme court in Barclay v. C. C. Pitts Sand & Gravel Co. There the court struck down the use of the term "proper control" but did note that there are other "more or less general inquiries" which may be submitted, including proper lookout, attractive nuisance, and discovered peril. In one decision, a court of civil appeals had occasion to apply Barclay to a situation involving an intersection collision in which the jury had found against specific inquiries of contributory negligence, but in favor of a general issue of contributory negligence. The court, while critical of broad issues ("improper") held that where a party submits specific issues he waives the right to have a general inquiry. Consequently, such a general finding does not create a conflict and may be disregarded.

An interesting application of the conflicting special issue rule occurred in an automobile collision suit in which the defendant cross acted. The jury found that the defendant failed to keep a proper lookout and that the plaintiff failed to keep a proper lookout. In addition, there were specific findings that the plaintiff was negligent in driving from the inside lane to the outside lane and failing to give proper signals. The court held that there was a conflict between the finding of the defendant's improper lookout and the specific findings of the plaintiff's negligence. To determine

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73 Id. at 795.
74 Id. at 796. See also Masterson, Preparation and Submission of Special Issues in Texas, 6 Sw. L.J. 163 (1912).
75 Hodges, SPECIAL ISSUES IN TEXAS 19-24 (1959).
76 387 S.W.2d 644 (Tex. 1965).
77 Id. at 648.
78 Smith v. Chase, 405 S.W.2d 450 (Tex. Civ. App. 1966) error ref. n.r.e.
79 Id. at 451-52.
80 Id. at 453.

It is significant that in the case under consideration specific acts which went to make up the question of 'traffic conditions then existing' were submitted to the jury and, incidentally, found in favor of appellants. The question of the court to the jury inquiring whether Mrs. Smith was negligent in crossing the street at the time and on the occasion in question and under the circumstances then existing was undoubtedly a broad and global submission which permitted the jury to take into consideration any fact or circumstance which they might consider to be pertinent or material to the issue. Such question encompasses the elements of speed, brakes, lookout and other specific matters which go to constitute the 'condition then existing.'

As stated by Justice Norvell in Barclay, a litigant should be allowed to go either global or specific, but he cannot go both ways.
81 Id. at 455 (dissenting opinion).
the existence of the conflict the court looked to the specific evidentiary factors which could go to make up the general issue of proper lookout and concluded that the specific jury findings against the plaintiff negated the existence of such grounds against the defendant. Since all of the conflicting issues were supported by some evidence the cause was reversed and remanded for a new trial.

On the interrelated problem of conflicting special issues and material issues the supreme court in C & R Transp., Inc. v. Campbell reiterated the basic principles and held that the negative answer to a special issue which placed the burden of proof in the affirmative could not be used as a finding in determining the existence of conflicts. The court then held that the evidence was legally sufficient to support a proper lookout issue. The four-judge dissent viewed the proper lookout issue as immaterial because there should be no duty of the lead driver to keep such a lookout under the circumstances. The court’s division points up the substantial problem that exists in analysing facts to determine the existence of a legal duty. Not only is duty a substantial problem, but it is one whose significance is often overlooked.

A case of tactical interest upheld the trial court’s discretion as to the order of the charge, in which the damage issue had been placed after the plaintiff’s issues and before the defensive issues.

IV. Motion for New Trials, Nunc Pro Tuncs and Appeals

Among the contributions that the State Bar of Texas has provided its members is the recent work, Appellate Procedure in Texas. The thousands of cases that are digested under the Appeal and Error heading underscore the continual problem which emerges in this area, and perhaps surprisingly, the number of well-settled points that appear to be urged. The foregoing phrase, “appear to be urged,” is used advisedly because in most instances it is not the existence of the principal that is challenged but whether it is applicable to the peculiar facts at hand.

Texas appellate practice requires careful attention to the proper preservation of error in the trial court and careful consideration of the dangers of waiver. Thus even though a motion for new trial is not a prerequisite to appeal in a non-jury case, when such motion is filed it will govern the appeal times, and errors not assigned in the motion will be waived on appeal.

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83 Id. at 911. On conflicts, see also Brown v. Dale, 395 S.W.2d 677 (Tex. Civ. App. 1965) error ref. n.r.e.
With reference to the time limit for appeal, a court of appeals decision discusses the effect of a nunc pro tunc order (see rules 306a, 306b, and 316) of the trial court entered more than thirty days after the entry of judgment. It is well established that the trial court loses all jurisdiction after thirty days and that an order entered after that date to set aside a voidable order is itself a wholly void order. On the other hand rule 316 does not specify any time limits for making a nunc pro tunc order and rule 306b clearly states that the time for appeal commences to run from the entry of the nunc pro tunc order. Robertson v. Blackwell Zinc Co. held that an order to correct the record to show that the motion for new trial was overruled on November 25 instead of November 23, 1963, could be made more than thirty days after the entry of the judgment and that the time from appeal would commence to run from the entry of the nunc pro tunc order. The supreme court in an n.r.e. opinion as to the right of an individual not named as a party, but considered as a party under the doctrine of virtual representation, to obtain review in a court of civil appeals by writ of error went on to expressly disclaim "approving or disapproving" the other holdings "of the Austin Court." The trial court in the present case entered a second judgment setting aside the first judgment; the second judgment copied the first judgment verbatim with the addition that the defendant gave notice of appeal in open court. The court of civil appeals held that the second judgment did not constitute a nunc pro tunc order under rules 316 or 306a and thus avoided the issue left open by the supreme court in Robertson.

To this writer, it would not seem desirable to permit nunc pro tunc orders to undermine the finality of judgments. But until the supreme court clarifies the limits of nunc pro tunc appeals or the rule is amended, the lawyer who has discovered that appeal time has slipped by is well advised to consider an appeal via a nunc pro tunc order.

In appeals from nonjury cases not involving fundamental error, the failure to obtain findings of fact and conclusions of law is apt to prove fatal. In a court of appeals decision it was held that a request for findings of fact and conclusions of law filed with the clerk two days prior to judgment were timely and where the trial judge three days after judgment

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89 390 S.W.2d 472 (Tex. 1965).
90 Ambassador Oil Corp. v. Robertson, 384 S.W.2d 752 (Tex. Civ. App. 1964) error ref. n.r.e.
91 See note 89 supra.
92 It would be possible to confine the appeal to the matter corrected by the nunc pro tunc order, but this is not the present practice as illustrated by Robertson; see text accompanying note 89 supra. The express dicta of the supreme court is certainly a clear indication that the practice of nunc pro tunc appeals is an open question.
denied request, as untimely. It excused the requirement of rule 297 that failure of the court to file findings must be brought to the attention of the judge.

V. AMENDMENTS TO RULES OF CIVIL PROCEDURE

Pursuant to the supreme court's rulemaking power, some fifteen changes in the rules were promulgated. They became effective on January 1, 1967. The changes range from technical amendments to major modifications. Until the advent of the Federal Rules of Civil Procedure in 1938, procedural reform in the United States in general proceeded at a glacier-like pace. It is indeed a healthy sign that the Texas Rules of Civil Procedure are not frozen.

The new rules adopted concern the following:

New Rules. Rule 14b provides for the return or other disposition of exhibits after judgment has become final and the times for various reviews have expired;

Rule 75a provides that the court reporter shall file with the clerk all exhibits which were proffered on a bill of exception during any hearing, proceeding, or trial;

Rule 75b provides for the conditions by which exhibits other than those disposed of by rule 14 may be withdrawn from the clerk;

Rule 226a provides for admonitory instructions to the jury panel as prescribed by the supreme court.

Rule 239a provides for post card notice of a default judgment to be mailed by clerk to defaulting party's last known address as supplied by a certificate of the prevailing party. Of the new rules, 239a is the most significant and represents a change of attitude towards the time-honored practice of taking a default judgment and then "hiding behind the log" until the time for a new trial and appeal had expired, thus forcing a solvent defendant to attack the judgment by writ of error (providing the record was defective), or by bill of review (providing a good excuse and defense existed);

Amendments. Rule 74 was amended to permit filings of exhibits with the judge who shall note the time and date and transmit them to the clerk;

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98 Texas Supreme Court, Civil Procedure Rules Amended, 29 Texas B.J. 735 (1966).
99 McDonald, Texas Civil Practice § 0.02 (1961); 1B Moore, Federal Practice § 0.501-0.512 (1965).
100 The court simultaneously promulgated detailed jury instructions. Texas Supreme Court, Civil Procedure Rules Amended, 29 Texas B.J. 735, 782 (1966).
102 See discussion of "Service of Process and Jurisdiction Over the Person," supra.
103 Ibid.
Rule 166a was amended to ban any oral testimony on hearing for summary judgment.

Rule 168 was amended to permit filing with the clerk copies of interrogatories when there are more than four parties, and was amended to make the sanctions under rule 215(a) and (b) applicable where the party refuses to answer certain interrogatories, and the sections under rule 215(c) applicable when the party fails to serve his answers;

Rule 186b was amended to provide that notice to take depositions and interrogatories other than under rule 187 may not be given prior to appearance day without leave of court, which leave may be with or without notice;

Rule 265 was amended to permit each party to either read his pleading or state the nature of his case to the jury, but not both;

Rule 309 was amended to provide that an order of sale in foreclosure proceedings is directed to any sheriff or any constable within the state;

Rule 329b was amended to give a party the right to amend a timely motion "without" leave of court;

Rule 372 was amended to permit anything occurring in open court or in chambers to be included in the statement of facts when so certified by the court reporter and to provide for the allocation of costs of *voir dire* and jury argument;

Rule 483 was amended to provide means of dismissing moot matter contained in an application for writ of error to the supreme court without the necessity of granting the writ; and

Rule 571 was amended to require the filing of an appeal bond by a plaintiff whose claim was denied in whole or in part.

Repealed. Rule 188, which formerly governed depositions (interrogatories) of adverse parties was repealed. Such rule in effect became obsolete upon the adoption of rule 168 in 1962.201

Of the amendments, the most significant concern the discovery sanctions under rule 168 and the repeal of rule 188. Interrogatories under rule 168 are *ex parte* and provide, unlike interrogatories under rule 186a and former rule 188,100 that the answers "may be used only against the party answering the interrogatories." Considerable advantage is also gained in using rule 168 in discovery against corporate parties because the answers must be in conformity to information known or available to the

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corporation and not matters merely within the personal knowledge of a particular officer or agent.\textsuperscript{108}

Because of the confusion of terms in Texas, discovery rules resulted from an \textit{ad hoc} conglomeration of federal discovery rules with Texas discovery principles, and it was not clear what sanctions, if any, were applicable when the party did not comply with requests for interrogatories under rule 168.\textsuperscript{107} Whatever the merits, or lack of merits of such arguments, the rule today is undeniably clear in providing for the application of the sanctions under rule 215 (a), (b) and (c). The most serious sanctions, including default, are governed by rule 215 (c) which would apply where the party fails to serve his answers to interrogatories.\textsuperscript{108} The failure to serve answers, however, should be distinguished from the refusal to answer interrogatories. For if a party should refuse to answer all of the interrogatories but serves this answer even if all of the interrogatories were proper and should have been answered, the sanctions available are those of rule 215 (a) and (b), but not (c).\textsuperscript{109}

In \textit{Ex Paret Hanlon},\textsuperscript{109} the supreme court held in granting habeas corpus that an insurance investor may refuse on deposition to preserve testimony to give the name of a potential defendant to an automobile suit who was unknown to the plaintiff. It is submitted that the identity of a party is a legitimate subject of rule 186a and that the rule needs amendment to avoid such overrestrictive interpretations as the above.

\textbf{VI. Potpourri of Procedure}

In the footnote that concludes this section a number of decisions are set forth to permit the reader a kaleidoscopic review of 1966.\textsuperscript{110} Prior to this review, though, one case, or series of cases, reflecting the Keystone Cop juridical relationship between the Texas Supreme Court and the United

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{108}] See discussion of federal rule 33 from which 168 was adopted, \textit{Moore. Federal Practice} § 33.07 (2d ed. 1966).
\item[\textsuperscript{107}] For example, does the term deposition for purposes of imposing sanctions include both oral examination by the attorney and written interrogatories by court reporter as well as ex parte interrogatories; does interrogatory include all types of interrogatories under all the discovery rules? See McGlinchey, \textit{infra} note 102.
\item[\textsuperscript{108}] \textit{Tex. R. Civ. P.} 168.
\item[\textsuperscript{109}] If a party, except for good cause shown, fails to serve answers to interrogatories after proper service of such interrogatories, the court in which the action is pending may, on motion and notice, make such orders as are just, including those authorized by paragraph (c) of Rule 215a.
\item[\textsuperscript{109}] \textit{Tex. R. Civ. P.} 168.
\item[\textsuperscript{110}] If a party refuses to answer any interrogatory, the proponent of the question may, upon reasonable notice to all persons affected, apply to the court in which the action is pending for an order compelling an answer. Reasonable expenses, including reasonable attorney's fees, incurred in obtaining the order or opposing the motion may be assessed, and a refusal to comply with the order shall authorize the court to act, as provided in paragraphs (a) and (b) of Rule 215a.
\item[\textsuperscript{110}] 406 S.W.2d 204 (Tex. 1966).
\end{itemize}
\end{footnotesize}
States Court of Appeals for the Fifth Circuit should not go unnoticed—the Delaney series of cases involving the merits of whether a pilot of a plane was a passenger within the meaning of an insurance contract. The Fifth Circuit, upon the occasion of having two different panels reach different results, decided in an en banc hearing to abstain. It may be fairly argued that it was improper to invoke abstention. The Texas Supreme Court apparently did not relish the thought of being a briefing clerk for the Fifth Circuit and apparently is not jealous about the concurrent aspects of diversity jurisdiction. It held the declaratory judgment proceeding to be a request for an advisory opinion and thus not within Texas' jurisdiction, although it may be fairly argued that the decision would not have been advisory. The Fifth Circuit then held on the merits that the pilot of the plane was not a passenger. It may be fairly argued that the Texas Supreme Court has held the opposite in an analogous case. Somewhere, somehow, as far as the parties are concerned, the concept that justice delayed is justice denied got lost.

The potpourri now follows in the footnotes.
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error ref. n.r.e. (witness in jail as grounds); Bray v. Miller, 397 S.W.2d 103 (Tex. Civ. App. 1965) error ref. n.r.e. (discretion of court); Stefanov v. Ceips, 395 S.W.2d 663 (Tex. Civ. App. 1965) (after withdrawal of attorney).


Judgments:
Apel. Atomic Fuel Extraction Corp. v. Slick, 403 S.W.2d 784 (Tex. 1966) (refusal of writ of error with notation of "no reversible error" is not approval of all of civil appeal opinion); Jones v. El Chorro Drilling Co., 401 S.W.2d 229 (Tex. Civ. App. 1966) (court of civil appeals may but does not have to dismiss appeal when appellant does not file brief within prescribed time); Offer v. Bell, 397 S.W.2d 278 (Tex. Civ. App. 1965) (for judgment to be final and appealable, it must determine whole case, dispose of all matters involved in suit, and determine rights of all parties, otherwise it is interlocutory and non-appealable, unless the trial court has ordered severance).


Judgment. Boswell v. Handley, 397 S.W.2d 213 (Tex. 1965) (summary judgment improper since rule 166-A was not complied with in absence of certified or verified copy of a will and order probating it); Hill v. W. E. Brittarm, Inc., 405 S.W.2d 803 (Tex. Civ. App. 1966) (notice of hearing); Ackerman v. Vordenbaum, 403 S.W.2d 362 (Tex. Civ. App. 1966) (generally, an order overruling motion for summary judgment is interlocutory in nature and not appealable); Hays v. Norton, 400 S.W.2d 12 (Tex. Civ. App. 1966) (requisites); Prince v. Peferso, 396 S.W.2d 913 (Tex. Civ. App. 1965) (judgment solely on a cross-action without disposing of plaintiff's cause of action is not a final judgment. The same is true when a judgment is rendered on plaintiff's cause of action without disposing of a cross-action); Stansbury v. Hicks, 396 S.W.2d 126 (Tex. Civ. App. 1965) (subject matter of cause in which judgment has become final can only be reached by an equitable proceeding, and judgment therein cannot be revised unless and until all parties interested in subject matter of suit are made parties to independent equitable proceedings attacking judgment); Perkins v. Hale, 396 S.W.2d 149 (Tex. Civ. App. 1965) error ref. n.r.e. (disregarding jury findings); Roberto v. Rig-A-Lite, 394 S.W.2d 819 (Tex. Civ. App. 1965) (requisites).

Jurisdiction. Rosenfeld v. Steelman, 405 S.W.2d 101 (Tex. 1966) (inasmuch as the record did not show that the owner was an indispensable party who had an interest in the action which would prevent the trial court from fully adjudicating the rights of those who were parties to the action, it was improper to consider the owner's affidavit filed in the court of civil appeals after the trial court record had been filed, to determine trial court's jurisdiction).


**Motion for New Trial:**

**Amended motion.** Miller v. Esunas, 401 S.W.2d 110 (Tex. Civ. App. 1966) error ref. n.r.e. (Texas Rule 329b(2) provides mandatory time limit of 20 days, after filing original motion for new trial, for filing any amended motion. If transcript failed to disclose when original motion was filed, court of appeals could not determine if amended motion was timely, thus appeal had to be dismissed.)

**Court's discretion.** Tarver v. Ed. C. Smith & Bros., 402 S.W.2d 220 (Tex. Civ. App. 1966) (granting or denying motion for new trial in court's discretion and will not be reversed except for manifest abuse of discretion).

**Grounds.** Vela v. Sharp, 395 S.W.2d 66 (Tex. Civ. App. 1965) error ref. n.r.e. (Motion for new trial on default judgment should be granted when movant shows himself and clients free from negligence at not being present at trial and that a meritorious defense exists. Opposing parties' counter affidavits and testimony is not to be taken into consideration of motion for new trial in default judgment.)

**Inadequate representation by counsel.** Sandoval v. Rattikin, 395 S.W.2d 889 (Tex. Civ. App. 1965) error ref. n.r.e. (no abuse if discretion shown by overruled motion for new trial when grounds that movant had meritorious defense but was prevented from proving defense by inadequate counsel by legal aid service).

**New evidence.** Terbay v. Pat Canion Excavating Co., 396 S.W.2d 482 (Tex. Civ. App. 1965) error ref. n.r.e. (motion for new trial should be granted on grounds of newly discovered evidence if movant had exercised "ordinary diligence" in investigating auto accident, and newly discovered evidence would change outcome of trial).


**Time limits.** Hilates, Inc. v. State, 401 S.W.2d 269 (Tex. Civ. App. 1965) error ref. n.r.e. (very interesting case on trial court jurisdiction to enter order denying or granting motion for new trial and jurisdiction to overrule previously granted or denied motions according to rule 329b); Nickel v. Anderson, 399 S.W.2d 220 (Tex. Civ. App. 1966) (when motion for new trial is filed in non-jury case, time limit for appeal begins to run after motion for new trial is overruled, by law or by the court).