1.1 NO DOCUMENTS

Chris Griesel

From: Nathan Hecht [Nathan.Hecht@courts.state.tx.us]
Sent: Saturday, May 26, 2001 3:35 PM
To: chris.griesel@courts.state.tx.us
Subject: FW:

-----Original Message-----
From: Nathan Hecht [mailto:Nathan.Hecht@courts.state.tx.us]
Sent: Saturday, May 26, 2001 3:33 PM
To: Chip Babcock; Bill Dorsaneo
Subject:

In Fulton v. Finch, 346 S.W.2d 823 (Tex. 1961), we held that a trial court lacked power to un-grant a motion for new trial more than 45 days after the motion was filed, based on TRCP 329b, s. 3, which then read: "All motions and amended motions for new trial must be determined within not exceeding forty-five (45) days after the original or amended motion is filed . . . ." The rule was completely rewritten in 1981 and no longer contains such language. However, in Porter v. Vick, 888 S.W.2d 789 (Tex. 1994) (per curiam), we cited Fulton as authority for the proposition that "any order vacating an order granting a new trial . . . signed outside the court's period of plenary power over the original judgment is void", without reference to the rule. Now the rules argument is that a trial court cannot ungrant a motion for new trial after its plenary jurisdiction would have expired, not because the rule prohibits it, but because the rule does not permit it -- is silent on the subject. See, e.g., Ferguson v. Globe-Texas Co., 35 S.W.3d 688 (Tex. App.--Amarillo 2000, pet. denied). The court in Ferguson observed that a federal trial court may ungrant a motion for new trial at any time, subject to review for abuse of discretion. The Court requests that the Advisory Committee consider whether the holding of Porter should be changed by rule. As always, the Court greatly appreciates your service and that of the other members of the Committee.

Nathan L. Hecht

2.1 TRAP RULES

The Supreme Court of Texas

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
NATHAN L. HECHT
CRAIG T. ENOCH
PRISCILLA R. OWEN
JAMES A. BAKER
GREG ABBOTT
DEBORAH G. HANKINSON
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CLERK
JOHN T. ADAMS

EXECUTIVE ASSISTANT
WILLIAM L. WILLIS

ADMINISTRATIVE ASSISTANT
NADINE SCHNEIDER

March 28, 2001

Mr. Charles L. Babcock
Jackson Walker
901 Main St. #6000
Dallas TX 75202

Dear Chip:

I would like to report to the Advisory Committee at its meeting this weekend on discussions among the Justices of the Courts of Appeals at their spring conference last week about proposed changes in Rule 47 of the Texas Rules of Appellate Procedure, and hear the Committee's views.

Justice McClure and I were asked to conduct an afternoon workshop for the appellate justices on the proposed changes in Rule 47 and specifically the use of memorandum opinions. My guess is that some seventy justices, active and senior, were in attendance. For about an hour I explained the proposed changes and their history and took questions. The attendees then discussed the changes and memorandum opinions in four break-out sessions for a little more than an hour. Afterward, the session leaders reported to the entire group on their discussions.

The changes I presented (Appendix A) reflected comments previously received and differed somewhat from the changes recommended by the Committee (Appendix B).

I heard no dissent expressed to the elimination of Rule 47.7, which prohibits the citation of unpublished opinions.

The predominant concern was that the elimination of the "do not publish" designation would result in all opinions being printed. Even if all opinions are available electronically, some justices expressed concern that the decision whether to print memorandum opinions should not be left entirely to a publisher, such as West. Also, some justices wondered whether a memorandum opinion could be used in every instance in which the appellate panel believed that its opinion lacked precedential value, so that the "memorandum" designation could not perfectly replace the signal afforded by the "do not publish" designation. Others believed that the "memorandum" designation should be nothing

other than a signal of lack of precedential value. One suggestion was that the rule require a citation of a memorandum opinion to indicate its designation, such as *Smith v. Jones*, [cite] (Tex. App.—Dallas 2001, no pet.) (memo). Some justices questioned whether the elimination of the "do not publish" designation was really necessary to achieve the revisions' goals.

There was no opposition to the use of memorandum opinions but much confusion over when they should be used, how they should be structured, and whether they would be accepted by the bar. Nearly everyone believed that shorter opinions are desirable as a general proposition, but they fear that any significant change will give rise to criticism that the court has not considered the case fully.

Several justices commented that Rule 47.4(e) should be changed to read "contains a concurring or dissenting opinion" so that a justice's decision to concur only in the judgment would not prevent a memorandum designation.

Several justices commented that the second sentence of Rule 47.4 appears to change the presumption against published opinions and should be changed to read, "An opinion should be labeled a memorandum opinion unless it does any of the following . . . ."

I found the justices' discussions quite constructive, and I would like the Committee's reactions.

As always, the Court appreciates the dedication you and the Committee give to the rules process.

Cordially,

Nathan L. Hecht
Justice

c: All Advisory Committee Members

APPENDIX A

PROPOSED CHANGES IN RULE 47, TEX. R. APP. P., AS RECOMMENDED BY THE SUPREME COURT ADVISORY COMMITTEE AND MODIFIED BASED ON COMMENTS RECEIVED

RULE 47. OPINIONS; AND PUBLICATION; ~~AND CITATION~~

47.1. Written Opinions. The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal. ~~Where the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it.~~[1]

47.2. Designating and Signing ~~of~~ Court Opinions; Participating Justices.[2] Each opinion for the court must be designated either an "Opinion," a "Memorandum Opinion," or a "Per Curiam" opinion.[3] Opinions and memorandum opinions must be signed, but per curiam opinions need not be. A majority of the justices who participate in considering the case must determine ~~whether the opinion will be signed by a justice or will be per curiam~~ — before an opinion is handed down — how it should be designated.[4] The names of the participating justices must be noted on all written opinions or orders of the court or a panel of the court.

47.3. Publication of Opinions. All opinions of the courts of appeals must be made available to the public including public reporting services, print or electronic.

~~a: *The Initial Decision.* A majority of the justices who participate in considering a case must determine — before the opinion is handed down — whether the opinion meets the criteria stated in 47.4 for publication. If those criteria are not met, the opinion will be distributed only to the persons specified in Rule 48, but a copy may be furnished to any person on request by that person.~~

---

[1] This sentence is moved verbatim to Rule 47.4.

[2] The SCAC recommended that Rule 47.2 not be changed, and that Rule 47.3 be replaced with a single sentence. Several comments have pointed out, however, that the excisions from Rule 47.3 may be too drastic. The provisions in the current text of Rule 47.3 that should be retained seem to fit better in Rule 47.2 and have been moved there.

[3] This is similar to the designation required by Rule 47.3(b).

[4] This sentence picks up the provision in Rule 47.3(a).

~~b: *Notation on Opinions.* A notation stating "publish" or "do not publish" must be made on each opinion.~~

~~c: *Reconsideration of Decision on Whether to Publish.* Any party may move the appellate court to reconsider its decision regarding publication of an opinion but the court of appeals must not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's petition for review, petition for discretionary review, or other request for relief.~~

~~d: *High Court Order.* The Supreme Court or the Court of Criminal Appeals may, at any time, order a court of appeals' opinion published.~~

47.4. ~~**Standards for Publication.**~~ Memorandum Opinions. If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it.[5] An opinion should ~~be published only~~ not be labeled a memorandum opinion if it does any of the following:

(a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;

(b) involves a legal issue of continuing public interest;

(c) criticizes existing law; ~~or~~

(d) resolves an apparent conflict of authority; or

(e) contains a concurrence or dissent.[6]

47.5. **Concurring and Dissenting Opinions.**[7] Only a justice who participated in the decision of a case may file or join in an opinion concurring in or dissenting from the judgment of the court of appeals. Any justice on the court may file an opinion in connection with a denial of a hearing or rehearing en banc. ~~A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in 47.4. If a concurrence or~~

[5] This sentence is moved verbatim from Rule 47.1.

[6] The factors to be considered in determining whether a memorandum opinion should be used are the same as those used in determining whether an opinion should be unpublished.

[7] The SCAC's recommendation included the deletion of Rule 47.5, but comments from Justices of the courts of appeals have suggested that a portion of the rule should be retained.

~~dissent is to be published, the majority opinion must be published as well.~~

47.6. ~~**Action of**~~ **Change in Designation by En Banc Court.** ~~Sitting en banc, the court may modify or overrule a panel's decision regarding the signing or publication of the panel's opinion or opinions.~~ A court en banc may change a panel's designation of an opinion.[8]

~~47.7. **Unpublished Opinions.** Opinions not designated for publication by the court of appeals have no precedential value and must not be cited as authority by counsel or by a court.~~

[8] This simplification is not intended to change the en banc court's authority.

APPENDIX B

PROPOSED CHANGES IN RULE 47, TEX. R. APP. P., AS RECOMMENDED BY THE SUPREME COURT ADVISORY COMMITTEE

RULE 47. OPINIONS; AND PUBLICATION; ~~AND CITATION~~

47.1. Written Opinions. The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal. ~~Where the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it.~~

47.2 Signing of Opinions. A majority of the justices who participate in considering the case must determine whether the opinion will be signed by a justice or will be per curiam. The names of the participating justices must be noted on all written opinions or orders of the court or a panel of the court.

47.3. Publication of Opinions. All opinions of the courts of appeals must be made available to the public including public reporting services, print or electronic.

~~a: *The Initial Decision.* A majority of the justices who participate in considering a case must determine — before the opinion is handed down — whether the opinion meets the criteria stated in 47.4 for publication. If those criteria are not met, the opinion will be distributed only to the persons specified in Rule 48, but a copy may be furnished to any person on request by that person.~~

~~b: *Notation on Opinions.* A notation stating "publish" or "do not publish" must be made on each opinion.~~

~~c: *Reconsideration of Decision on Whether to Publish.* Any party may move the appellate court to reconsider its decision regarding publication of an opinion but the court of appeals must not order any unpublished opinion to be published after the Supreme Court or Court of Criminal Appeals has acted on any party's petition for review, petition for discretionary review, or other request for relief.~~

~~d: *High Court Order.* The Supreme Court or the Court of Criminal Appeals may, at any time, order a court of appeals' opinion published.~~

47.4. ~~Standards for Publication.~~ Memorandum Opinions. If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reason for it. An opinion should ~~be published only~~ not be

labeled a memorandum opinion if it does any of the following:

(a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;

(b) involves a legal issue of continuing public interest;

(c) criticizes existing law; ~~or~~

(d) resolves an apparent conflict of authority; or

(e) contains a concurrence or dissent.

~~47.5. **Concurring and Dissenting Opinions.** Only a justice who participated in the decision of a case may file or join in an opinion concurring in or dissenting from the judgment of the court of appeals. Any justice on the court may file an opinion in connection with a denial of a hearing or rehearing en banc. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in 47.4. If a concurrence or dissent is to be published, the majority opinion must be published as well.~~

~~47.6. **Action of En Banc Court.** Sitting en banc, the court may modify or overrule a panel's decision regarding the signing or publication of the panel's opinion or opinions.~~

~~47.7. **Unpublished Opinions.** Opinions not designated for publication by the court of appeals have no precedential value and must not be cited as authority by counsel or by a court.~~

E-MAILS RE: TRAP RULES

Chip:

Before the committee or the supreme court takes further action on the TRAP rules, I would like to see if we can make one additional change.

I think the TRAP rules should say that anyone who files an affidavit of indigence in the trial court must also serve a copy on the court reporter. Previous TRAP 40(a)(3)(B) required exactly that. Somehow this requirement was omitted when present TRAP 20(d)(1) was promulgated, and now the rule lets the movant just file the indigence affidavit puts the burden on the clerk to notify the court reporter. In a perfect world, clerks would always get it done. But in reality, especially in Bexar County, clerks drop the ball.

There is a part of me that says clerks should notice these affidavits when they are filed and should do their duty. But sometimes they just don't, and it seems unfair to court reporters. The salient fact for me is that the added burden to the indigent appellant is close to zero (make an extra copy and send it or take it to the reporter), while the reality in the courthouse is that clerks sometimes drop the ball.

Could we discuss this briefly at the meeting?

David Peeples

****

Chip and others, I will be in Fargo, North Dakota during the meeting and won't be able to get to Austin. The issue Judge Peeples happens more often than we think. It's become a matter of course now to file an indigency
appeal in hopes that the court reporter won't find out about it until it's too late. They are usually the ones who contest them because it is money and time they actually donate to the cause out of their pocket. In true indigency cases we should be doing them; but we should have the ability to make them prove it's a true indigency case and not someone who just doesn't want to pay for an appeal, which is more often the case.

Have a great meeting, and thanks, Judge Peeples, for bringing this up.

David B. Jackson, CSR, RDR

2.2 NO NEW DOCUMENTS

May refer to document titled "Jane's Due Process", bates MAR01-00024-38, distributed during March 2001 SCAC Meeting. A few copies will be available during this meeting if this document is referred to.

2.3 NO DOCUMENTS ON RULES 103 OR 536

(h) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule 174, judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

(Amended March 31, 1941, eff. Sept. 1, 1941; July 21, 1970, eff. Jan. 1, 1971; Dec. 5, 1983, eff. April 1, 1984.)

Notes and Comments

Source: Federal Rule 13.

Change: Subdivisions (d) and (f) of the Federal Rule have been omitted and the subdivisions re-lettered. Subdivisions (d), (e), (f) in part, and (h) above correspond to subdivisions (e), (g), (h), and (i) respectively of the Federal Rule. In (a) above the compulsory counter-claim has been limited to a claim within the jurisdiction of the court. In (c) a similar limitation has been embodied. Other subdivisions have minor textual changes.

Change by amendment of March 31, 1941: The proviso in subdivision (f) takes the place of the last sentence of subdivision (f) in original Rule 97, and subdivision (g) has been added. Subdivision (g) in original Rule 97 has been changed to (h).

Change by amendment effective January 1, 1971: Proviso concerning effect of judgment based upon settlement or compromise of claim of one party to a transaction has been added to subdivision (a).

Change by amendment effective April 1, 1984: Section (f) is rewritten.

RULE 98. SUPPLEMENTAL ANSWERS

The defendant's supplemental answers may contain special exceptions, general denial, and the allegations of new matter not before alleged by him, in reply to that which has been alleged by the plaintiff.

(Amended March 31, 1941, eff. Sept. 1, 1941.)

Notes and Comments

Source: Texas Rule 8 (for District and County Courts).

SECTION 5. CITATION

RULE 99. ISSUANCE AND FORM OF CITATION

a. Issuance. Upon the filing of the petition, the clerk, when requested, shall forthwith issue a citation and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition. Upon request, separate or additional citations shall be issued by the clerk.

b. Form. The citation shall (1) be styled "The State of Texas," (2) be signed by the clerk under seal of court, (3) contain name and location of the court, (4) show date of filing of the petition, (5) show date of issuance of citation, (6) show file number, (7) show names of parties, (8) be directed to the defendant, (9) show the name and address of attorney for plaintiff, otherwise the address of plaintiff, (10) contain the time within which these rules require the defendant to file a written answer with the clerk who issued citation, (11) contain address of the clerk, and (12) shall notify the defendant that in case of failure of defendant to file an answer, judgment by default may be rendered for the relief demanded in the petition. The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof. The requirement of subsections 10 and 12 of this section shall be in the form set forth in section c of this rule.

c. Notice. The citation shall include the following notice to the defendant: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you."

d. Copies. The party filing any pleading upon which citation is to be issued and served shall furnish the clerk with a sufficient number of copies thereof for use in serving the parties to be served, and when copies are so furnished the clerk shall make no charge for the copies.

(Amended Oct. 10, 1945, eff. Feb. 1, 1946; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 2021.

RULE 100 TO 102. [REPEALED]

(Repealed July 15, 1987, eff. Jan. 1, 1988.)

RULE 103. WHO MAY SERVE

Citation and other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age. No person who is a party to or interested in the outcome of a suit shall serve any process. Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which the case is pending. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order.

(Amended June 10, 1980, eff. Jan. 1, 1981; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 2401.

Comment to 1990 change: To conform justice court service of citation to the extent practicable to service of citation for other trial courts.

RULE 535. ANSWER FILED

Where citation has been personally served at least ten days before appearance day, exclusive of the day of service and of return, the answer of the defendant shall be filed at or before ten o'clock a.m. on such day. Where citation has been served by publication, and the first publication has been made at least twenty-eight days before appearance day, the answer of the defendant shall be filed at or before ten o'clock a.m. on the first day of the first term which shall convene after the expiration of forty-two days from the date of issuance of such citation.

Notes and Comments

Source: Art. 2009 and Art. 2404.

RULE 536. WHO MAY SERVE AND METHOD OF SERVICE

(a) Citation and other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) any person authorized by law or by written order of the court who is not less than eighteen years of age. No person who is a party to or interested in the outcome of a suit shall serve any process. Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which the case is pending. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order.

(b) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by this rule by:

(1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto if any is filed.

(c) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service:

(1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or

(2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

(Amended April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Source: Art. 2402, with minor textual change.

Comment to 1990 change: To conform justice court service of citation to the extent practicable to service of citation for other trial courts.

RULE 536a. DUTY OF OFFICER OR PERSON RECEIVING AND RETURN OF CITATION

The officer or authorized person to whom process is delivered shall endorse thereon the day and hour on which he received it, and shall execute and return the same without delay.

The return of the officer or authorized person executing the citation shall be endorsed on or attached to the same; it shall state when the citation was served and the manner of service and be signed by the officer officially or by the authorized person. The return of citation by an authorized person shall be verified. When the citation was served by registered or certified mail as authorized by Rule 536, the return by the officer or authorized person must also contain the receipt with the addressee's signature. When the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain.

Where citation is executed by an alternative method as authorized by Rule 536, proof of service shall be made in the manner ordered by the court.

No default judgment shall be granted in any cause until the citation with proof of service as provided by this rule, or as ordered by the court in the event citation is executed under Rule 536, shall have been on file with the clerk of the court three (3) days, exclusive of the day of filing and the day of judgment.

(Added April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Comment to 1990 change: New rule to conform justice court service of citation to the extent practicable to conform to service of citation for other trial courts.

RULE 103 AND 536 T.R.C.P.
PROPOSED CHANGE, ISSUE OVERVIEW

History:

Prior to 1977 only sheriffs and constables were permitted to serve civil process in Texas. However, due to an increasing backlog of process needing to be served, the Supreme Court in 1977 amended Rule 178, T.R.C.P. to add "any person who is not a party and not less than 18 years of age" as an authorized person to serve subpoenas. Ten years later, in 1987, the legislature changed the law regarding who was authorized to serve citations and other notices. In response to this legislation the Supreme Court amended Rule 103, T.R.C.P. to permit these documents to be served by "any person authorized by law or by written order of the court who is not less than 18 years of age."

In the fourteen years that private process servers have been authorized to serve by written order of the court there has been a significant shift in the way process is served in Texas. Despite the additional expense and inconvenience of getting orders signed authorizing serve under Rule 103, more and more litigants are choosing to use private process servers rather than a sheriff or constable. Private process servers are now an integral part of the court administration system and provide a vital legal support service.

The Problem:

Under the current system, private process servers who wish to serve litigants throughout Texas are faced with a daunting task. Existing law and rules require that they obtain written orders from each of the State's 254 counties. In many counties, however, the process server is required to obtain a written order from each court in that county. This means that a process server who wants to serve process statewide would theoretically be required to register in over 900 separate courts. Additionally, under current law there is no statewide standard for who is eligible to serve process. There is no requirement that private process servers have any formal training or continuing education, nor is there any requirement for a private process server to have insurance to protect the public.

The Solution:

At the request of Justice Hecth, the Supreme Court Rules Committee is considering a change to Rule 103 and 536, which would establish a statewide system for authorizing a person to serve private process in Texas and guidelines to administer such a system. The system is modeled after a similar system currently being used in Arizona and other states. The proposed system would require the following:

1. the person not be less that 18 years of age, and disclose any conviction of a misdemeanor involving a crime of moral turpitude,
2. complete and file an application
3. attend eight hours of education on civil process
4. provide an original criminal history record check from DPS
5. provide proof of Errors and Omissions and General Liability insurance in the amount of $300,000.
6. pay a fee to the clerk

(A copy of the proposed order is attached hereto as Exhibit A)

When enacted, this order will provide for a standardized, efficient, cost effective manner to provide for private civil process. The courts will have better control over who serves process and how the process is served. The system will insure a higher level of professionalism within the private process server industry. The system will allow process servers to be licensed at an affordable level and ensure process servers are trained, educated, and insured to protect the public, which they are serving.

SUPREME COURT OF TEXAS

AUTHORIZED PROCESS SERVERS

Administrative Order No._____

Based upon the authority granted the Supreme Court in Article_____,Section____of the Constitution of the State of Texas, and Texas Revised Statutes_____and in accordance with Rule 103 & 536 Texas Rules of Civil Procedure.

IT IS ORDERED that all persons wishing to serve process in Texas must:

1. Be not less than 18 years of age and who is not a party to or interested in the outcome of the suit.

2. Have not been convicted in any jurisdiction of a felony or equivalent offense.

3. Have not been convicted in any jurisdiction of a Class A or B misdemeanor within the last five years before the application date. The Presiding District Judge or his/her designee may deny the order if the misdemeanor conviction is of such an offense that it would be in the best interest to the public to deny the individual's order to serve process.

4. Complete and file an application for a registered process server on a form provided by the Presiding District Judge or his/her designee.

5. Provide with the application a Texas Department of Public Safety verified finger print criminal history record check.

6. Attend at least an seven-hour approved education course on civil process approved by the Presiding Judge or his/her designee and attach a copy of the certificate of completion with the application.

7. Provide with the application proof of Errors & Omissions & General Liability Insurance in an amount not less than $300,000.

8. Pay a non-refundable application fee to the County where the application is made at a fee set no more then the cost to file a civil suit in District court for the two-year period order.

9. Provide photograph(s) as required by the Presiding District Judge or his/her designee.

10. Provide with the application a copy of the applicant's Texas driver's license.

IT IS FURTHER ORDERED that persons approved to serve process pursuant to these requirements shall be approved as an authorized process server for a period of two years and shall be considerd public servants when in performance of their duties..

IT IS FURTHER ORDERED that all authorized process servers complying with these requirements shall have authority to serve process in the State of Texas as authorized by state law in the same manner as constables and sheriffs, with the exception that the authorized process server may not serve any writs that requires the authorized process server to take control, possession, or seize any person, property, or thing.

IT IS FURTHER ORDERED that authorized process servers have no authority as peace officers and must obey all State and Federal laws when in performance of their duties.

IT IS FURTHER ORDERED that the Presiding District Judge or his/her designee will issue a Photo Identification card with the registration number on it. The Presiding District Judge or his/her designee will approve the design of the Identification card. The Presiding District Judge or his/her designee may charge a fee to cover the cost of producing the card. The identification card remains the property of the Presiding District Judge or his/her designee and must be surrender upon demand by the Presiding District Judge or his/her Designee..

IT IS FURTHER ORDERED that registered authorized process server wishing to renew their approval to serve process must:

1. Complete a re-application form and file the form with the Presiding District Judge or his/her designee.

2. Provide photograph(s) as required by the Presiding District Judge or his/her designee.

3. Provide with the application a copy of the certificate of completion of a four hour continuing education course on civil process approved by the Presiding District Judge or his/her designee.

4. Provide with the application an updated Texas Department of Public Safety verified finger print criminal history record check.

5. Provide with the application proof of Errors & Omissions & General Liability Insurance in an amount not less than $300,000.

6. Pay a non-refundable application fee to the Presiding District Judge or his/her designee.

IT IS FURTHER ORDERED that the Presiding District Judge or his/her designee shall have the authority to approve the application and re-application forms. Establish application fees and renewal fees, to cover the cost of administering this Administrative Order. Approve study guide(s) and course(s) for applicants, and to develop and revise any policies, procedures, and guidelines necessary to carry out the intent of this Administrative Order.

IT IS FURTHER ORDERED that this Administrative Order is effective ten (10) business days from the date of this order is signed.

DATED AND ENTERED this _____day of_____2000.

_____
Thomas R. Phillips, Chief Justice

_____
Nathan L. Hechi, Justice

_____
Greg Abbott, Justice

_____
Craig T. Enoch, Justice

_____
Deborah G. Hankinson, Justice

_____
Priscilla R. Owen, Justice

_____
Harriet O'Neil, Justice

_____
James A. Baker, Justice

_____
Alberto R. Gonzales, Justice

2.4 NO DOCUMENTS FOR RULE 9.2

The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

March 28, 2001

Mr. Charles L. Babcock
Jackson Walker
901 Main St. #6000
Dallas TX 75202

Dear Chip:

Please direct this issue to the appropriate subcommittee for study and recommendations:

- Mike Hatchell points out (letter attached) that the U.S. Postal Service has introduced a new service called "Delivery Confirmation" that may be superior to the "Certificate of Mailing" for purposes of Rule 9.2 of the Rules of Appellate Procedure. Should the rule be amended to allow this new service and others that may be offered?

As always, the Court greatly appreciates your work on the rules of procedure.

Cordially,

Nathan L. Hecht
Justice

2.5 NO NEW DOCUMENTS

May refer to previous documents under Section 2.4 of the March 2001 SCAC Agenda titled "Report of the Subcommittee on Texas Rules of Civil Procedure 300-330" and Memorandum from Bill Dorsaneo dated Janusary 26, 2001.

Chip:

Attached are two documents: (1) Proposed revisions of rules 306 and 306a and (2) a memo explaining these revisions and my thoughts.

Briefly: Revised rule 306 restates current law and puts it into one rule. If we want to do more than this, I offer amended rule 306a. Amended rule 306a does two main things: (1) It says that if the Lehmann language is not used in a judgment all timetables are delayed, and (2) it requires clerks to send a more thorough notice of final judgment and delays timetables if the notice is not received.

I have sent all this to the committee members by copy of this email, but I will bring hard copies of everything to the meeting Friday.

David

MEMORANDUM

TO: All members of the Supreme Court Advisory Committee

FROM: David Peeples

RE: Finality of Judgments

DATE: June 14, 2001

At our meeting on March 30, I was asked to write up my suggestions for improving the existing finality rules without a comprehensive rewrite. Here they are.

1. **General observations.** First some general thoughts.

   A. Finality is not a problem in the trial courts. Now that *Lehmann* has clarified and improved the law, it is okay with me to leave things alone.

   B. Even if we decide to leave present law as it is, the supreme court has asked us to draft a rule of some kind. My new rule 306 (attached) is offered in that spirit. I think we should do something like this because it would put the case law in one concise rule with one minor improvement (requiring the language to be near the judge's signature).

   C. There are of course occasional appellate problems, but most of our efforts to solve those problems with new rules (e.g., mandatory language or mandatory death certificate) threaten to create fresh problems in the trial courts (i.e. many judgments remaining interlocutory and pending indefinitely). Put to the choice, I would prefer the status quo to the mandatory-language solutions we have been discussing so far.

   D. In the event we decide to go beyond merely restating present law in a concise rule, my revised rule 306a (attached) tries to reduce the inadvertent loss of appeal rights by negligent attorneys—by requiring a more thorough notice of judgment and giving additional time for correction of mistakes.

2. **Existing law.** I submit that the following principles can be distilled from the cases:

   A. *Complete relief.* When the court has granted or denied all relief sought as to all parties (whether in one instrument or in two or more instruments taken together), there is a final judgment, and all trial-court and appellate timetables begin to run from the date the last order was signed.

B. *Severance.* By carving one case into two, a severance can make an existing interlocutory order become final. The severance does this by factoring out the unadjudicated claims and/or parties from the others. After the severance, if one case contains only adjudicated claims, the severance has created a final judgment in that case.

C. *Language.* Under the supreme court's recent decision in *Lehmann*, traditional Mother Hubbard catch-all language is no longer effective to adjudicate claims and thereby create finality. Under *Lehmann*, general language can have Mother Hubbard effect only if it shows with unmistakable clarity that all claims by and against all parties have been adjudicated.

3. Problems with existing law. The committee's discussions have identified three principal problems under the present rules. There may be others, but these are the main ones. (*Lehmann* has ameliorated Problem *A* below, but not entirely.)

A. *Inadvertent loss of appeal rights by catch-all clause.* This problem seems to occur primarily in summary judgments, but it can happen in other situations too. After a hearing on a motion for partial summary judgment, the court *should* sign an order dealing specifically with the issues presented and nothing else. But until *Lehmann* a Mother Hubbard clause in the order has had the effect of denying all other claims, including claims as to parties that the motion did not even mention. *See Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993). As a result, the trial-court and appellate timetables would start to run, and they sometimes expired before unwary litigants and lawyers realized that the catch-all clause had denied their claims. *Lehmann*'s requirement of neon language will help put everyone on notice that a final judgment has been signed, but I am sure there will still be negligent and inattentive lawyers who do not notice or do not understand.

B. *Inadvertent loss of appeal rights by cumulative orders.* When the rulings in successive orders add up to a complete adjudication of all claims between all parties, the result is a final judgment, even if the last order does not mention the earlier ones or contain language of finality. Some lawyers do not realize that the timetables begin to run when the last order is signed, and they have a rude awakening when they learn later that the time for perfecting appeal has passed. *Lehmann* does not address this problem.

C. *Finality hard to determine.* After a series of interlocutory rulings in complicated cases, judges sometimes have difficulty determining whether there has been a complete adjudication. District and County Clerks, who must send notice of final judgment under Rule 306a(3), have the same difficulty.

4. The attached rules vs. other proposals.

A. Other proposals. It has been suggested that we *require* neon language in the judgment, or perhaps require a death certificate signed by the judge. My main objection to these suggestions is that they focus only on the appellate issues (inadvertent loss of appeal rights) at the expense of trial-court finality concerns. Both the appellate and trial-court issues are important. But if the language (or the death certificate) is *mandated*, judgments without the language (or the death certificate) will remain interlocutory until someone learns about it and gets the language included (or the death certificate signed). I consider it unacceptable to have so many cases remain interlocutory and pending indefinitely.

B. The attached proposals. If we decide to do more than restate existing law in proposed rule 306, I propose the modified rule 306a. Amended rule 306a would do these things:

(1) Clarify present law of finality. Judgments become final in the following three ways (or some combination of them):

- By presumption after a conventional trial on the merits,
- By expressly disposing of all parties and issues (including series of orders),

or

- By including *Lehmann*-type neon language.

(2) Put final/appealable language in prominent place. Lawyers who want the judgment to become final quickly would be motivated to include the *Lehmann* language because if such language is not used the timetables would be delayed automatically for 90 days. In other words, when the language is not used all time-tables are extended, even if the judgment expressly disposes of all issues between all parties. Judges would usually insist on the language when they intended finality and would certainly strike it out when they did not.

(3) Require more meaningful notice from the clerk. The clerk's notice would have to say the court has signed a judgment that disposes of all issues between all parties and is final and appealable.

(4) Extend timetables. If anyone can prove that this notice was not received, the timetables will be extended for potentially 90 more days. Thus, if the judgment lacks the required language *and* the beefed-up notice is not given, the timetables would be extended for two consecutive 90-day periods, for a total of 180 days.

PROPOSED CHANGES IN RULES 306 AND 306a
(new language in *italics*)

Rule 306. ~~Recitation~~ *Finality* of Judgment *or Order*

1. Final judgment. ~~The entry of the judgment, shall contain the full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered.~~ *At the conclusion of the litigation, the court shall render a final judgment or order.*

2. Judgment after conventional trial on merits. *A judgment rendered after a conventional trial on the merits is presumed to dispose of all claims between all parties and is presumed to be final and appealable.*

3. Other judgments and orders. *A judgment or order rendered without a conventional trial on the merits is final only if it:*

(a) expressly disposes of all claims between all parties,

(b) is the latest of two or more orders that, considered together, expressly dispose of all claims between all parties, or

(c) states with unmistakable clarity, in language placed immediately above or adjacent to the judge's signature, that it is final as to all claims between all parties and is appealable.

4. Interlocutory judgments and orders. *Any judgment or order that does not comply with paragraph (2) or (3) remains interlocutory and is not final.*

Rule 306a. Periods to Run From Signing of Judgment or Order

1. Beginning of periods. The date ~~of~~ *a* judgment or order is signed as shown of record shall determine the beginning of the periods prescribed by these rules for the court's plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order and for filing in the trial court the various documents that these rules authorize a party to file within such periods including, but not limited to, motions for new trial, motions to modify judgment, motions to reinstate a case dismissed for want of prosecution, motions to vacate judgment and requests for findings of fact and conclusions of law; but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose. *The beginning date of all such periods is extended [90] days for all final judgments or final orders that do not state with unmistakable clarity, in language placed immediately above or adjacent to the judge's signature, that the judgment or order is final as to all claims between all parties and is appealable.*

2. Date to be shown. Judges, attorneys and clerks are directed to use their best efforts to cause all judgments, decisions and orders of any kind to be reduced to writing and signed by the trial judge with the date of signing stated therein. If the date of signing is not recited in the judgment or order, it may be shown in the record by a certificate of the judge or otherwise; provided, however, that the absence of a showing of the date in the record shall not invalidate any judgment or order.

3. Notice of judgment. When the final judgment, *final order,* or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by first-class mail advising that the judgment or order was signed. *The notice of final judgment or final order must state that the court has disposed of all claims between all parties and that the judgment or order is final and appealable.* Failure to comply with the *notice*

provisions of this ~~rule~~ *paragraph* shall not affect the periods mentioned in paragraph (1) ~~of this rule~~, except as provided in paragraph (4).

4. No notice of judgment. If within twenty days after the ~~judgment or other appealable order is signed,~~ *beginning date for all periods, as determined under paragraph (1),* a party adversely affected by the judgment or order or his attorney has ~~neither~~ *not* received the notice required by paragraph (3) ~~of this rule~~ nor acquired actual knowledge of the *signed* order, then with respect to that party all the periods mentioned in paragraph (1) shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the ~~signing~~ *signed order*, whichever occurred first, but in no event shall such periods begin more than ninety days after the ~~original judgment or other appealable order~~ *beginning date as determined under paragraph (1)* .

5. Motion, notice and hearing. In order to establish the application of paragraph (4) ~~of this rule~~, the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received ~~a~~ *the* notice ~~of the judgment~~ *required by paragraph (4)* or acquired actual knowledge of the ~~signing~~ *signed judgment or order* and that this date was more than twenty days after the ~~judgment was signed.~~ *beginning date as determined under paragraph (1).*

6. Nunc pro tunc order. When a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316, the periods mentioned in paragraph (1) ~~of this rule~~ shall run from the date of signing the corrected judgment with respect to any complaint that would not be applicable to the original document.

7. When process served by publication. With respect to a motion for new trial filed more than thirty days after the judgment was signed pursuant to Rule 329 when process has

been served by publication, the periods provided by paragraph (1) shall be computed as if the judgment were signed on the date of filing the motion.

2.6 DOCUMENTS WILL BE AVAILABLE AT MEETING

May also access documents under "Publications" on SCAC Website. Look for the following documents included in title: "2.6: June Agenda":

Commentary prepared by Professor Elaine Carlson-Forcible Entry and Detainer Practice
Index to Subcommittee Proposed Amendments
Subcommittee Proposed Amendments to Rules 733-758
Subcommittee Proposed Amendment to Rule 4
Subcommittee Proposed Amendment to Rule 143a
Subcommittee Proposed Amendment to Rule 190
Subcommittee Proposed Amendment to Rule 216
Subcommittee Proposed Amendment to Rule 245
Chapter 27, Texas Property Code
Dillingham v. Putnam
The State Bar Court Rules Committee Proposed Changes to Forcible Rules

TO: SCAC MEMBERS

RE: PROPOSED AMENDMENTS TO RULES 733-758

June 15, 2001

Chairman Babcock has asked the SCAC Subcommittee for Rules 735-822 to review Tex. R. Civ. P. 742, 749b, 749c, and 751. We have reviewed all the rules pertaining to forcible entry and detainer practice, and propose a number of modifications. Please refer to the following attachments:

Attachments:

Commentary prepared by Professor Elaine Carlson-Forcible Entry and Detainer Practice
Index to Subcommittee Proposed Amendments
Subcommittee Proposed Amendments to Rules 733-758
Subcommittee Proposed Amendment to Rule 4
Subcommittee Proposed Amendment to Rule 143a
Subcommittee Proposed Amendment to Rule 190
Subcommittee Proposed Amendment to Rule 216
Subcommittee Proposed Amendment to Rule 245
Chapter 27, Texas Property Code
Dillingham v Putnam
The State Bar Court Rules Committee Proposed Changes to Forcible Rules

Commentary-Forcible Entry & Detainer Rule Modifications

A forcible entry and detainer action is brought by one claiming a superior right to possession to real property. Typically these actions are brought by a landlord against a tenant seeking possession due to a breach of the lease agreement, most often for failure to pay rent. Historically, the sole issue in a forcible action is the right to possession, although there is a limited ability to join related claims, including an action for back rent if within the jurisdiction of the court. The rationale for limiting the issues that may be tried in a forcible proceeding is to ensure a summary, speedy, simple, and inexpensive remedy for the determination of the right to possession[1]. For that reason, a forcible action is not exclusive, but cumulative, of any other remedy that the parties may have and other remedies may be the subject of an independent action.[2] A forcible judgment awarding possession is not a bar to an action for trespass, damages, waste, rent or mesne profits.[3] Nor does a forcible judgment bar a tenant's subsequent action for wrongful eviction.[4]

Subject matter jurisdiction for forcible entry and detainer actions is in the justice of the peace courts, regardless of the value of the property for which possession is sought. However, the amount in controversy jurisdiction of justice courts is limited to $5000 and justice courts lack jurisdiction to issue injunctive relief. A claim for money damages in excess of $5,000, such as for back rent, would have to be the subject of a separate lawsuit brought in a court that has jurisdiction. Thus, the res judicata maxim that all transactionally related claims must be litigated in the same proceeding does not apply to forcible actions as the plaintiff may choose to litigate separately the issue of possession from that of money damages.

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[1] *McClothlin v. Kliebert*, 672 S.W.2d 231, 232 (Tex. 1984); *Scott v. Hewitt*, 127 Tex. 31, 90 S.W.2d 816 (1936)

[2] *Holcombe v. Loringo*, 79 S.W.2d 307, 309 (Tex. 1935).

[3] Texas Property Code section 24.008.

[4] *Tallwater v. Brodnax*, 156 S.W.2d 142 (Tex. 1941); *Hanks v. Lake Towne Apts*, 812 S.W.2d 625, 627 (Tex. App.-Dallas 1991, writ denied).

The principle authorities governing forcible actions are Texas Rules of Civil Procedure 737-755 and Chapter 24 of the Texas Property Code.[5] These governing rules and statute provide for an expedited trial of forcible cases, with an appeal by trial de novo in the county court. A final judgment of a county court in an eviction suit may not be further appealed on the issue of possession unless the premises are being used for residential purposes only.[6] However, if the premises are used for residential purposes, the issue of possession may be further reviewed on appeal to the court of appeals and the supreme court.

Currently, distinctive provisions apply as to the necessity and method of superseding a forcible judgment depending upon whether the appeal is from justice court to county court or if the appeal is from county court to the court of appeals. In the latter instance, the Legislature has mandated that "A judgment of a county court may not under any circumstances be stayed pending appeal [to the court of appeals] unless, within ten days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court."[7] The amount of the supersedeas bond is to protect the appellee from loss or damage occasioned by the appeal, and consideration should be given in setting the amount of the bond to the value of rents likely to accrue during the appeal. An indigent appellant must post the bond to stay execution. There is no "pauper's affidavit" for a supersedeas bond.[8] A judgment creditor has a statutory right to have execution issued to enforce a judgment pending appeal, unless and until a valid supersedeas bond has been filed.[9] There is no requirement that supersedeas be posted to perfect the appeal to the court of appeals, but only to stay the judgment. Thus, the indigent's right to appeal is preserved.

There is a dearth of case law addressing the effect enforcing a forcible judgment pending appeal to the court of appeals when no supersedeas has been posted has on the appeal. Recently, one intermediate court held that when a tenant perfects an appeal of a county court forcible judgment to the court of appeals but does not post supersedeas, the prevailing party may obtain a writ of possession, thereby mooting the issue of possession in the forcible

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[5] However, potentially three sets of procedural rules govern forcible actions. The Texas Rules of Civil Procedure governing district and county courts also govern justice courts "insofar as they can be applied, except where otherwise specifically provided by law" or when rules 523-591 apply that provide distinctive rules of practice for the justice court. In addition, forcible actions are subject to rules 738-755. Chapter 24 of the Property Code also provides procedures for forcible entry and detainer actions.

[6] Texas Property Code sec 24.007 states "for residential purposes" but rule 755 currently says unless the premises are "used for residential purposes only". The proposed amended rule reads "for residential purposes" thus making rule 755 conform to Prop. Code Sec 24.007.

[7] Texas Property Code section 24.007.

[8] *Texas Employers' Ins. Assoc. v. Engelke,* 790 S.W.2d 93, 95 (Tex.App.--Houston [1st Dist.] 1990, orig. proceeding)

[9] Id. TEX. R. APP. P. 24 addressing suspension of enforcement of judgments pending appeal in civil cases does not include a pauper's affidavit as a method to supersede a judgment.

proceeding.[10] However, if other issues remain in controversy, the appeal is not moot and the court should proceed to adjudicate those issues.[11] Thus, for example, if the appeal involved both issues of the right to possession and a money judgment for back rent, the issuance of the writ of possession would not moot the issues pertaining to the validity of the judgment awarding or denying back rent. Further, even though the issue of possession may be mooted by the appellant tenant's failure to supersede the judgment, the issue of wrongful eviction is not mooted by issuance of a writ of possession and may be the subject of an independent action[12]. As observed above, the permissible issues that may be litigated in a forcible action are extremely limited, and for that reason a forcible judgment is not res judicata to other claims the parties may have arising out of the landlord-tenant relationship. A forcible action is not exclusive, but cumulative, of any other remedy that the parties may have.

The procedures to appeal a forcible judgment from the justice court to the county court and to stay enforcement of that judgment pending appeal are different than those discussed above for an appeal of a forcible judgment of a county court to the court of appeals. Either party may appeal the justice court's forcible judgment to the county court by filing an *appeal* bond set by the justice in an amount that will protect the appellee from damages or delay caused by the appeal and may include additional damages the appellee will suffer for withholding or defending possession of the premised during the pendency of the de novo appeal, including loss rentals, and attorneys fees incurred at the county court level[13]. The appeal bond is to be conditioned that the appellant will prosecute the de novo appeal with effect and pay all costs and damages which may be adjudged against the appellant. There is no separate provision for a supersedeas bond to be filed on the appeal from the justice court to the county court, presumptively because the appeal bond covers the damages that ordinarily would be protected by a supersedeas. However, an important distinction from a supersedeas bond is the fact that an appeal bond must be filed to perfect the appeal[14]. In a nonpayment of rent forcible case, a tenant may perfect the appeal by filing a pauper's affidavit pursuant to rule 749a and is entitled

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[10] *Kemper v. Stonegate Manor Apts., Ltd.*, 29 S.W.3d 362 (Tex. App.-Beaumont 2000, pet. dism'd w.o.j.).

[11] *Shelby Operating Co. v. City of Waskon*, 964 S.W.2d 75, 81 (Tex. App.--Texarkana 1997). The Texarkana court in discussing the doctrine of mootness observed: "A case becomes moot or abstract when it does not rest, or ceases to rest, on any existing right or fact. Several corollaries of this rule are: (1) a case is not moot if some issue is still in controversy; (2) a case becomes moot if it is impossible for the court to grant effectual relief for any reason; (3) a case can become moot by reason of new legislation or acts which supersede existing legislation. *James v. City of Round Rock,* 630 S.W.2d 466, 468 (Tex.App.-Austin 1982, no writ) (citing *Swank v. Sharp,* 358 S.W.2d 950 (Tex.Civ.App.-Dallas 1962, no writ), and *Gordon v. Lake,* 163 Tex. 392, 356 S.W.2d 138 (1962)). When a case becomes moot, the only proper judgment is one dismissing the cause. *Polk v. Davidson,* 145 Tex. 200, 196 S.W.2d 632, 633 (1946). In determining whether a case is moot, the court may consider anything that bears upon the question. *Hunt Oil Co. v. Federal Power Comm'n,* 306 F.2d 359, 361 (5th Cir.1962)."

[12] *Tallwater v. Brodnax*, 156 S.W.2d 142 (Tex. 1941); Hanks v. Lake Towne Apts. 812 S.W.2d 625, 627 (Tex. App.-Dallas 1991, writ denied).

[13] TEX. R. CIV. P. 749, 752.

[14] TEX. R. CIV. P. 749c.

to remain in possession of the premises during the pendency of the appeal to the county court if the tenant complies with rule 749b. That rule requires the indigent tenant to pay into the justice court registry one rental period's rent within five days of filing the pauper's affidavit, and to pay the rent as it becomes due into the county court registry within 5 days of the date rent is due under the rental agreement, throughout the appeal process. If the indigent tenant fails to timely pay the rent, the landlord may seek possession notwithstanding the de novo appeal.

The State Bar Court Rules Committee has suggested a series of modifications to the appeals process when an indigent tenant seeks de novo review of an adverse justice court judgment in a forcible entry and detainer action for nonpayment of rent. In particular, the State Bar Committee expressed concern over reported abuses under the current rules that afford a tenant taking an appeal five days after judgment in which to file the pauper's affidavit and 5 more days to pay one rental period's rent, guaranteeing, in some cases, 10 days free rent when the affidavit is not contested. The State Bar Committee recommends conditioning perfection of the appeal upon the indigent tenant paying one rental period's rent into the registry of the justice court, and that failing to do so would result in a writ of possession being issued in favor of the landlord.

Our sub-committee reviewed those suggestions and proposes alternative rules which, we believe, will meet the concerns expressed by the Court Rules Committee. Of central concern to the sub-committee was the current practice that requires a party appealing a justice court forcible judgment to file an appeal bond that secures the judgment, as well as rent that may accrue on appeal, attorneys fees, and any other damages caused by the appeal. The Texas Supreme Court, in *Dillingham v. Putnam*, held that conditioning an appeal upon a party filing a supersedeas bond (or other appellate security bonding the judgment) violates the Texas Open Courts[15] constitutional guarantee.[16] Art. 1, section 13, provides "All courts shall be open and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law."[17] Thus, a party has a guarantee of access to the courts[18] and a right to appeal

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[15] Every Texas Constitution has contained an open courts provision. W. Harris, Constitution of the State of Texas Annotated, 114 (1913),

[16] *Dillingham v. Putnam*,14 S.W. 303 (Tex. 1890), stating "[A] party's right to appeal to this court cannot be made to depend on his ability to give a bond which will itself secure to the party successful in the court below full satisfaction of his judgment." The Texas Supreme Court has reaffirmed the holding in Dillingham on numerous occasions most recently in *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 449 (Tex. 1993). See also *LeCroy v. Hanlon*, 713 S.W.2d 335, 340 (Tex. 1986); *Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984). For an extensive analysis of Texas jurisprudence on this issue, see Elaine A. Carlson, Mandatory Supersedeas Bond Requirements--A Denial of Due Process Rights? 39 Baylor L. Rev. 29 (1987).

[17] The Open Courts provision emanates from Chapter 40 of t he Magna Carta ("To no one will we sell, to no one will we refuse or delay, right or justice") and was adopted in response to abuses such as "the denial and delay of justice through external interference with the courts by the King and his ministers" and the requirement that writs be purchased as a precondition to access to the courts. *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986). "Judgeships were purchased and the court had a vested interest in prolonging and multiplying court proceedings because most of their income derived from fees paid by

without having to secure the judgment or post supersedeas.[19] However, should a judgment-loser appeal and fail to post appellate security, the judgment-winner may seek enforcement of the judgment.[20] The enforcement of a money judgment does not moot the appeal. [21] It appears that the issue of possession is mooted when the tenant fails to supersede and the landlord obtains issuance of a writ of possession. Notwithstanding the issuance of a writ of possession, the tenant may proceed with the appeal of an adverse forcible judgment as to "non-possession" issues. In addition, the tenant may proceed with other claims, such as a wrongful eviction action in an independent action.

A law which unreasonably denies access to Texas courts or arbitrarily or unreasonably abolishes common law causes of action is invalid under the open courts provision of the Texas Constitution.[22] The Texas Supreme Court has acknowledged that the open courts guarantee confers independent state constitutional rights[23] and have found impermissible violations under a variety of circumstances, including: requiring a party determined by a Texas agency to be in violation of environmental statutes to tender a cash deposit or post a supersedeas bond in the full amount of the penalties assessed or forfeit the right to judicial review ;[24] requiring payment of a filing fee that goes to the state general revenues was held to be an arbitrary and unreasonable interference with the right of access to the courts;[25] a statute requiring that a

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litigants." Jonathon M. Hoffman, By The Course of The Law: The Origins of the Open Courts Clause of State Constitutions, 74 Or. L. Rev. 1279 (1995). Thirty-nine states, including Texas have adopted an Open Courts provision as a part of the state constitution. The federal constitution does not contain an open courts guarantee. David Schuman, The Right to a Remedy, 65 Temp. L. Rev. 1197, 1198 n. 6, 1199 (1992).

[18] William C. Koch, Reopening Tennessee's Open Courts Clause: A Historical Reconsideration, 27 U. Mem. L. Rev. 333, 361 (1997).

[19] *Dillingham v. Putnam*,14 S.W. 303 (Tex. 1890); *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 449 (Tex. 1993).

[20] Tex. R. Civ. P. 627. See *Willis v. Keator*, 181 S.W. 556, 557 (Tex. Civ. App.-Amarillo 1915, no writ).

[21] *Cravens v. Wilson*, 48 Tex. (1877); *Employees Fin. Co. v. Lathram*, 369 S.W.2d 927 (Tex. 1963). However, subsequently, if the judgment of the trial court is reversed on appeal, the judgment creditor is liable to the appellant for the fair market value of the property seized through execution. Tex. Civ. Prac. & Rem. Code Ann. § 34.022; *Texas Trunk R. Co. v. Jackson*, 85 Tex. 605, 22 S.W. 1030 (1893), overruled other grounds, *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986).

[22] See *Lebohm v. City of Galveston*, 154 Tex. 192, 275 S.W.2d 951 (1955); LeCroy, 713 S.W.2d 335 (Tex. 1986).

[23] *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986) stating "Like the citizens of other states, Texans have adopted state constitutions to restrict governmental power and guarantee individual rights. The powers restricted and the individual rights guaranteed in the present constitution reflect Texas' values, customs, and traditions. Our constitution has independent vitality, and this court has the power and duty to protect the additional state guaranteed rights of all Texans."

[24] *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 449 (Tex. 1993).

[25] *LeCroy v. Hanlon*, 713 S.W.2d 335, 341 (Tex. 1986).

minor's medical malpractice claim be filed within two years of the injury or medical treatment violated the minor's access to courts at the age of majority.[26]

It appears that our current rules requiring a party to post an appeal bond securing a forcible judgment (and damages caused by the delay of a de novo appeal) or an indigent to put up rent in advance as a precondition to appellate review implicates the open courts guarantee. It is against this background, that the subcommittee suggests the following rule amendments.

Overview of Sub-Committee Proposal:

The subcommittee proposes the adoption of parallel provisions for supersedeas in forcible appeals from the justice court to the county court as exist for forcible appeals from the county court to the court of appeals.

Tenant who is not an indigent must post appeal bond to perfect an appeal. The appeal bond is to cover the costs incurred in the justice court.

Indigent tenant is excused from posting appeal bond, by properly proceeding as an indigent, when the same is not successfully contested.

Justice court is to make a finding of fact and include the same in the transcript sent from the justice court to the county court, of any past due rent, as well as the [fair market value] amount of one rental period's rent and the due date of such rent. Tenant (indigent or not), wishing to remain in possession pending the appeal, must post supersedeas that secures past due rent, as well as deposit into the registry of the county court the [fair market value of] rent when due (so if due monthly, rent deposit must be made monthly, so long as the appeal continues). If the tenant fails to do so, the county court judge may issue a writ of possession in favor of the landlord.

Supersedeas practices provided in TEX. R. APP. P. 24 should be adopted, insofar as feasible, in the appellate process of judgments from justice to county court, including the power of the justice court to exercise concurrent jurisdiction in reviewing questions of whether a surety is a good and sufficient surety, etc.

Summary: Make forcible appeal procedures from justice court to county appeal parallel with county to court of appeals. Require an appeal bond to cover costs (when D is appellant) or notice of appeal (when P is appellant), and appeal perfected when filing fee for county ct paid. (Does not violate open courts). Supersedeas bond (or other appellate security) is to cover judgment and interest. Rent is to be paid when due. If supersedeas is not posted or rent not paid when due, appellee may seek writ of possession, and possession issue mooted in forcible action.

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[26] *Sax v. Votteler,* 648 S.W.2d 661, 664-665 (Tex. 1983).

Rev 3 6/5/01 (6.8)

Index of Rule Changes

Existing Rule	Proposed Rule
738 May Sue For Rent	Re-worded but essentially unchanged except for adding language about contractual late charges, attorney's fees, and court costs being awarded. Contractual late charges are added because late charges are too closely linked to rent as a cause of action to justify requiring a separate action for late charges. The comment makes it clear that whenever the rules use the term forcible entry and detainer they also intend that it include a forcible detainer.
739 Citation	Gender and style changes only
740 Complainant May Have Possession	Option #1 is to repeal the entire section. The plaintiff may request a possession bond, at or after, the filing of a forcible. The tenant may file a counterbond or request a trial to be held within six days after the tenant is served (although as a practical matter this may be difficult if the tenant makes the request on the 4th or 5th day after service, because of the court's schedule). What if the tenant requests a jury trial, which would be very difficult to hold within 6 days after service? When a plaintiff/landlord requests a possession bond, the tenant will then receive two citations. The first citation is in response to the original forcible and will have an appearance date that will generally be the trial date. The next citation will be for the possession bond and will advise the tenant that he can either post a counterbond or

request a trial to be held within 6 days, and if he does neither then he will be evicted, presumably before the trial referred to in the first citation. Also if the tenant does not post a counterbond or request a trial then the sheriff or constable may evict the tenant, apparently without a writ of possession from the justice court and possibly before the actual trial referred to in the original citation. If the tenant is evicted by the sheriff or constable, is the trial moot because the tenant is now evicted and there is no apparent appeal from this procedure, and if it is not moot what is the result if a trial is held and the tenant wins and is granted a judgment for possession?
Option # 2 is to modify the rule so that there is more due process. Service of process must be by rule 742, not 742a, and the plaintiff would have to get a writ of possession from the justice court not just simply have the sheriff or constable evict the tenant without any order from the court. Still unanswered is the effect of the justice court issuing a writ of possession on a possession bond where the tenant did not post a counterbond or request a trial. Is the actual trial moot, and if not what happens if at the trial the court finds for the tenant for possession after having already granted a writ of possession on the possession bond? Option # 2 is a better solution but perhaps the best solution is to simply repeal the rule entirely.

741 Requisites Of Complaint

Deleted specific sections of the Texas Property Code in favor of a more general reference.

742 Service of Citation

Change will allow private process servers to serve citation on evictions, and will require the citation to be returned to the trial court at least one day before the trial day so that the citation is not returned after trial but yet still on the same day.

742a Service By Delivery To Premises	Change will allow a 742a service by only attempting service at the rental premises instead of all possible addresses. If the plaintiff lists other addresses then service must be attempted at all addresses listed in the complaint before 742a service is authorized. There is also a new requirement that return of the citation on a 742a service be verified.
743 Docketed	Addresses discovery in this accelerated trial schedule by allowing discovery at discretion of the judge (same language in small claims rules).
744 Demanding Jury	No change except for deleting the five dollar charge for a jury fee and replacing it with general language referring to the fee allowed by law. This is so we do not have to change the rule whenever the legislature changes the fee for a jury trial.
745 Trial Postponed	Allows trials to be continued for longer periods at request of all parties or by the court for good cause shown.
746 Only Issue	Rule was rewritten for style only and the reference to the specific section of the Property Code was deleted in order to refer to the general chapter.
747 Trial	No changes.
747a Representation By Agents	Conforms this rule to Sec. 24.011 of the Texas Property Code.
748 Judgment And Writ	This new rule has significant changes which will require JP's to have separate written judgments with findings of fact as to rent and other aspects of the landlord/tenant relationship. It also makes clear what may be awarded in a forcible judgment. These changes are necessary to dovetail with the new supersedeas procedure and for the new method of paying rent into the registry of the

court as it becomes due during the pendency of the appeal. Current rules allow the judgment to simply be recorded in the docket book without a separate written document. The new rule also clarifies that a counterclaim may not be filed in a forcible entry and detainer.

749 May Appeal

This new rule has significant changes which will set up a dual track appeal. One track will allow either party to appeal the case itself, which is found in this rule, and the other track allows a defendant to suspend the enforcement of the judgment, which is dealt with in Rule 750. A tenant will be able to appeal the judgment, but not suspend the enforcement of the judgment, by posting an appeal bond, security or deposit in the amount of the court costs. A plaintiff may appeal by filing a notice of appeal but there is no requirement to post a bond as the plaintiff will have already paid the justice court filing fees. Any party appealing must also pay the county court filing fee to the justice court.

749a Pauper's Affidavit

The old 749a is repealed and replaced with a new rule which is called Affidavit of Indigence. It replaces the old method of an indigent appealing if they cannot afford the bond, with a modernized method more in keeping with the TRAP rules. It closely follows TRAP rule 20.1 as to the information the party claiming indigency must provide. The procedure for handling affidavit of indigency motions in both justice and county court is the same although it is re-written to make it easier to follow. There is a provision for either the justice court or county court to extend the hearing for a maximum of 5 additional days.

749b Pauper's Affidavit In Non Payment of Rent Appeals

The old rule 749b is repealed with there now being no distinction between an appeal

based on a rent versus non-rent breach. Part of old rule 749b is moved to rule 750 and part to rule 754. The new rule 749b is now called Appeal Perfected. All indigent appeals would be governed by rule 749a. 749b will cover perfecting appeals and define exactly what the appellant must do to perfect an appeal and exactly what the court must do when an appeal is perfected. The new rule also makes clear that appealing the case will not suspend the enforcement of the judgment. The comment to the rule further explains that not suspending the enforcement of the judgment will cause the appeal on the issue of possession to be moot and subject the appeal to dismissal at county court.

749c Appeal Perfected

The old rule 749c is now incorporated in rule 749b. The new rule 749c is now called Form Of Appeal Bond. This appeal bond form was formerly found in the old rule 750, which has been modified to fit the new rules.

750 Suspension of Enforcement of Judgment Pending Appeal in Forcible Entry and Detainer Cases

The old rule 750 is now contained in new rule 749c. The new rule 750 is now called Suspension of Enforcement of Judgment Pending Appeal in Forcible Entry and Detainer Cases. This will set up the second track of an appeal, which is to post a supersedeas to stop the enforcement of the judgment. This is similar to TRAP rule 24.1. Sub-section (g) talks about paying rent into the registry of the county court during the pendency of the appeal. It specifies what to do if rent is not paid when due and the action that may be taken by the county court if there is default.

751 Transcript

The old rule 751 is now contained in new rule 749b, 753, and 754. The new rule is called Form of Supersedeas Bond. It sets forth a form for the supersedeas bond.

752 Damages	Changes include a mention that the trial on appeal in county court is de novo and the deletion of the last sentence talking about recovering from the sureties on the bond. The liability of sureties is now in rule 754.
753 Duty Of Clerk To Notify Parties	The new rule 753 is from the old rule 751.
753a Judgment By Default	This is from the old rule 753 except that the reference to trial is now in rule 754 and the eight day limit is now ten days for filing a written answer.
754 Blank	Now called Trial of the Case in County Court. This rule will address the trial of the case on appeal in county court. The rule deals with requesting jury trials, discovery, the sufficiency of sureties on appeal and supersedeas bonds, and setting the case for trial.
755 Writ of Possession	Addresses the conflict between Sec 24.007 Texas Property Code and this rule by changing the language for who can suspend the enforcement of a judgment in an appeal from county court from one who uses the premises as the principal residence to one who uses the premises as a residence. It also adds language from Texas Property Code Section 24.007 reflecting that a judgment of a county court may not be stayed on appeal unless a supersedeas bond is posted within ten days after the judgment is signed.
4 Computation of Time	Rule 4 defines how to calculate five day periods with respect to counting weekends and holidays. The renumbering of some of these rules necessitates this change.
143a Cost on Appeal to County Court	Proposed Rule 749, subsection (d) requires a party appealing a forcible judgment to pay to the justice court the filing fee required by the county court and the same is a condition to perfect the de novo appeal. Rule 749b.

190 Discovery Limitations	Proposed amendments to Rule 743 acknowledge that generally discovery is not appropriate in a forcible entry and detainer action, but provides the justice with discretion to allow reasonable discovery when appropriate. Thus, the prescribed discovery limits set forth in Rule 190 should not apply to forcible actions.
216 Request & Fee for Jury Trial	Rule 744 governs request and fee for jury trials in forcible entry and detainer actions in justice court , and Rule 754 governs request and jury fees for jury trials in forcible appeals in county courts. Thus, forcible entry and detainer actions should be exempted from the application of Rule 216.
245 Assignment of Cases for Trial	Forcible entry and detainer actions are subject to an accelerated time frame for trial as mandated by the legislature. Thus, Rule 245 should not apply to forcible entry and detainer actions.

SECTION 3. FORCIBLE ENTRY AND DETAINER

RULE 738. MAY SUE FOR RENT

~~A suit for rent, may be joined with an action of forcible entry and detainer, wherever the suit for rent is within the jurisdiction of the justice court. In such case the court in rendering judgment in the action of forcible entry and detainer, may at the same time render judgment for any rent, due the landlord by the renter; provided the amount thereof is within the jurisdiction of the justice court.~~

A suit for rent, contractual late charges, and attorney's fees may be joined with an action of forcible entry and detainer. The court in rendering judgment for possession, may at the same time render judgment for any rent, contractual late charges, and attorney's fees, due the landlord by the renter; provided the amount thereof is within the jurisdiction of the justice court. The justice may also award court costs against the unsuccessful party.

Notes and Comments

Source: Art. 3976, unchanged.

Notes and Comments

Comment: Whenever the term forcible entry and detainer is used in this section it is intended that it also include forcible detainer. Back rent, late charges authorized by lease or contract, and attorney's fees may be sought subject to the jurisdictional limit of the justice court.

[Comment for the committee. Late charges should be included in an eviction suit. Judicial economy dictates that a landlord not have to file for back rent in an eviction and then sue for late charges on that back rent in a separate action. I am also trying to show that late charges, attorney's fees and rent may be requested if they are within the jurisdictional limit of the court, but that costs may be awarded regardless of the amount in controversy because costs are not included within the jurisdictional limit.]

RULE 739. CITATION

When an aggrieved ~~the~~ party ~~aggrieved~~ or ~~his~~ the party's authorized agent shall file ~~his~~ a written sworn complaint, the justice shall immediately issue citation ~~directed to~~ directing the defendant or defendants ~~commanding him~~ to appear before such justice at a time and place named in such citation, such time being not more than ten days nor less than six days from the date of service of the citation.

The citation shall inform the parties that, upon timely request and payment of a jury fee no later than five days after the defendant is served with citation, the case shall be heard by a jury.

(Amended July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3977.

[Comment for the committee. Gender neutral changes]

{ Option # 1 (Repeal the entire section) }

RULE 740. ~~COMPLAINANT MAY HAVE POSSESSION~~

~~The party aggrieved may, at the time of filing his complaint, or thereafter prior to final judgment in the justice court, execute and file a possession bond to be approved by the justice in such amount as the justice may fix as the probable amount of cost of suit and damages which may result to defendant in the event that the suit has been improperly instituted, and conditioned that the plaintiff will pay defendant all such costs and damages as shall be adjudged against plaintiff.~~

~~The defendant shall be notified by the justice court that plaintiff has filed a possession bond. Such notice shall be served in the same manner as service of citation and shall inform the defendant of all of the following rules and procedures:~~

~~(a) Defendant may remain in possession if defendant executes and files a counterbond prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's bond. Said counterbond shall be approved by the justice and shall be in such amount as the justice may fix as the probable amount of costs of suit and damages which may result to plaintiff in the event possession has been improperly withheld by defendant;~~

~~(b) Defendant is entitled to demand and he shall be granted a trial to be held prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond;~~

~~(c) If defendant does not file a counterbond and if defendant does not demand that trial be held prior to the expiration of said six-day period, the constable of the precinct or the sheriff of the county where the property is situated, shall place the plaintiff in possession of the property promptly after the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond; and~~

~~(d) If, in lieu of a counterbond, defendant demands trial within said six-day period, and if the justice of the peace rules after trial that plaintiff is entitled to possession of the property, the constable or sheriff shall place the plaintiff in possession of the property five days after such determination by the justice of the peace.~~

(Amended June 16, 1943, eff. Dec. 31, 1943; July 22, 1975, eff. Jan 1, 1976; May 9, 1977, eff. Sept. 1, 1977.)

Notes and Comments

Source: Art. 3978, unchanged, except that by amendment effective December 31, 1943, the regulations as to the bond of defendant have been enlarged so as to include a case where an out-of-county officer effects service of citation and so as to make it clear that six days' time will be allowed, before possession is given the aggrieved party, within which defendant may give such bond; and other relevant changes have been made.

Changes by amendment effective January 1, 1976; The rule is rewritten to eliminate the requirement that the defendant execute a counterbond for double the amount of plaintiff's bond.

The rule is rewritten to permit a possession bond and a counterbond in the probable amount of costs and damages. The new rule requires notice to the defendant of the rights and liabilities stated in sections (a) through (d).

Amended by substitution of "five days" for "immediately" to avoid conflict with Rule 748.

[Comment for the committee. Option #1 is to repeal the rule and Option #2 is to amend it to make it somewhat easier to understand.]

{Option # 2 (Modify the section) }

RULE 740. COMPLAINANT MAY HAVE POSSESSION

The ~~party aggrieved~~ plaintiff may, at the time of filing his complaint, or thereafter prior to ~~final judgment~~ trial in the justice court, execute and file a possession bond to be approved by the justice in such amount as the justice may fix as the probable amount of cost of suit and damages which may result to defendant in the event that the suit has been improperly instituted, and conditioned that the plaintiff will pay defendant all such costs and damages as shall be adjudged against plaintiff.

The defendant shall be notified by the justice court that plaintiff has filed a possession bond. Such notice ~~shall~~ must be served on a defendant under Rule 742 in the same manner as service of citation and shall inform the defendant of all of the following rules and procedures:

(a) Defendant may remain in possession if;

(1) defendant executes and files a counterbond prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's bond. Said counterbond shall be approved by the justice and shall be in such amount as the justice may fix as the probable amount of costs of suit and damages which may result to plaintiff in the event possession has been improperly withheld by defendant; or

(2) ~~Defendant~~ defendant ~~is entitled to~~ demands ~~and he shall be granted~~ a trial by judge ~~to~~ which must be held prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond;

(b) If defendant does not file a counterbond and if defendant does not demand that trial be held prior to the expiration of said six-day period, the ~~constable of the precinct or the sheriff of the county where the property is situated, shall place the plaintiff in possession of the property promptly~~ plaintiff may request a writ of possession from the justice court after the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond; and

(c) If, in lieu of a counterbond, defendant demands trial within said six-day period, and if the justice of the peace rules after trial that plaintiff is entitled to possession of the property, the ~~constable or sheriff shall place the plaintiff in possession of the property~~ justice court may issue a writ of possession five days after such determination by the justice of the peace.

(d) Whenever a justice court issues a writ of possession under this rule a defendant may appeal in the same manner as a traditional forcible entry and detainer trial.

Notes and Comments

A defendant must be served with a possession bond under Rule 742 only, not under Rule 742a. The sheriff or constable can no longer place a plaintiff in possession without a writ of possession from the justice court.

RULE 741. REQUISITES OF COMPLAINT

The complaint shall describe the lands, tenements or premises, the possession of which is claimed, with sufficient certainty to identify the same, and it shall also state the facts which entitled the complainant to the possession and authorize the action under Chapter 24 of the ~~Sections 24.001-24.004,~~ Texas Property Code.

(Amended Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3979, unchanged.
Change by amendment effective April 1, 1984; Corrective.

[Comment for the committee. This prevents having to amend the rules if the Property Code is renumbered.]

RULE 742. SERVICE OF CITATION

(a) Person Authorized to Serve Citation in Forcible Entry and Detainer Actions.
Persons authorized to serve citation in Forcible Entry and Detainer actions include (1) any sheriff or constable or other person authorized by law or, (2) any person authorized by law or written order of the court who is not less than 18 years of age. No person who is a party to, or interested in the outcome of a suit shall serve any process.

(b) Method of Service of Citation
The officer ~~receiving such citation shall execute the same~~ or other person authorized to serve citation shall execute the citation by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at ~~his usual place of abode~~ the rental premises at issue, at least six days before the return day ~~thereof~~ for the citation. ~~and on or before the day assigned for trial~~ The person serving the citation ~~he~~ shall return ~~such~~ the citation, noting the action taken thereon, ~~with his action written thereon~~, to the justice who issued the ~~same~~ citation at least one day before the appearance day named in the citation.

(Amended Aug. 18, 1947, eff. Dec 31, 1947.)

Notes and Comments

Source: Art 3980, with minor textual change.

[Comment for the committee. This will conform service of citation in evictions to service for all other civil suits in Texas. The requirement that the citation be returned at least one day prior to trial will prevent the citation being returned after the time set for trial although on the same day.]

RULE 742a. SERVICE BY DELIVERY TO PREMISES

If the sworn complaint lists ~~all home an work addresses~~ the address of the premises at issue as well as any other alternate addresses of the defendant or defendant's as contained in a written lease agreement, ~~of the defendant which are known to the person filing the sworn complaint and if it states that such person knows of no other home or work addresses of the defendant in the county where the premises are located~~, and if service of citation cannot be effected under Rule 742 then service of citation may be by delivery to the rental premises ~~in question~~ at issue as follows:

If the officer or other person authorized to serve citation in forcible entry and detainer actions ~~receiving such citation~~ is unsuccessful in serving ~~such~~ citation under Rule 742, the officer or other authorized person shall no later than five days after receiving such citation execute a sworn statement based on personal knowledge, confirming that ~~the officer has made~~ diligent efforts have been made to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located as may be shown on the sworn complaint, stating the times and places of attempted service. Such sworn statement shall be filed ~~by the officer~~ with the justice ~~who shall promptly consider the sworn statement of the officer~~. After promptly considering the sworn statement ~~of the officer~~ the justice may then authorize service by written order ~~according to the following~~ as follows:

(a) The officer or other authorized person shall place the citation inside the premises ~~by placing it~~ through a door mail chute or by slipping it under the ~~front door~~ main entry door to the

premises; and if neither method is possible or practical, ~~the officer shall~~ to securely affix the citation to the ~~front door or~~ main entry door to the premises; and

(b) The officer or other authorized person shall that same day ~~or the next day~~ deposit in the mail a true copy of such citation with a copy of the sworn complaint attached thereto, addressed to the defendant at the premises in question and sent by first class mail; and

(c) The officer or other authorized person shall note on the return of such citation the date of delivery under (a) above and the date of mailing under (b) above. The return of the citation by an authorized person shall be verified; and

(d) Such delivery and mailing to the premises shall occur at least six days before the return day of the citation; and ~~on or before~~ at least one day before the appearance day named in the citation ~~assigned for trial~~. The officer or other authorized person accomplishing service ~~he~~ shall return such citation noting ~~with his~~ the action taken ~~written~~ thereon, to the justice who issued the same.

It shall not be necessary for the aggrieved party or ~~his~~ the party's authorized agent to make a request for or motion for alternative service pursuant to this rule.

(Added April 15, 1982, eff. Aug. 15, 1982.)

Notes and Comments

This is a new rule.

[Comment for the committee. This will conform service of citation under 742a with service under Rule 742. It will also relieve the landlord of the requirement of putting down all possible addresses of the defendant for the process server to attempt service at before a request for service under Rule 742a can be made. The best address in which to serve a defendant for an eviction is generally at the premises in question. It will also require the process server to get the citation back to the court at least one day prior to trial. If the trial is set for 9am and the process server doesn't get the citation back until 3pm then it doesn't do much good as the trial will have been rescheduled even though the process server will have technically complied with the law. This change will also require that the server file a verified return of citation. Another change is that the server mails the citation on the same day it is attached to or slipped through the door. This solves the problem of how you calculate the earliest trial date under sub-section (d) [i.e. do you calculate from the date of delivery or the date of mailing?] and it gets the mailed citation to the defendant quicker by 1 day.

RULE 743. DOCKETED

The cause shall be docketed and tried as other cases. If the defendant shall fail to enter an appearance upon the docket in the justice court or file answer before the case is called for trial, the allegations of the complaint may be taken as admitted and judgment by default entered

accordingly. The justice shall have authority to issue subpoenas for witnesses to enforce their attendance, and to punish for contempt.

Generally, discovery is not appropriate in forcible entry and detainer actions, however, the justice has the discretion to allow reasonable discovery.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947.)

Notes and Comments

Source: Art. 3981, unchanged.

[Comment for the committee: Some provision must be made for discovery although applying the entire discovery rules for forcible entry and detainer cases is not reasonable. This language is similar to the language in Chapter 28 of the Government Code providing for reasonable discovery in small claims court, therefore the justice courts will be familiar with this terminology.]

RULE 744. DEMANDING JURY

Any party shall have the right of trial by jury, by making a request to the court on or before five days from the date the defendant is served with citation, and by paying ~~a~~ the jury fee ~~of five dollars~~ required by law for requesting a jury trial in justice court. Upon such request, a jury shall be summoned as in other ~~cases in~~ justice court proceedings.

(Amended July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art 3982, unchanged.

[Comment for the committee. See comment at the end regarding Rule 4]

RULE 745. TRIAL POSTPONED

For good cause shown, supported by affidavit of either party, the trial may be postponed for a period not exceeding ~~six~~ seven days. The trial may be postponed for a longer period upon the agreement of all parties provided such agreement is made in writing and filed with the court, or if the agreement is made in open court.

Notes and Comments

Source: Art 3983, unchanged.

[Comment for the committee. Many JP courts hold evictions only one day a week and it is generally on the same day each week, therefore being able to continue a case for only 6 days is

often inconvenient for the court. There are some cases where both parties would like a longer continuance in order to further prepare or for settlement discussions.

RULE 746. ONLY ISSUE

~~In a case of forcible entry or of forcible detainer under Sections 24.001-24008, Texas Property Code, the only issue shall be as to the right to actual possession and the merits of the title shall not be adjudicated.~~

Except as provided in rule 738, the only issue in a forcible entry and detainer action under Chapter 24 of the Texas Property Code is the right to actual possession and the merits of the title shall not be adjudicated.

(Amended Dec. 5, 1983, eff. April 1, 1984; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3984, with minor textual change.

Change by amendment effective April 1, 1984: Corrective.

[Comment for the committee. This is a housekeeping change so we will not have to amend the rules if the property code is renumbered. Also by eliminating the word only perhaps we clear up some confusion about what can be tried in an eviction action. Rule 746 now seems to be in conflict with rules 738 and 748. Striking only makes it more consistent.

RULE 747. TRIAL

If no jury is demanded by either party, the justice shall try the case. If a jury is demanded by either party, the jury shall be impaneled and sworn as in other cases; and after hearing the evidence it shall return its verdict in favor of the plaintiff or the defendant as it shall find. (Amended June 16, 1943, eff. Dec. 31, 1943; June 10, 1980, eff. Jan 1, 1981.)

Notes and Comments

Source: Art. 3985.

Change by amendment effective January 1, 1981: The last sentence of the former rule is deleted because it is the same provision as the second sentence of Rule 743.

RULE 747a. REPRESENTATION BY AGENTS

In forcible entry and detainer cases for non-payment of rent or holding over beyond the rental term, the parties may represent themselves or be represented by their authorized agents, who

need not be attorneys. ~~in justice court~~ In any forcible entry and detainer suit in justice court, an authorized agent requesting or obtaining a default judgment need not be an attorney.

(Added April 15, 1982, eff. Aug. 15, 1982.)

Notes and Comments

This is a new rule.

[Comment for the committee. This will conform Rule 747a to Chapter 24.011 Texas Property Code.

RULE 748. JUDGMENT AND WRIT

If the judgment or verdict is ~~be~~ in favor of the plaintiff, the justice shall give judgment for plaintiff for possession of the premises, and costs. The justice may also give judgment for ~~damages~~ the plaintiff for back rent, contractual late charges and attorney's fees, if sought and established by proof, and provided that such claims are within the jurisdiction of the court. ~~and he shall award his a writ of possession~~. If the judgment or verdict is ~~be~~ in favor of the defendant, the justice shall give judgment for defendant against the plaintiff for costs and for possession of the premises. The justice may also award a defendant who prevails against the plaintiff in the issue of possession, a judgment for attorney's fees if authorized and established by proof, and provided that such claim is within the jurisdiction of the court. ~~and any damages~~. If the judgment is for the plaintiff for possession, the justice shall issue a writ of possession except that no ~~No~~ writ of possession shall issue until the expiration of five days from the ~~time~~ day the judgment is signed.

(a) A forcible entry and detainer judgment shall be in writing in a separate document and contain the full names of the parties, as stated in the pleadings, and state for and against whom the judgment is rendered. The judgment shall recite who is awarded:
(1) possession of the premises:
(2) back rent, if any, and contractual late charges, if any, and in what amount.
(3) attorney's fees, if any, and in what amount;
(4) court costs and in what amount.

(b) A forcible entry and detainer judgment shall contain findings of fact which must include the following:
(1) whether there is an obligation to pay rent on the part of the defendant;
(2) a determination of the rent paying period;
(3) a determination of the day rent is due;
(4) a determination of the amount of rent due each rent paying period, and if the rental agreement provides that all or part of the tenant's rental obligation is subsidized by the government then a determination as to how much rent is to be paid by the tenant and how much rent is to be paid by the federal government;
(5) a determination of the date through which the judgment for back rent, and contractual late charges is calculated.

(c) If there is no obligation on the part of the tenant to pay rent then the judge shall make a finding as to the fair market rental value of the premises per month as if there was an obligation to pay rent.

Notes and Comments

Comment: The main issue in a forcible entry and detainer action is possession, however a plaintiff may join a claim for rent, contractual late charges, costs, and attorney's fees to the issue of possession. The rules also allow a defendant who prevails to recover any costs and attorney's fees to which they are entitled but a defendant may not file a counterclaim. Recovery under any other grounds is not permitted under this section. This amendment to the rule also sets out a requirement that judgments in a forcible entry and detainer case be in writing in a separate document and that the judgment contains specific information, including findings of fact about the rent. This is necessary in order to determine the amount of the appeal bond and the supersedeas bond, and for the county court to determine when and how much rent the tenant/appellant should pay into the registry of the court when the appeal is pending in county court.. Part (c) requires a finding by the court of the fair market rental value of the premises if there is no contractual obligation for the defendant to pay rent. This is necessary, for example, where a tenant at sufferance who holds over after the termination of an executory contract or after a foreclosure, or someone who has entered the real property of another without legal authority, (see Chapter 24 of the Texas Property Code).

(Amended July 26, 1960, eff. Jan. 1, 1961; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan 1, 1981; July 15, 1987, eff. Jan 1, 1988.)

Notes and Comments

Source: Art. 3986.

Change: Elimination of verdict of "guilty" or "not guilty."

Change by amendment effective January 1, 1961: The time within which writ of restitution to issue changed from two days to five days.

Changes by amendment effective January 1, 1976; The amendments authorize judgments for costs and damages which Rule 740 protects.

Change by amendment effective January 1, 1981; Changed so that time runs from the date judgment is signed.

[Comment for the committee. This will clarify what a prevailing plaintiff or defendant is entitled to if they are successful. We have some defendants who try to file a counterclaim on evictions which I don't think is contemplated under the rules. Since a forcible entry and detainer does not bar a tenant from filing a suit for trespass, damages, waste, mesne profits or any other cause of action the inability to file a counterclaim in a forcible will not harm the tenant. This will also require for the first time a separate written judgment which contains information which will be needed in setting an appeal or supersedeas bond and in calculating how much rent will need to be paid into the registry of the court during the pendency of the appeal)

RULE 749. MAY APPEAL

~~In appeals in forcible entry and detainer cases, no motion for new trial shall be filed.~~

~~Either party may appeal from a final judgment in such case, to the county court of the county in which the judgment is rendered by filing with the justice within five days after the judgment is signed, a bond to be approved by said justice, and payable to the adverse party, conditioned that he prosecute his appeal with effect, or pay all costs and damages which may be adjudged against him.~~
~~Within five days following the filing of such bond, the party appealing shall give notice as provided in Rule 21a of the filing of such bond to the adverse party. No judgment shall be taken by default against the adverse party in the court to which the cause has been appealed without first showing substantial compliance with this rule.~~

~~The justice shall set the amount of the bond to include the items enumerated in Rule 752.~~

(a) All motions to set aside a forcible entry and detainer judgment or for a new trial shall be made within 1 day after the judgment is signed. The filing of a motion to set aside a judgment or for a new trial does not extend the deadline to perfect an appeal under these rules.

(b) A defendant may appeal from a final judgment in a forcible entry and detainer, to the county court of the county in which the judgment is signed by filing with the justice, not more than five days after the judgment is signed, an appeal bond, deposit, or security to be approved by said justice. The appeal from a judgment for court costs, back rent, late charges, attorney's fees and possession may be made by posting an appeal bond, deposit, or security in an amount equal to the court costs incurred in justice court.

(c) A plaintiff may appeal from a final judgment in a forcible entry and detainer, to the county court of the county in which the judgment is signed by filing a written notice of appeal with the justice not more than five days after the day the judgment is signed. The notice of appeal must identify the trial court, plaintiff, defendant and the cause number, and state that the plaintiff desires to appeal. The notice of appeal must be signed by the plaintiff or the plaintiff's authorized agent.

(d) The party appealing the judgment must also pay to the justice court, the filing fee required by that county to appeal a case to county court. The court will forward the filing fee to the county clerk along with all other papers in the case. The filing fee must be made payable to the county clerk of the county in which the case was heard.

(e) If an appeal bond is posted it must meet the following criteria:
(1) It must be in an amount required by this rule,
(2) It must be made payable to the county clerk of the county in which the case was heard,
(3) It must be signed by the judgment debtor or the debtor's authorized agent,

(4) It must be signed by a sufficient surety or sureties as approved by the court. If an appeal bond is signed by a surety or sureties, then the court may, in its discretion, require evidence of the sufficiency of the surety or sureties prior to approving the appeal bond.

(f) Deposit in lieu of appeal bond. Instead of filing a surety appeal bond, a party may deposit with the trial court:
(1) cash;
(2) a cashier's check payable to the county clerk of the county where the case was heard, drawn on any federally insured and federally or state chartered bank or savings and loan association; or
(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(g) Any motions challenging the sufficiency of the appeal bond or deposit in lieu of appeal bond may be filed with the county court.

(h) Within five days following the filing of an appeal bond by a defendant, or the filing of a notice of appeal by a plaintiff, the party appealing shall give notice in accordance with Rule 21a of the filing of an appeal bond or the filing of a notice of appeal to the adverse party. No judgment shall be taken by default against the adverse party in the county court to which the cause has been appealed without first showing substantial compliance with this subsection.

(Amended Aug. 18, 1947, eff. Dec. 31, 1947; July 22, 1975, eff. Jan. 1, 1976; June 10, 1980, eff. Jan 1, 1981; July 15, 197, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art. 3987, unchanged.

Changes by amendment effective January 1, 1976: The first sentence has been moved to that place from within the rule as previously written. The amount of the appeal bond is fixed by the justice as prescribed by Rule 752.

Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.

Comment on 1988 Change: The purpose of this amendment is to give notice to the appellee that an appeal of the case from the justice court has been perfected in the county court.

(Note to committee: This rule is rewritten to allow a two-part method of appeal. Rule 749 sets forth what a plaintiff and defendant must do to appeal the judgment, including the notice, amount of the appeal bond or contents of the notice of appeal. Rule 749a talks about the affidavit of indigence which replaces the old pauper's affidavit. The affidavit of indigence may be used to avoid posting the appeal bond but may not be used to suspend the enforcement of the judgment. Rule 749b discusses what must occur for an appeal to be perfected and rule 749c contains the form of the appeal bond, which was formerly found in rule 750.)

RULE 749a. PAUPER'S AFFIDAVIT

If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 749, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the filing of such affidavit and notice thereof to the opposite party or his attorney of record by any officer of the court or party to the suit, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence either than by affidavit above referred to. When a pauper's affidavit is timely contested by the appellee, the justice shall hold and rule on the matter within five days.

If the justice of the peace disapproves the pauper's affidavit, appellant may, within five days thereafter bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing, not later than five days, and shall hear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case.

A pauper's affidavit will be considered approved upon one of the following occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit.

No writ of possession may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 within five days thereafter. If no appeal bond is filed within five days, a writ of possession may issue.

(Added May 9, 1977, eff. Sept. 1, 1977; amended June 10, 1980, eff. Jan. 1, 1981; April 245, 1990 amendment withdrawn Sept. 4, 1990, and rule amended eff. retroactively to Sept. 1, 1980.)

This is a new rule. It substantially tracks Rule 572.

Notes and Comments

Change by amendment effective January 1, 1981: Changed so that time runs from the date judgment is signed.

~~Comment to 1990 change: Proceedings on pauper affidavits are revised. The term writ of restitution is corrected to writ of possession.~~

Rule 749a Affidavit of Indigence

(a) Establishing indigence

A party who cannot pay the costs to appeal may proceed without advance payment of costs if:

(1) the party files an affidavit of indigence in compliance with this rule within five days after the judgment is signed; and

(2) the claim of indigence is not contested or, if contested, the contest is not sustained by a timely written order.

(b) Contents of affidavit.

The affidavit of indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:

(1) the nature and amount of the party's current employment income, government-entitlement income, and other income;

(2) the income of the party's spouse and whether that income is available to the party;

(3) real and personal property the party owns;

(4) cash the party holds and amounts on deposit that the party may withdraw;

(5) the party's other assets;

(6) the number and relationship to the party of any dependents;

(7) the nature and amount of the party's debts;

(8) the nature and amount of the party's monthly expenses;

(9) the party's ability to obtain a loan for court costs;

(10) whether an attorney is providing free legal services to the party;

(11) whether an attorney has agreed to pay or advance court costs.

(c) When and Where Affidavit Filed

An appellant must file the affidavit of indigence in the justice court within five days after the judgment is signed

(d) Duty of Clerk or Justice of the Peace

Upon the filing of an affidavit of indigence the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of indigence within one working day of its filing by written notification accomplished by first class mail.

(e) No contest filed

Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(f) Contest to affidavit

The appellee or county clerk, may contest the claim of indigence by filing a contest to the affidavit. The contest must be filed in the justice court within five days after the date when the notice of the filing of the affidavit was mailed by the clerk or justice of the peace to the opposing party. The contest need not be sworn.

(g) Burden of Proof

If a contest is filed, the party who filed the affidavit of indigence must prove the affidavit's allegations. If the indigent party is incarcerated at the time the hearing on a contest is held, the affidavit must be considered as evidence and is sufficient to meet the indigent party's burden to present evidence without the indigent party's attending the hearing.

(h) Hearing and decision in the trial court

(1) Notice required

If the affidavit of indigence is filed in the justice court and a contest is filed, the justice court must set a hearing and notify the parties of the setting.

(2) Time for hearing.

The justice court must either hold a hearing and rule on the matter or sign an order extending the time to conduct a hearing within five days from the date a contest is filed.

(3) Extension of time for hearing.

The time for conducting a hearing must not be extended for more than five days from the date the order is signed.

(4) Time for written decision; effect.

Unless—within the period set for the hearing---the justice court signs an order sustaining the contest, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(i) Appeal from the justice court order disapproving the affidavit of indigence

(1) No writ of possession may issue pending the hearing by the county court of the appellant's right to appeal on an affidavit of indigence.

(2) If a justice of the peace disapproves the affidavit of indigence, appellant may, within five days thereafter, bring the matter before the county court for a final decision, and , on request, the justice shall certify to the county court appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county court shall hold a hearing de novo and rule on the matter within five days from the date the matter is brought to the county court, or within that five day period, sign an order extending the time to conduct a hearing. The time for conducting a hearing must not be extended for more than five days from the date the order is signed. If the affidavit of indigence is approved by the county court, it shall direct the justice to transmit to the clerk of the county court, the transcript, records, and papers of the case. If the county court disapproves the affidavit of indigence, appellant may perfect an appeal by filing an appeal bond, deposit, or security with the justice court in the amount required by this rule within five days thereafter. If no appeal bond is filed within five days thereafter, the justice court may issue a writ of possession.

(j) Costs defined

As used in this rule, costs means:

(1) a filing fee paid in justice court to initiate the forcible entry and detainer action:

(2) any other costs sustained in the justice court; and

(3) a filing fee paid to appeal the case to the county court.

(Notice to committee: The new affidavit of indigence replaces the pauper's affidavit and generally follows the TRAP rules except for a few modifications necessary for to make the rule fit these cases. It is important to note that the approval of an affidavit of indigence only allows the case to be appealed but does not suspend the enforcement of the judgment. The procedures for filing, contesting and appealing the denial of the affidavit of indigence are essentially the same as under old rule 749a.)

~~**RULE 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS**~~

~~In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:~~

~~(1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry on rental period's rent under the terms of the rental agreement.~~

~~(2) During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.~~

~~(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.~~

~~(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.~~

~~(5) All hearings and motions under this rule shall be entitled to precedence in the county court.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977.)~~

~~**Notes and Comments**~~

~~This is a new rule.~~

Rule 749b Appeal Perfected

When an appeal bond, deposit, or security has been timely filed in conformity with Rule 749, and the filing fee required for the appeal of cases to the county court is paid, or an affidavit of indigence approved in conformity with Rule 749a, the appeal shall be perfected When an appeal has been perfected, the trial court shall make out a transcript of all the entries made on it's docket of the proceedings had in the case and immediately file the same, together with the original papers, any money in the court registry pertaining to that case, and the appeal bond, deposit, or security filed in conformity with Rule 749, or the affidavit of indigence approved in conformity with Rule 749a with the county clerk of the county in which the case was heard.

The county clerk shall docket the case and the trial shall be de novo. The county clerk shall immediately notify both appellant and appellee of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when there is no written answer on file in the justice court.

The perfection of an appeal in a forcible entry and detainer case does not suspend enforcement of the judgment. Enforcement of the judgment may proceed unless the enforcement of the judgment is suspended in accordance with rule 750. If the appeal is based on a judgment for possession and court costs only then the tenant's failure to post a supersedeas bond will allow the appellee to seek a writ of possession. Issuance of a writ of possession will cause the appeal to be moot and allow the county court in which the case is pending to dismiss the appeal.

Notes and Comments

An appeal by a tenant for rent, contractual late charges, attorney's fees, and court costs may be appealed separately from the issue of possession, and the tenant's failure to post a supersedeas bond to suspend the enforcement of judgment, such as with a writ of possession, will not moot the appeal on grounds other than possession. If the appeal is based on a judgment for possession and court costs only, then the tenant's failure to post a supersedeas bond will allow the appellee to seek a writ of possession and cause the appeal to be moot.

(Added May 9, 1977, eff. Sept. 1, 1977; amended April 15, 1982, eff. Aug. 15, 1982; April 24, 1990, eff. Sept. 1, 1990.)

Notes and Comments

Change by amendment effective August 15, 1982: This rule is amended so that one month's rent need not be paid when an appeal bond is made.

Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.

(Amended May 9, 1977, eff. Sept. 1, 1977; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)

(From old RULE 751)

Notes and Comments

Source: Art. 3989.

Amended to require immediate filing of papers and money with clerk of county court. Provides for precedence of trial, hearings, and motions.

Comment on 1988 Change: This amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in the justice court.

Comment to 1990 change: To provide for transfer of subject funds.

(Note to committee; This rule sets forth what must occur to perfect an appeal. It now includes a requirement that the filing fee for county court be paid to the justice court. As in old rule 749c it also dictates what the justice court must do when an appeal is perfected.)

~~**RULE 749c. APPEAL PERFECTED**~~

~~When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.~~

~~(Added May 9, 1977, eff. Sept. 1, 1977; amended April 15, 1982, eff. Aug. 15, 1982; April 24, 1990, eff. Sept. 1, 1990.)~~

~~**Notes and Comments**~~

~~Change by amendment effective August 15, 1982: This rule is amended so that one month's rent need not be paid when an appeal bond is made.~~

~~Comment to 1990 change: To dispense with the appellate requirement of payment of any rent into the court registry.~~

~~**RULE 750.**~~ **RULE 749c FORM OF APPEAL BOND**

The appeal bond authorized in the preceding article may be substantially as follows:

_____ , Plaintiff	"The State of Texas,
vs.	"County of _____
_____ , Defendant	Cause Number _____

"~~Whereas~~ WHEREAS, in the above entitled and numbered ~~upon a writ of~~ forcible entry and detainer in the Justice Court of precinct _____ of _____ County, Texas, judgment was signed on the _____day of _____, _____ in favor of ~~A.B~~ _____ appellee., and against ~~C.D.~~ _____ appellant. ~~tried before _____, a justice of the peace of _____ county, a judgment was rendered in favor of the said A.B. on the _____day of _____, A.D. ___, and against the said C.D~~ From ~~from~~ which judgment the said ~~C.D~~ appellant, ~~has appealed~~ wishes to appeal to the county court; now, therefore, the said ~~C.D~~ appellant, and ~~his/her~~ sureties, covenant that appellant will prosecute ~~his/her~~ said appeal with effect and pay all cost and damages which may be adjudged against the appellant, provided the sureties shall not be liable in an amount greater than $_____, said amount being the amount of the bond herein.

NOW, THEREFORE, WE _____, appellant, as principal, and _____, as surety at _____ (address of surety), and_____ as surety at _____ (address of surety), acknowledge ourselves as bound to pay to _____ appellee, the sum of $ _____, conditioned that appellant shall prosecute the appeal with effect and will perform an adverse judgment final on appeal.

" Given under our hands this _____day of _____, A.D. ____."

_____

Signature of Appellant

_____

Signature of Surety

_____

Signature of Surety

(Amended July 22, 1975, eff. Jan. 1, 1976.)

Notes and Comments

Source: Art. 3988, unchanged.

Change by amendment effective January 1, 1976: The form is amended to state the limits of liability of the sureties.

(Note to committee: This form of the appeal bond has been modified. It was formerly found in rule 750 but was moved so that all rules pertaining to the appeal are found in one place.)

Rule 750 SUSPENDING ENFORCEMENT OF FORCIBLE ENTRY AND DETAINER JUDGMENT PENDING APPEAL TO COUNTY COURT

(a) In a forcible entry and detainer case an appellant who has perfected an appeal under these rules shall be entitled to suspend the enforcement of the judgment and, where applicable, stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:
(1) filing with the justice court a written agreement with the appellee for suspending enforcement of the judgment ;
(2) filing with the justice court a good and sufficient supersedeas bond;
(3) making a deposit with the justice court in lieu of a supersedeas bond; or
(4) providing alternate security as ordered by the justice court.

(b) Supersedeas Bonds
(1) must be in an amount required by this rule;
(2) must be made payable to the county clerk of the county in which the case was heard;
(3) must be signed by the appellant or the appellant's agent;
(4) must be signed by a sufficient surety or sureties as approved by the justice court.
(5) the justice court may, in its discretion require evidence of the sufficiency of the surety or sureties prior to approving the supersedeas bond.

(c) Deposit in lieu of supersedeas bond.
Instead of filing a surety supersedeas bond, a party may deposit with the justice court;
(1) cash;
(2) a cashier's check payable to the county clerk , drawn on any federally insured and federally or state chartered bank or savings and loan association; or
(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(d) Conditions of liability. The surety or sureties on a supersedeas bond, any deposit in lieu of a supersedeas bond, or any alternate security ordered by the court is subject to liability for all damages and costs that may be awarded against the debtor—up to the amount of the supersedeas bond, deposit, or security—if;
(1) the debtor does not perfect an appeal or the debtor's appeal is dismissed, and the debtor does not perform the justice court's judgment; or
(2) the debtor does not perform an adverse judgment final on appeal.

(e) Effect of supersedeas. Enforcement of a judgment must be suspended if the judgment is superseded. Enforcement begun before the judgment is superseded must cease when the judgment is superseded. If execution or a writ of possession has been issued, the justice court will promptly issue a writ of supersedeas.

(f) Amount of supersedeas bond, deposit or security. The amount of the supersedeas bond, deposit or security must be at least in an amount to cover;
(1) the amount of the judgment, and interest on the judgment for the estimated duration of the appeal;
(2) the amount of attorney's fees awarded for the appellee;

(3) the amount of rent owed by the appellant for the current rent paying period less any portion of that rent reflected in the judgment, except that if the appellant was the plaintiff in justice court then the supersedeas bond need not include any rent; or

(4) if there is no obligation on the part of the appellant to pay rent then an amount equal to the fair market value of the rent for the current month.

(5) Lesser amount The justice court may order a lesser amount than required by subsections 1-4 above if, after notice to all parties and a hearing, the justice court finds that;

(A) posting a supersedeas bond, deposit, or security in the amount required by subsections 1-4 above will irreparably harm the appellant; and

(B) that posting a supersedeas bond, deposit or security in a lesser amount will not substantially impair the appellee's ability to recover under the judgment after all appellate remedies are exhausted.

(g) Effect of appellant's not paying rent or the amount of fair market value into the registry of the county court.

(1) During the pendency of the appeal the appellant must pay rent, or the amount determined to be a fair market rental value of the premises as set forth in Rule 748, into the registry of the county court as it becomes due. If the appellant fails to make timely payments into the registry of the county court as it becomes due, the appellee may file a notice of default in the county court where the cause is pending. Upon sworn motion by the appellee, and a showing of default by the appellant in making payments into the registry of the county court as they become due, the court may issue a writ of possession. During the appeal, if a governmental agency is responsible for payment of a portion of the rent and does not pay that portion to the landlord or into the registry of the county court, the landlord may file a motion with the county court requesting that the tenant be required to pay the full amount of the rent into the county court registry as a condition for remaining in possession. After notice and hearing, the court may grant the motion only if the landlord:

(A) did not cause the agency to cease making the payments: and

(B) is not able to take an action that will cause the agency to resume making payments or to otherwise pay all or part of the rent.

(2) The county court may allow the appellee to withdraw any or all rent or the amount determined to be a fair market rental value from the county court registry upon;

(A) sworn motion and hearing, prior to final determination of the case, showing the right to receive payment;

(B) dismissal of the appeal, or

(C) order of the court upon final hearing.

(3) All hearings and motions under this rule shall be entitled to precedence in the county court.

(h) When the enforcement of the judgment has been suspended the justice court shall stay all further proceedings on the judgment and shall immediately make out a transcript of all the entries on the court's docket of the proceedings related to the suspension of the judgment; and shall immediately file same, together with the supersedeas bond, deposit, or security with the clerk of the county court. The justice court will immediately issue whatever writs of supersedeas are needed, or take other actions to suspend the enforcement of the judgment.

(i) Once the appeal has been perfected and five days have expired since the day the judgment was signed, any actions to suspend the enforcement of the judgment under this rule, or to modify an existing justice court order suspending the enforcement of the judgment, must be filed in the county court where the appeal is pending.

(j) If the appeal is perfected and the tenant does not take any actions to suspend the enforcement of the judgment within five days after the judgment was signed, or if the tenant does not pay rent into the registry of the county court as it becomes due, the county court, where the appeal is pending, may issue a writ of possession at any time.

Notes and Comments

If the tenant who perfects an appeal from an adverse judgment does not post a supersedeas bond or deposit or other security, or pay rent into the registry of the county court as it becomes due, the appellee may request a writ of possession from the county court where the case is pending at any time.

(Note to committee: This sets up the second part of an appeal, which is suspending the enforcement of the judgment by posting a supersedeas bond. There is no provision to avoid the posting of a supersedeas bond by filing an affidavit of indigence. This provision is very similar to the TRAP rules modified somewhat for these cases.)

~~**RULE 751. TRANSCRIPT**~~

~~When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers, and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.~~

~~The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.~~

~~The trial, as well as all hearing and motions, shall be entitled to precedence in the county court.~~

~~(Amended May 9, 1977, eff. Sept. 1, 1977; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.)~~

~~**Notes and Comments**~~

~~Source: Art. 3989.~~

~~Amended to require immediate filing of papers and money with clerk of county court. Provides for precedence of trial, hearings, and motions.~~

~~Comment on 1988 Change: This amendment provides due process to pro se defendants by advising them of the necessity of filing a written answer in the county court if they did not file one in the justice court.~~

~~Comment to 1990 change: To provide for transfer of subject funds.~~

Rule 751 Form of Supersedeas Bond

The supersedeas bond authorized in the preceding article may be substantially as follows:

SUPERSEDEAS BOND

"The State of Texas"
"County of _____"
"Cause No. _____"

WHEREAS, in the above entitled and numbered forcible entry and detainer in the Justice Court of Precinct _____ of _____ County, Texas, judgment was signed on the _____ day of _____, _____ in favor of _____ (plaintiff/defendant), hereinafter referred to as appellee against _____ (plaintiff/defendant), hereinafter referred to as appellant for;

____ Possession,
____ Court costs of $ _____,
____ Back rent and contractual late charges of $ _____,
____ Attorney's fees of $ _____,

together with interest thereon from the date of the judgment, at the rate of ____ percent per annum, from which judgment appellant has appealed to the county court of _____ County, Texas.

WHEREAS, appellant desires to suspend enforcement of the judgment pending determination of said appeal:

NOW, THEREFORE, WE _____ (appellant), as principal, and _____ as surety at _____ (address of surety), and _____ as surety at _____ (address of surety), acknowledge ourselves as bound to pay to _____ (appellee), the sum of $ _____, said sum being at least the amount of the judgment, interest, and costs, plus estimated interest from the date of the judgment until final disposition of the appeal, and any rent, or the fair market value of the property, currently owed during this rent paying period and not reflected in the judgment, conditioned that appellant shall prosecute the appeal with effect; and in case the judgment of the county court be against appellant, appellant shall perform its judgment, sentence or decree, and pay all such damages as the court may award against appellant up to the amount of the bond.

"Given under our hands this ____ day of _____, _____."

_____
Signature of Appellant

Signature of Surety

Signature of Surety

Notes and Comments

This is a new rule which provides a suggested form for the supersedeas bond provided by rule 750.

(Note to committee: This is a new supersedeas bond form. Most of the content of old rule 751 is now in rule 749c.)

RULE 752. DAMAGES

On the trial de novo of the cause in the county court the appellant or appellee shall be permitted to plead, prove and recover his damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal.

Damages may include but are not limited to loss of rentals during the pendency of the appeal and reasonable attorney fees in the justice and county courts provided, as to attorney fees, that the requirements of Chapter 24 ~~Section 24.006~~ of the Texas Property Code have been met. Only the party prevailing in the county court shall be entitled to recover damages against the adverse party. ~~That prevailing party shall be entitled to recover against the sureties on the appeal bond in cases where the adverse party has executed such bond.~~

Notes and Comments

Source: Art. 3990, unchanged; except that by amendment effective December 31, 1943, the rule is made to extend, in a proper case, to appellant as well as to appellee; and other relevant changes have been made.

Changes by amendment effective January 1, 1976: Costs and damages are stated by this rule rather than by various enumeration's in other rules.

~~**RULE 753. JUDGMENT BY DEFAULT**~~

RULE 753. DUTY OF CLERK TO NOTIFY PARTIES

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

RULE 753a. JUDGMENT BY DEFAULT

~~Said cause shall be subject to trial at any time after the expiration of eight full days after the date the transcript is filed in the county court.~~ If the defendant has filed a written answer in the justice court, the same shall be taken to constitute ~~his~~ the defendant's appearance and answer in the county court, and such answer may be amended as in other cases. If the defendant made no answer in writing in the justice court, and ~~if he~~ fails to file a written answer within ten ~~eight~~ full days after the transcript is filed in the county court, the allegations of the complaint may be taken as admitted and judgment by default may be entered accordingly.

(Amended June 16, 1943, eff. Dec. 31, 1943; Aug. 18, 1947, eff. Dec. 31, 1947; July 15, 1987, eff. Jan. 1, 1988.)

Notes and Comments

Source: Art 3991, with minor textual change.

RULE 754. ~~[BLANK]~~ TRIAL OF THE CASE IN COUNTY COURT

(a) The trial of a forcible entry and detainer appeal as well as all hearings and motions shall be entitled to precedence in the county court.

(b) No jury trial shall be had in any appeal of a forcible entry and detainer, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than five days in advance. The fee required by law for requesting a jury trial in county court must be deposited with the county clerk within the time for making a written request for jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

(c) Generally, discovery is not appropriate in forcible entry and detainer appeals, however, the county court has the discretion to allow reasonable discovery.

(d) The forcible entry and detainer appeal shall be subject to trial de novo at any time after the expiration of ten full days after the date the transcript is filed in the county court. The county court may set appeals of forcible entry and detainer cases for trial on written motion of any party or on the court's own motion, with reasonable notice to the parties of a first setting for trial, or by agreement of the parties.

(e) On written motion by the appellee contesting the sufficiency of the appeal bond or the

supersedeas bond, the county court may hold a hearing on the appellee's motion. If upon review of the appeal bond or the supersedeas bond, the county court should find the bond to be deficient, the court may disapprove the bond and allow the appellant 5 days from the date the bond is disapproved to correct the deficiencies with the bond. If the deficiencies are corrected then the bond may be approved. If the deficiencies on the appeal bond are not corrected then the appeal may be dismissed. If the deficiencies on a supersedeas are not corrected then the appellee may proceed with the enforcement of judgment including a writ of possession

(f) When the appellant fails to prosecute the appeal with effect or the county court renders judgment against the appellant, then the county court must render judgment against the sureties on the appellant's appeal bond or supersedeas bond, for the performance of the judgment up to the amount of the bond.

(Note to committee: This rule will provide guidance to the county court's on how to try appeals of forcible entry and detrainer cases. See 754(e) for a comment on a still unresolved issue.)

RULE 755. WRIT OF POSSESSION

The writ of possession, or execution, or both, shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable, as in other cases; and such writ of possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used ~~as the principal residence of a party~~ for residential purposes only. A judgment of a county court may not under any circumstances be stayed pending appeal unless, within ten days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court.

(Note to committee: There is a conflict between the language in the current rule 755 which says that you cannot supersede a judgment unless the premises was used as a primary residence and the language in Texas Property Code Section 24.007 which says that a judgment cannot be stayed unless the premises was used as a residence. This amendment would conform the rule to the property code. The last sentence in this rule mirrors the mandate of Section 24.007.)

(Amended July 15, 1987, Jan. 1, 1988.)

Notes and Comments

Source: Art 3993, unchanged.

Rule 4. COMPUTATION OF TIME

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included, The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purposes of the three-day periods in Rules 21 and 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 744, 748, 749, 749a, ~~749b, and 749c,~~750 and 754.

(Amended July 26, 1960, eff Jan. 1, 1961; April 24, 1990, eff. Sept. 1, 1990.)

(Note to committee: This needs to be changed because under the current rules 5 days may be longer than 6 days.
Example: A defendant is served with citation for an eviction on a Wednesday so under Rule 739 the trial can be held as early as the following Tuesday. However, under rule 744 the defendant can request a jury trial within 5 days of service, and under rule 4 you cannot count holidays, Saturdays or Sundays in that 5 day calculation. If the tenant was served on Wednesday you would count Thursday and Friday as day 1 and 2, exclude Saturday and Sunday and then count Monday as day 3, Tuesday as day 4 and Wednesday as day 5. Therefore a defendant could come in on Wednesday to timely request a jury trial under rule 744 one day after the trial could have been set under rule 739. If service occurred the Wednesday before thanksgiving then day five would be Friday of the following week or 3 days after the trial. Adding rule 744 to rule 4 would seem to solve this problem. Other changes to the rules necessitate deleting rules 749b and 749c, and adding rules 750 and 754.)

Rule 143a. COST ON APPEAL TO COUNTY COURT

If the appellant fails to pay the cost on appeal from a judgment of a justice of the peace or small claims court, except for a forcible entry and detainer case, within twenty (20) days after being notified to do so by the county clerk, the appeal shall be deemed not perfected and the county clerk shall return all papers in said cause to the justice of the peace having original jurisdiction and the justice of the peace shall proceed as though no appeal had been attempted.

(Added July 22, 1975, eff. Jan. 1, 1976.)

14 S.W. 303
(Cite as: 109 Tex. 1, 14 S.W. 303)
<KeyCite Citations>

Supreme Court of Texas.

DILLINGHAM
v.
PUTNAM.

June 24, 1890.

Appeal from district court, Grayson county

West Headnotes

Appeal and Error k374(1)
30k374(1)

Statute providing that before appeal or writ of error is allowed to receiver he shall give bond was unconstitutional. Gen.Laws 1889, p. 58; Vernon's Ann.St.Const.Tex. art. 1, § 13.

Constitutional Law k328
92k328

Gen.Laws 1889, p. 58, provides that before an appeal or writ of error is allowed to a receiver he shall give bond, with sureties, in a sum double the amount of the judgment, conditioned that he will prosecute his appeal or writ of error with effect, and will perform the judgment should it be affirmed. Held, that the act is void, as it violates Const.Tex. art. 1, § 13, which declares that "all courts shall be open, and every person, for an injury done him, * * * shall have remedy by due course of law," in that it denies to receivers the right to have judgments against them reviewed on the same terms as those prescribed in the case of other persons.

Statutes k85(1)
361k85(1)

Gen.Laws 1889, p. 58, provides that before an appeal or writ of error is allowed to a receiver he shall give bond, with sureties, in a sum double the amount of the judgment, conditioned that he will prosecute his appeal or writ of error with effect, and will perform the judgment, should it be affirmed. Held, that this is not in violation of Vernon's Ann.St. Const. art. 3, § 56, prohibiting the enactment of special laws "for the limitation of civil or criminal actions."

Statutes k107(2)
361k107(2)

Gen.Laws 1889, p. 58, purports in its title to be "An act to amend * * * an act for the appointment of receivers, and to define their powers and duties, and to regulate proceedings under such appointment of receivers." Held, that this is not violative of Vernon's Ann.St. Const. art. 3, § 35, which provides that "no bill shall contain more than one subject, which shall be expressed in its title."

***303 *2** *R. Dearmond* and *O. T. Holt*, for appellant.

W. W. Wilkins and *C. B. Randle*, for appellee.

**304 STAYTON, C. J.

The legislature at its last session enacted a statute which, in all appeals prosecuted by receivers, requires that 'before such appeal or writ of error shall be perfected or allowed such receiver shall enter into bond with two or more good and sufficient sureties, to be approved by the clerk of the court or justice of the peace, payable to the appellee or defendant in error in a sum at least double the amount of the judgment, interest, and costs, conditioned that such receiver shall prosecute his appeal or writ of error with effect; and, in case the judgment of the court to which such appeal or writ of error be taken shall be against him, that he will perform its judgment, sentence, or decree, and pay all such damages as may be awarded against him. In the event that the judgment of the court of which such appeal or error is taken shall be against such receiver, judgment shall at the same time be entered against the sureties on his said bond, and execution thereon may issue against such sureties within twenty days after the rendition of such judgment.' Gen. Laws 1889, p. 58. In this case appellant seeks to prosecute an appeal upon a bond, which binds himself and sureties for costs only, while the bond required by the statute above quoted, requires a bond that will bind principal and sureties absolutely, to satisfy the judgment in case of affirmance. The appeal is prosecuted by appellant as a receiver, and for the purpose of having revised a judgment rendered against him in his official capacity, and appellee moves to dismiss the appeal because a *supersedeas* bond has not been filed.

It is urged that the statute in question is violative of the constitution in that the act embraces more than one subject, and because it is a special law regulating

the practice or jurisdiction of the courts, or placing a limitation on civil actions. The statute quoted is found in an act entitled 'An act to amend sections 2 and 6 of chapter 131 of 'An act to provide for the appointment of receivers, and to define their powers and duties, and to regulatc proceedings under such appointment of receivers,' as passed by the twentieth legislature, and approved *3 April 2, 1887.' It is believed that the appointment, the fixing of the powers and duties of receivers, and the regulation of proceedings, when it becomes necessary that such appointments shall be made, powers exercised, and duties performed, are so intimately connected as to make an act such as that in question valid under the terms of the constitution, which provides that 'no bill * * * shall contain more than one subject, which shall be expressed in its title.' The matter of receivers or receiverships is the subject of the act, and is single in the sense of the constitution, for it is this to which the entire act applies. Receivers can only exist through the appointments of courts. Their powers must be such as the law or the order appointing may lawfully give, and the many steps through which those things can be fixed and determined are but proceedings. The purpose of the provision of the constitution cited has been so often stated that it is unnecessary to repeat it, and looking to that, the entire purpose of the act, and the past decisions of this court, we must hold that the statute in question is not violative of section 35, art. 3, of the constitution. Cattle Co. v. State. 68 Tex. 526, 4 S. W. Rep. 865. Nor is it believed that the act, within the meaning of the constitution, is a special law regulating the practice or jurisdiction of the courts, for it affects the proceedings in every receivership, and it would seem that it in no respect comes within the evil intended to be prevented by that section of the constitution which prohibits the passage of enumerated special laws. On the contrary, a proper act on this subject, as in cases of appeals by executors, administrators, guardians, and by municipal corporations created under the general law, would seem to be proper.

The section of the constitution forbidding the passage of special or local laws on enumerated subjects forbids the passage of such laws 'for limitation of civil or criminal actions,' (Const. art. 3, § 56,) but we do not understand the act in question within the meaning of the constitution to be such a limitation. We understand that section of the constitution to forbid the passage of a law which would extend or restrict the time within which an action should be brought against or in favor of one person, when upon a like cause of action a longer or shorter period of limitation is provided for persons generally of like *status*. It is suggested, however, that the act, if given effect, will in many cases deprive this court of power to exercise the jurisdiction conferred on it by the constitution, and, if this be true, the act cannot in so far be given effect. The constitution gives this court jurisdiction, coextensive with the limits of the state, to hear and determine all civil causes tried in the district courts in the exercise of the jurisdiction conferred on them by the constitution, (Const. art. 5, § 3;) and it further declares that 'all courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law,' (Id. art. 1, § 13.) This applies to a defendant as well as a plaintiff. 'Due course of law,' in a cause tried *4 in a district court, means a trial according to the settled rules of law in that court, and a further hearing in this court, if either party to the litigation desires it after a final judgment in the trial court. A law which practically takes away from either party to litigation the right to a fair and impartial trial in the courts provided by the constitution for the determination of a given controversy, denies a remedy by due course of law. That the legislature has power to regulate appeals, and to provide for the execution of such bonds as the party appealing may be able to give for the security of the adverse party, is not questioned. But a party's right to appeal to this court cannot be made to depend on his ability to give a bond which will within itself secure to the party successful in the court below full satisfaction of his judgment. Recognizing that fact, the legislature has provided that every person desiring to appeal from a judgment rendered against him in the district **305 court may appeal or prosecute a writ of error in this court, and has made most ample provision for securing the party obtaining the judgment in the benefits to result from it, and at the same time for securing the right to the other party to have the judgment of the trial court here revised. If the defeated party desire to supersede the judgment pending appeal, he is required to execute a bond which will secure the payment of the judgment and all damages that may be awarded against him. Rev. St. art. 1404. If the judgment be for the recovery of land or other property, he must execute a bond which will secure to the adverse party the rent or hire of the property, and, if he fails to execute such bonds, the process of the court may issue as though no appeal or writ of error was prosecuted, and thus the adverse party be in position at once to realize the fruits of the judgment obtained by him. Id. art. 1405. If the party during the revision of a judgment against him does not desire or is not able to give a bond that will supersede a judgment, he may appeal or prosecute a writ of error by executing a bond that will only secure

the costs of litigation; but in that case the successful party may have process and reap the full benefit of his judgment, as though no appeal or writ of error was prosecuted, (Id. art. 1400,) subject to liability to make restitution if the judgment be reversed. If the party desiring to appeal or to prosecute a writ of error is unable to pay the costs or to give security therefor, he may still have the judgment rendered against him revised in this court upon making affidavit that he is unable to pay the costs. Id. art. 1401. If a party to a suit filed in the district court is unable to pay costs, he is entitled to all process necessary to the proper prosecution of his cause, and to prosecute it without the payment of costs or giving security therefor, in all cases in which he makes affidavit of his inability to pay or give security for costs, unless, on contest, his affidavit is decided to be untrue. Id. art. 1438. Thus is the spirit of the constitution manifested in legislation, and the courts held open to the appeal of every one, whether ***5** an individual or corporation, for the law in the administration of justice makes no difference between them.

We are of opinion that an act of the legislature which makes the right of an individual or corporation to prosecute an appeal or writ of error to depend on the giving of a *supersedeas* bond, without reference to the ability or inability of such corporation or individual to give such a bond, is violative of the constitution, and the reasons why such a law should not be sustained are stronger when the party seeking the revision of a judgment against him stands in a fiduciary relation to the property in his hands, or to those interested in it. Property in the hands of a receiver is theoretically in the hands of the court that appointed him, and he has neither the power nor the right to dispose of it, except as the court may direct him to do so. The fund or property is most usually placed in his hands because of the insolvency of its owner, and for the benefit of his or its creditors, to be administered by the court as their respective legal and equitable rights may require, and, as a defendant, a receiver is not personally liable even for costs. In case a judgment is rendered against him, unless in cases in which his own wrong created the liability, he is not liable personally, and there is most frequently no one other than the creditors who are interested in the property in his hands who have any interest in prosecuting appeals or writs of error from judgments rendered against him. Such other creditors are interested in having an erroneous judgment rendered against a receiver set aside, for, if paid, in case the debtor be insolvent, the payment must diminish the fund to which all creditors must look; but must they, and, if they do not, who will, render themselves absolutely liable personally to pay the judgment as a condition on which it may be revised? If so, such legislation indirectly denies them the right to have a judgment in which they are interested revised on the same terms upon which other judgments may be. Other fiduciaries, such as executors, administrators, and guardians, are permitted to appeal or prosecute writs of error without giving any bond at all, simply because the estate from which the judgment to be revised must be paid, if affirmed, is in the custody of a court, and cannot be taken thence without its order in due course of administration. The rule has been extended even to executors acting without the control of probate courts. We do not wish to be understood to hold that hardships which might and would frequently result if the validity of such a law as that in question was sustained would furnish any reason why the courts should not enforce it, nor to hold that all fiduciaries must be placed on the same footing in reference to the terms on which appeals or writs of error may be prosecuted to this court, but to hold that a law which denies to any individual, whether acting in his own right or in a fiduciary capacity, or to a corporation, the right to appeal unless a *supersedeas* bond is executed, is violative of the constitution in that it deprives this court, if given effect, of jurisdiction conferred on it by the constitution, and ***6** deprives the party seeking revision of a judgment here of remedy by due course of law. The motion to dismiss the appeal will be overruled.

RULE 190 DISCOVERY LIMITATIONS

190.1 Discovery Control Plan Required. Except in forcible entry and detainer cases, every case must be governed by a discovery control plan as provided in this Rule. A plaintiff must allege in the first numbered paragraph of the original petition whether discovery is intended to be conducted under Level 1, 2, or 3 of this Rule.

RULE 216 REQUEST & FEE FOR JURY TRIAL

a. Request. No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.

b. Jury Fee. Unless otherwise provided by law, a fee of ten dollars if in the district court and five dollars if in the county court must be deposited with the clerk of the court within the time for making a written request for a jury trial. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet.

c. This Rule does not apply in forcible entry and detainer cases.

Notes and Comments

Comment to 2001 change: Rule 744 governs request & fee for jury trials in forcible entry and detainer cases in justice court, and Rule 754 governs request & fee for jury trials in forcible entry and detainer appeals in county court.

Rule 245. ASSIGNMENT OF CASES FOR TRIAL

The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties Noncontested cases may be tried or disposed of at any time whether set or not, and may be set at any time for any other time. The forty-five day notice required in the preceding sentence will not apply to cases set for trial in justice court, including forcible entry and detainer cases, nor will it apply to the de novo trial of appeals of forcible entry and detainer cases in county court.

A request for trial setting constitutes a representation that the requesting party reasonably and in good faith expects to be ready for trial by the date requested, but no additional representation concerning the completion of pretrial proceedings or of current readiness for trial shall be required in order to obtain a trial setting in a contested case.

(Amended July 22, 1975, eff. Jan. 1, 1975; Dec. 5, 1983, eff. April 1, 1984; April 24, 1990, eff. Sept. 1, 1990.)

VERNON'S TEXAS STATUTES AND CODES ANNOTATED

PROPERTY CODE

TITLE 4. ACTIONS AND REMEDIES

CHAPTER 24. FORCIBLE ENTRY AND DETAINER

Current through End of 1999 Reg. Sess.

§ 24.001. Forcible Entry and Detainer

(a) A person commits a forcible entry and detainer if the person enters the real property of another without legal authority or by force and refuses to surrender possession on demand.

(b) For the purposes of this chapter, a forcible entry is:

(1) an entry without the consent of the person in actual possession of the property;

(2) an entry without the consent of a tenant at will or by sufferance; or

(3) an entry without the consent of a person who acquired possession by forcible entry.

§ 24.002. Forcible Detainer

(a) A person who refuses to surrender possession of real property on demand commits a forcible detainer if the person:

(1) is a tenant or a subtenant wilfully and without force holding over after the termination of the tenant's right of possession;

(2) is a tenant at will or by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant's lease; or

(3) is a tenant of a person who acquired possession by forcible entry.

(b) The demand for possession must be made in writing by a person entitled to possession of the property and must comply with the requirements for notice to vacate under Section 24.005.

§ 24.003. Substitution of Parties

If a tenancy for a term expires while the tenant's suit for forcible entry is pending, the landlord may prosecute the suit in the tenant's name for the landlord's benefit and at the landlord's expense. It is immaterial whether the tenant received possession from the landlord or became a tenant after obtaining possession of the property.

§ 24.004. Jurisdiction

A justice court in the precinct in which the real property is located has jurisdiction in eviction suits. Eviction suits include forcible entry and detainer and forcible detainer suits.

§ 24.005. Notice to Vacate Prior to Filing Eviction Suit

(a) If the occupant is a tenant under a written lease or oral rental agreement, the landlord must give a tenant who defaults or holds over beyond the end of the rental term or renewal period at least three days' written notice to vacate the premises before the landlord files a forcible detainer suit, unless the parties have contracted for a shorter or longer notice period in a written lease or agreement. A landlord who files a forcible detainer suit on grounds that the tenant is holding over beyond the end of the rental term or renewal period must also comply with the tenancy termination requirements of Section 91.001.

(b) If the occupant is a tenant at will or by sufferance, the landlord must give the tenant at least three days' written notice to vacate before the landlord files a forcible detainer suit unless the parties have contracted for a shorter or longer notice period in a written lease or agreement. If a building is purchased at a tax foreclosure sale or a trustee's foreclosure sale under a lien superior to the tenant's lease and the tenant timely pays rent and is not otherwise in default under the tenant's lease after foreclosure, the purchaser must

give a residential tenant of the building at least 30 days' written notice to vacate if the purchaser chooses not to continue the lease. The tenant is considered to timely pay the rent under this subsection if, during the month of the foreclosure sale, the tenant pays the rent for that month to the landlord before receiving any notice that a foreclosure sale is scheduled during the month or pays the rent for that month to the foreclosing lienholder or the purchaser at foreclosure not later than the fifth day after the date of receipt of a written notice of the name and address of the purchaser that requests payment. Before a foreclosure sale, a foreclosing lienholder may give written notice to a tenant stating that a foreclosure notice has been given to the landlord or owner of the property and specifying the date of the foreclosure.

(c) If the occupant is a tenant of a person who acquired possession by forcible entry, the landlord must give the person at least three days' written notice to vacate before the landlord files a forcible detainer suit.

(d) In all situations in which the entry by the occupant was a forcible entry under Section 24.001, the person entitled to possession must give the occupant oral or written notice to vacate before the landlord files a forcible entry and detainer suit. The notice to vacate under this subsection may be to vacate immediately or by a specified deadline.

(e) If the lease or applicable law requires the landlord to give a tenant an opportunity to respond to a notice of proposed eviction, a notice to vacate may not be given until the period provided for the tenant to respond to the eviction notice has expired.

(f) The notice to vacate shall be given in person or by mail at the premises in question. Notice in person may be by personal delivery to the tenant or any person residing at the premises who is 16 years of age or older or personal delivery to the premises and affixing the notice to the inside of the main entry door. Notice by mail may be by regular mail, by registered mail, or by certified mail, return receipt requested, to the premises in question. If the dwelling has no mailbox and has a keyless bolting device, alarm system, or dangerous animal that prevents the landlord from entering the premises to leave the notice to vacate on the inside of the main entry door, the landlord may securely affix the notice on the outside of the main entry door.

(g) The notice period is calculated from the day on which the notice is delivered.

(h) A notice to vacate shall be considered a demand for possession for purposes of Subsection (b) of Section 24.002.

(i) If before the notice to vacate is given as required by this section the landlord has given a written notice or reminder to the tenant that rent is due and unpaid, the landlord may include in the notice to vacate required by this section a demand that the tenant pay the delinquent rent or vacate the premises by the date and time stated in the notice.

§ 24.0051. Procedures Applicable in Suit to Evict and Recover Unpaid Rent

(a) In a suit filed in justice court in which the landlord files a sworn statement seeking judgment against a tenant for possession of the premises and unpaid rent, personal service on the tenant or service on the tenant under Rule 742a, Texas Rules of Civil Procedure, is procedurally sufficient to support a default judgment for possession of the premises and unpaid rent.

(b) A landlord may recover unpaid rent under this section regardless of whether the tenant vacated the premises after the date the landlord filed the sworn statement and before the date the court renders judgment.

§ 24.006. Attorney's Fees and Costs of Suit

(a) Except as provided by Subsection (b), to be eligible to recover attorney's fees in an eviction suit, a landlord must give a tenant who is unlawfully retaining possession of the landlord's premises a written demand to vacate the premises. The demand must state that if the tenant does not vacate the premises

before the 11th day after the date of receipt of the notice and if the landlord files suit, the landlord may recover attorney's fees. The demand must be sent by registered mail or by certified mail, return receipt requested, at least 10 days before the date the suit is filed.

(b) If the landlord provides the tenant notice under Subsection (a) or if a written lease entitles the landlord to recover attorney's fees, a prevailing landlord is entitled to recover reasonable attorney's fees from the tenant.

(c) If the landlord provides the tenant notice under Subsection (a) or if a written lease entitles the landlord or the tenant to recover attorney's fees, the prevailing tenant is entitled to recover reasonable attorney's fees from the landlord. A prevailing tenant is not required to give notice in order to recover attorney's fees under this subsection.

(d) The prevailing party is entitled to recover all costs of court.

§ 24.0061. Writ of Possession

(a) A landlord who prevails in an eviction suit is entitled to a judgment for possession of the premises and a writ of possession. In this chapter, "premises" means the unit that is occupied or rented and any outside area or facility that the tenant is entitled to use under a written lease or oral rental agreement, or that is held out for the use of tenants generally.

(b) A writ of possession may not be issued before the sixth day after the date on which the judgment for possession is rendered unless a possession bond has been filed and approved under the Texas Rules of Civil Procedure and judgment for possession is thereafter granted by default.

(c) The court shall notify a tenant in writing of a default judgment for possession by sending a copy of the judgment to the premises by first class mail not later than 48 hours after the entry of the judgment.

(d) The writ of possession shall order the officer executing the writ to:

(1) post a written warning of at least 8 1/2 by 11 inches on the exterior of the front door of the rental unit notifying the tenant that the writ has been issued and that the writ will be executed on or after a specific date and time stated in the warning not sooner than 24 hours after the warning is posted; and

(2) when the writ is executed:

(A) deliver possession of the premises to the landlord;

(B) instruct the tenant and all persons claiming under the tenant to leave the premises immediately, and, if the persons fail to comply, physically remove them;

(C) instruct the tenant to remove or to allow the landlord, the landlord's representatives, or other persons acting under the officer's supervision to remove all personal property from the rental unit other than personal property claimed to be owned by the landlord; and

(D) place, or have an authorized person place, the removed personal property outside the rental unit at a nearby location, but not blocking a public sidewalk, passageway, or street and not while it is raining, sleeting, or snowing.

(e) The writ of possession shall authorize the officer, at the officer's discretion, to engage the services of a bonded or insured warehouseman to remove and store, subject to applicable law, part or all of the property at no cost to the landlord or the officer executing the writ.

(f) The officer may not require the landlord to store the property.

(g) The writ of possession shall contain notice to the officer that under Section 7.003, Civil Practice and Remedies Code, the officer is not liable for damages resulting from the execution of the writ if the officer executes the writ in good faith and with reasonable diligence.

(h) A sheriff or constable may use reasonable force in executing a writ under this section

§ 24.0062. Warehouseman's Lien

(a) If personal property is removed from a tenant's premises as the result of an action brought under this chapter and stored in a bonded or insured public warehouse, the warehouseman has a lien on the property to the extent of any reasonable storage and moving charges incurred by the warehouseman. The lien does not attach to any property until the property has been stored by the warehouseman.

(b) If property is to be removed and stored in a public warehouse under a writ of possession, the officer executing the writ shall, at the time of execution, deliver in person to the tenant, or by first class mail to the tenant's last known address not later than 72 hours after execution of the writ if the tenant is not present, a written notice stating the complete address and telephone number of the location at which the property may be redeemed and stating that:

(1) the tenant's property is to be removed and stored by a public warehouseman under Section 24.0062 of the Property Code;

(2) the tenant may redeem any of the property, without payment of moving or storage charges, on demand during the time the warehouseman is removing the property from the tenant's premises and before the warehouseman permanently leaves the tenant's premises;

(3) within 30 days from the date of storage, the tenant may redeem any of the property described by Section 24.0062(e), Property Code, on demand by the tenant and on payment of the moving and storage charges reasonably attributable to the items being redeemed;

(4) after the 30-day period and before sale, the tenant may redeem the property on demand by the tenant and on payment of all moving and storage charges; and

(5) subject to the previously stated conditions, the warehouseman has a lien on the property to secure payment of moving and storage charges and may sell all the property to satisfy reasonable moving and storage charges after 30 days, subject to the requirements of Section 24.0062(j) of the Property Code.

(c) The statement required by Subsection (b)(2) must be underlined or in boldfaced print.

(d) On demand by the tenant during the time the warehouseman is removing the property from the tenant's premises and before the warehouseman permanently leaves the tenant's premises, the warehouseman shall return to the tenant all property requested by the tenant, without charge.

(e) On demand by the tenant within 30 days after the date the property is stored by the warehouseman and on payment by the tenant of the moving and storage charges reasonably attributable to the items being redeemed, the warehouseman shall return to the tenant at the warehouse the following property:

(1) wearing apparel;
(2) tools, apparatus, and books of a trade or profession;
(3) school books;
(4) a family library;
(5) family portraits and pictures;
(6) one couch, two living room chairs, and a dining table and chairs;
(7) beds and bedding;
(8) kitchen furniture and utensils;
(9) food and foodstuffs;
(10) medicine and medical supplies;

(11) one automobile and one truck;
(12) agricultural implements;
(13) children's toys not commonly used by adults;
(14) goods that the warehouseman or the warehouseman's agent knows are owned by a person other than the tenant or an occupant of the residence;
(15) goods that the warehouseman or the warehouseman's agent knows are subject to a recorded chattel mortgage or financing agreement; and
(16) cash.

(f) During the first 30 days after the date of storage, the warehouseman may not require payment of removal or storage charges for other items as a condition for redeeming the items described by Subsection (e).

(g) On demand by the tenant to the warehouseman after the 30-day period and before sale and on payment by the tenant of all unpaid moving and storage charges on all the property, the warehouseman shall return all the previously unredeemed property to the tenant at the warehouse.

(h) A warehouseman may not recover any moving or storage charges if the court determines under Subsection (i) that the warehouseman's moving or storage charges are not reasonable.

(i) Before the sale of the property by the warehouseman, the tenant may file suit in the justice court in which the eviction judgment was rendered, or in another court of competent jurisdiction in the county in which the rental premises are located, to recover the property described by Subsection (e) on the ground that the landlord failed to return the property after timely demand and payment by the tenant, as provided by this section. Before sale, the tenant may also file suit to recover all property moved or stored by the warehouseman on the ground that the amount of the warehouseman's moving or storage charges is not reasonable. All proceedings under this subsection have precedence over other matters on the court's docket. The justice court that issued the writ of possession has jurisdiction under this section regardless of the amount in controversy.

(j) Any sale of property that is subject to a lien under this section shall be conducted in accordance with Sections 7.210, 9.301-9.318, and 9.501-9.507 of the Business & Commerce Code.

(j) Any sale of property that is subject to a lien under this section shall be conducted in accordance with Section 7.210 and Subchapters D and F, Chapter 9, Business & Commerce Code.

(k) In a proceeding under this section, the prevailing party is entitled to recover actual damages, reasonable attorney's fees, court costs, and, if appropriate, any property withheld in violation of this section or the value of that property if it has been sold.

§ 24.007. Appeal

A final judgment of a county court in an eviction suit may not be appealed on the issue of possession unless the premises in question are being used for residential purposes only. A judgment of a county court may not under any circumstances be stayed pending appeal unless, within 10 days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the county court. In setting the supersedeas bond the county court shall provide protection for the appellee to the same extent as in any other appeal, taking into consideration the value of rents likely to accrue during appeal, damages which may occur as a result of the stay during appeal, and other damages or amounts as the court may deem

appropriate.

§ 24.008. Effect on Other Actions

An eviction suit does not bar a suit for trespass, damages, waste, rent, or mesne profits.

§ 24.009. Renumbered

§ 24.010. [Blank]

§ 24.011. Nonlawyer Representation

In eviction suits in justice court for nonpayment of rent or holding over beyond a rental term, the parties may represent themselves or be represented by their authorized agents, who need not be attorneys. In any eviction suit in justice court, an authorized agent requesting or obtaining a default judgment need not be an attorney.

14 S.W. 303
(Cite as: 109 Tex. 1, 14 S.W. 303)
<KeyCite Citations>

Supreme Court of Texas.

DILLINGHAM
v.
PUTNAM.

June 24, 1890.

Appeal from district court, Grayson county

West Headnotes

Appeal and Error k374(1)
30k374(1)

Statute providing that before appeal or writ of error is allowed to receiver he shall give bond was unconstitutional. Gen.Laws 1889, p. 58; Vernon's Ann.St.Const.Tex. art. 1, § 13.

Constitutional Law k328
92k328

Gen.Laws 1889, p. 58, provides that before an appeal or writ of error is allowed to a receiver he shall give bond, with sureties, in a sum double the amount of the judgment, conditioned that he will prosecute his appeal or writ of error with effect, and will perform the judgment should it be affirmed. Held, that the act is void, as it violates Const.Tex. art. 1, § 13, which declares that "all courts shall be open, and every person, for an injury done him, * * * shall have remedy by due course of law," in that it denies to receivers the right to have judgments against them reviewed on the same terms as those prescribed in the case of other persons.

Statutes k85(1)
361k85(1)

Gen.Laws 1889, p. 58, provides that before an appeal or writ of error is allowed to a receiver he shall give bond, with sureties, in a sum double the amount of the judgment, conditioned that he will prosecute his appeal or writ of error with effect, and will perform the judgment, should it be affirmed. Held, that this is not in violation of Vernon's Ann.St. Const. art. 3, § 56, prohibiting the enactment of special laws "for the limitation of civil or criminal actions."

Statutes k107(2)
361k107(2)

Gen.Laws 1889, p. 58, purports in its title to be "An act to amend * * * an act for the appointment of receivers, and to define their powers and duties, and to regulate proceedings under such appointment of receivers." Held, that this is not violative of Vernon's Ann.St. Const. art. 3, § 35, which provides that "no bill shall contain more than one subject, which shall be expressed in its title."

***303 *2** *R. Dearmond* and *O. T. Holt*, for appellant.

W. W. Wilkins and *C. B. Randle*, for appellee.

**304 STAYTON, C. J.

The legislature at its last session enacted a statute which, in all appeals prosecuted by receivers, requires that 'before such appeal or writ of error shall be perfected or allowed such receiver shall enter into bond with two or more good and sufficient sureties, to be approved by the clerk of the court or justice of the peace, payable to the appellee or defendant in error in a sum at least double the amount of the judgment, interest, and costs, conditioned that such receiver shall prosecute his appeal or writ of error with effect; and, in case the judgment of the court to which such appeal or writ of error be taken shall be against him, that he will perform its judgment, sentence, or decree, and pay all such damages as may be awarded against him. In the event that the judgment of the court of which such appeal or error is taken shall be against such receiver, judgment shall at the same time be entered against the sureties on his said bond, and execution thereon may issue against such sureties within twenty days after the rendition of such judgment.' Gen. Laws 1889, p. 58. In this case appellant seeks to prosecute an appeal upon a bond, which binds himself and sureties for costs only, while the bond required by the statute above quoted, requires a bond that will bind principal and sureties absolutely, to satisfy the judgment in case of affirmance. The appeal is prosecuted by appellant as a receiver, and for the purpose of having revised a judgment rendered against him in his official capacity, and appellee moves to dismiss the appeal because a *supersedeas* bond has not been filed.

It is urged that the statute in question is violative of the constitution in that the act embraces more than one subject, and because it is a special law regulating

the practice or jurisdiction of the courts, or placing a limitation on civil actions. The statute quoted is found in an act entitled 'An act to amend sections 2 and 6 of chapter 131 of 'An act to provide for the appointment of receivers, and to define their powers and duties, and to regulatc proceedings under such appointment of receivers,' as passed by the twentieth legislature, and approved *3 April 2, 1887.' It is believed that the appointment, the fixing of the powers and duties of receivers, and the regulation of proceedings, when it becomes necessary that such appointments shall be made, powers exercised, and duties performed, are so intimately connected as to make an act such as that in question valid under the terms of the constitution, which provides that 'no bill * * * shall contain more than one subject, which shall be expressed in its title.' The matter of receivers or receiverships is the subject of the act, and is single in the sense of the constitution, for it is this to which the entire act applies. Receivers can only exist through the appointments of courts. Their powers must be such as the law or the order appointing may lawfully give, and the many steps through which those things can be fixed and determined are but proceedings. The purpose of the provision of the constitution cited has been so often stated that it is unnecessary to repeat it, and looking to that, the entire purpose of the act, and the past decisions of this court, we must hold that the statute in question is not violative of section 35, art. 3, of the constitution. Cattle Co. v. State. 68 Tex. 526, 4 S. W. Rep. 865. Nor is it believed that the act, within the meaning of the constitution, is a special law regulating the practice or jurisdiction of the courts, for it affects the proceedings in every receivership, and it would seem that it in no respect comes within the evil intended to be prevented by that section of the constitution which prohibits the passage of enumerated special laws. On the contrary, a proper act on this subject, as in cases of appeals by executors, administrators, guardians, and by municipal corporations created under the general law, would seem to be proper.

The section of the constitution forbidding the passage of special or local laws on enumerated subjects forbids the passage of such laws 'for limitation of civil or criminal actions,' (Const. art. 3, § 56,) but we do not understand the act in question within the meaning of the constitution to be such a limitation. We understand that section of the constitution to forbid the passage of a law which would extend or restrict the time within which an action should be brought against or in favor of one person, when upon a like cause of action a longer or shorter period of limitation is provided for persons generally of like *status*. It is suggested, however, that the act, if given effect, will in many cases deprive this court of power to exercise the jurisdiction conferred on it by the constitution, and, if this be true, the act cannot in so far be given effect. The constitution gives this court jurisdiction, coextensive with the limits of the state, to hear and determine all civil causes tried in the district courts in the exercise of the jurisdiction conferred on them by the constitution, (Const. art. 5, § 3;) and it further declares that 'all courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law,' (Id. art. 1, § 13.) This applies to a defendant as well as a plaintiff. 'Due course of law,' in a cause tried *4 in a district court, means a trial according to the settled rules of law in that court, and a further hearing in this court, if either party to the litigation desires it after a final judgment in the trial court. A law which practically takes away from either party to litigation the right to a fair and impartial trial in the courts provided by the constitution for the determination of a given controversy, denies a remedy by due course of law. That the legislature has power to regulate appeals, and to provide for the execution of such bonds as the party appealing may be able to give for the security of the adverse party, is not questioned. But a party's right to appeal to this court cannot be made to depend on his ability to give a bond which will within itself secure to the party successful in the court below full satisfaction of his judgment. Recognizing that fact, the legislature has provided that every person desiring to appeal from a judgment rendered against him in the district **305 court may appeal or prosecute a writ of error in this court, and has made most ample provision for securing the party obtaining the judgment in the benefits to result from it, and at the same time for securing the right to the other party to have the judgment of the trial court here revised. If the defeated party desire to supersede the judgment pending appeal, he is required to execute a bond which will secure the payment of the judgment and all damages that may be awarded against him. Rev. St. art. 1404. If the judgment be for the recovery of land or other property, he must execute a bond which will secure to the adverse party the rent or hire of the property, and, if he fails to execute such bonds, the process of the court may issue as though no appeal or writ of error was prosecuted, and thus the adverse party be in position at once to realize the fruits of the judgment obtained by him. Id. art. 1405. If the party during the revision of a judgment against him does not desire or is not able to give a bond that will supersede a judgment, he may appeal or prosecute a writ of error by executing a bond that will only secure

the costs of litigation; but in that case the successful party may have process and reap the full benefit of his judgment, as though no appeal or writ of error was prosecuted, (Id. art. 1400,) subject to liability to make restitution if the judgment be reversed. If the party desiring to appeal or to prosecute a writ of error is unable to pay the costs or to give security therefor, he may still have the judgment rendered against him revised in this court upon making affidavit that he is unable to pay the costs. Id. art. 1401. If a party to a suit filed in the district court is unable to pay costs, he is entitled to all process necessary to the proper prosecution of his cause, and to prosecute it without the payment of costs or giving security therefor, in all cases in which he makes affidavit of his inability to pay or give security for costs, unless, on contest, his affidavit is decided to be untrue. Id. art. 1438. Thus is the spirit of the constitution manifested in legislation, and the courts held open to the appeal of every one, whether ***5** an individual or corporation, for the law in the administration of justice makes no difference between them.

We are of opinion that an act of the legislature which makes the right of an individual or corporation to prosecute an appeal or writ of error to depend on the giving of a *supersedeas* bond, without reference to the ability or inability of such corporation or individual to give such a bond, is violative of the constitution, and the reasons why such a law should not be sustained are stronger when the party seeking the revision of a judgment against him stands in a fiduciary relation to the property in his hands, or to those interested in it. Property in the hands of a receiver is theoretically in the hands of the court that appointed him, and he has neither the power nor the right to dispose of it, except as the court may direct him to do so. The fund or property is most usually placed in his hands because of the insolvency of its owner, and for the benefit of his or its creditors, to be administered by the court as their respective legal and equitable rights may require, and, as a defendant, a receiver is not personally liable even for costs. In case a judgment is rendered against him, unless in cases in which his own wrong created the liability, he is not liable personally, and there is most frequently no one other than the creditors who are interested in the property in his hands who have any interest in prosecuting appeals or writs of error from judgments rendered against him. Such other creditors are interested in having an erroneous judgment rendered against a receiver set aside, for, if paid, in case the debtor be insolvent, the payment must diminish the fund to which all creditors must look; but must they, and, if they do not, who will, render themselves absolutely liable personally to pay the judgment as a condition on which it may be revised? If so, such legislation indirectly denies them the right to have a judgment in which they are interested revised on the same terms upon which other judgments may be. Other fiduciaries, such as executors, administrators, and guardians, are permitted to appeal or prosecute writs of error without giving any bond at all, simply because the estate from which the judgment to be revised must be paid, if affirmed, is in the custody of a court, and cannot be taken thence without its order in due course of administration. The rule has been extended even to executors acting without the control of probate courts. We do not wish to be understood to hold that hardships which might and would frequently result if the validity of such a law as that in question was sustained would furnish any reason why the courts should not enforce it, nor to hold that all fiduciaries must be placed on the same footing in reference to the terms on which appeals or writs of error may be prosecuted to this court, but to hold that a law which denies to any individual, whether acting in his own right or in a fiduciary capacity, or to a corporation, the right to appeal unless a *supersedeas* bond is executed, is violative of the constitution in that it deprives this court, if given effect, of jurisdiction conferred on it by the constitution, and ***6** deprives the party seeking revision of a judgment here of remedy by due course of law. The motion to dismiss the appeal will be overruled.

STATE BAR OF TEXAS

COURT RULE COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact Wording of Existing Rule:

RULE 742. SERVICE OF CITATION

The officer receiving such citation shall execute the same by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at his usual place of abode, at least six days before the return day thereof; and on or before the day assigned for trial he shall return such citation, with his action written thereon, to the justice who issued the same.

II. Proposed Rule:

RULE: 742. SERVICE OF CITATION

The officer ~~receiving such citation shall execute the same~~ or other person authorized to serve citation under Rule 103 shall execute the citation by delivering a copy of it to the defendant, or by leaving a copy of the citation with some person over the age of sixteen years, at the defendant's usual place of abode, at least six days before the return day ~~thereof~~ for the citation. ~~and~~ On or before the day assigned for trial, the person serving the citation. ~~he~~ shall return ~~such~~ the citation with his action written on it, to the justice who issued the citation.

III. Brief Statements of Reasons for Requested Changes and Advantages to be Served by Them.

The current rule dealing with Forcible, Entry and Detainer cases only provides for service of citation by an "officer." Practitioners have indicated that they would like the rule revised to allow for service by private process servers. This change would expedite service in metropolitan counties where sheriffs' offices face backlogs in serving citations.

STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

Rule 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS

In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:

(1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement.

(2) During the appeal process as rent becomes due under the rental agreement the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.

(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.

(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

II. Proposed Rule:

Rule 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS

In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises

during the pendency of the appeal, by complying with the following procedure:

(1) ~~Within five days of the date that~~ At the time the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement. Failure to pay one rental period's rent into the justice court registry will result in the appeal not being perfected and authorize the justice court to issue a writ of possession upon payment of the appropriate fee.

(2) During the appeal process as rent becomes due under the rental agreement the tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.

(3) If the tenant/appellant fails to pay the rent into the ~~court registry within the time limits proscribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of possession.~~ registry of the court as required by subparagraph (2) of this rule, the appellee may notify the court in writing of such default and request the court to issue a writ of possession. Upon receipt of the notice of default, the court shall immediately confirm with the clerk of the court that the appellent is in default and upon such confirmation shall issue a writ of possession upon payment of the appropriate fee, and order the clerk to pay all rent in the county court registry to the landlord/appellee.

(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

III. Brief Statements of Reasons for Requested Changes and Advantages to be Served by Them.

See reasons stated under Rule 751.

STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

Rule 749c. APPEAL PERFECTED

When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.

II. Proposed Rule:

Rule 749c. APPEAL PERFECTED

When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a and one rental period's rent paid into the justice court registry, the appeal shall be perfected.

III. Brief Statements of Reasons for Requested Changes and Advantages to be Served by Them.

See reasons stated under Rule 751.

STATE BAR OF TEXAS

COURT RULES COMMITTEE

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing Rule:

Rule 751. TRANSCRIPT

When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

The trial, as well as all hearings and motions, shall be entitled to precedence in the county court.

II. Proposed Rule:

Rule 751. TRANSCRIPT

When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1) <u>together with a statement of the amount of one rental period's rent and the due date of such rent</u>, with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

The trial, as well as all hearings and motions, shall be entitled to precedence in the county court.

III.Brief Statements of Reasons for Requested Changes and Advantages to be Served by Them.

These changes come at the request of one or more justices of the peace who have, for some time, wanted changes in the rules to correct abuses on the part of tenants in forcible detainer suits. If a tenant files an appeal bond and appeals the matter to county court, the amount of the bond is governed by Rule 752 and includes an amount to cover loss of rentals during the pendency of the appeal, and the landlord is protected.

If however, the tenant files a pauper's affidavit, the pauper's affidavit perfects the appeal when it is approved. The tenant has five days after judgment in which to file a pauper's affidavit and five days after filing the pauper's affidavit, to pay one rental period's rent into the registry of the court. Thus, the tenant gets ten days of free rent. If the pauper's affidavit is not contested, and therefore, becomes approved, the appeal is then perfected and the tenant may never pay a month's rental into the registry of the justice of the peace court. The tenant then remains in possession during the appeal process and may not pay any money into the registry of the county court. No writ of possession gets issued until the landlord hires a lawyer and files a motion with the country court to have the writ of possession issued. This allows the tenant at least ten and sometimes many more days of free rent, before the landlord can recover possession of the premises.

The changes proposed are designed to expedite restoring possession to the landlord, in a pauper's oath situation, if the tenant fails to pay one rental period's rent, both in the justice court and in the county court.

Rule 749c has been changed to proved that the pauper's oath appeal is not perfected until one rental period's rent is paid into the justice court registry.

Rule 749b requires such payment to be made at the time the pauper's affidavit is filed. This prevents the tenant from filing a pauper's affidavit and continuing to occupy the premises rent free, until the pauper's affidavit gets approved or disapproved. Upon failure of the tenant to pay the one rental period's rent into the registry of the court, the justice of the peace is authorized to issue a writ of possession upon payment of the appropriate fee for the issuance of such writ.

If the appeal gets perfected and the tenant fails to pay the rent as it becomes due under the rental

agreement into the registry of the county court, then the landlord only has to notify the court in writing of such default. The county judge verifies the default with the county clerk and the court is then authorized to issue a writ of possession upon payment of the appropriate fees. This eliminates the possible need for a hearing before the county court and the cost and expenses the landlord must incur to hire a lawyer to represent the landlord in the county court.

Rule 751 has also been amended to provide that the transcript must contain a statement of the amount of one rental period's rent and the due date of such rent so that the county court can ascertain whether the tenant is in default in paying the rent as it becomes due in the county court.

2.7 Rule 2 - See SCAC Web Site under "Publications"

Proposed Revisions to Recodification Draft Rule 2
as approved at November meeting of SCAC
with change proposed in June 2001
to add justice courts authorized by statute to adopt local rules:

Rule 2. Local Rules.

2.1. Exclusivity. No local rule, order, or practice can be applied in determining any matter unless it complies with the requirements of this rule.

2.2. Procedure for adoption. Each administrative judicial region, district court, county court, county court at law, ~~and~~ probate court, and any justice court authorized by statute to adopt local rules may make and amend local rules governing practice before these courts, provided:

(a) a proposed local rule or amendment is not effective until it is approved by the Supreme Court of Texas; and

(b) a proposed local rule or amendment is not effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of the attorneys practicing before the court or courts for which it is made.

2.3. Availability. The local rules must be available upon request.

2.4. Applicability.

(a) No local rule may:

(1) be inconsistent with these rules or with a rule of the administrative judicial region in which the court is located; or

(2) alter any time period provided by these rules.

(b) A local rule that would otherwise be invalid under 2.4(a) is valid if the Supreme Court order approving adoption of the rule explicitly states that it is valid notwithstanding the inconsistency.

2.8 Rule 3a – See SCAC Web Site under "Publications"

Memorandum on the Need to Amend Rule 3a

The 75th Legislature in 1997 passed a bill amending Section 75.404 of the Government Code which allowed the justice courts in Harris County, Texas to pass and implement local rules. The amendment required that all 16 justices of the peace must vote to adopt a rule, which has resulted in no local rules being adopted by the Harris County justice courts.

The 77th Legislature passed an amendment to Section 75.404 of the Government Code allowing rules to be adopted by a vote of two-thirds of the Harris County justices of the peace. This was H.B. 3662 and will be effective Sept. 1, 2001.

Therefore on Sept. 1, 2001 the Harris County justices of the peace may begin to adopt local rules. Since Rule 3a does not currently apply to the Harris County justice courts, there is no requirement that any local rules adopted be submitted to the Texas Supreme Court for review or approval. Section 75.404 of the Government Code does not require approval of any adopted local rules by the Supreme Court or any other entity.

Since it is clearly in the best interests of the administration of justice to have the Texas Supreme Court review and approve such local rules as are within its jurisdiction I request that Rule 3a be amended to resolve this issue. I understand that the SCAC approved and sent a revision of Rule 3a to the Supreme Court last November, but that no action has been taken. I have no objection to simply amending what the SCAC sent to the Supreme Court last November, unless there is a problem which may keep the Supreme Court from acting on that revision. If there is a problem then I request that we simply recommend an amendment to the current Rule 3a and send that to the Supreme Court as the only issue to consider.

Rule 3a LOCAL RULES

Each administrative judicial region, district court, county court, county court at law, probate court, and any justice court authorized by statute to adopt local rules may make and amend local rules governing practice before such courts, provided;

(1) that any proposed rule or amendment shall not be inconsistent with these rules or with any rule of the administrative judicial region in which the court is located;

(2) no time period provided by these rules may be altered by local rules;

(3) any proposed local rule or amendment shall not become effective until it is submitted and approved by the Supreme Court of Texas;

(4) any proposed local rule or amendment shall not become effective until at least thirty days after its publication in a manner reasonably calculated to bring it to the attention of attorneys practicing before the court or courts for which it is made;

(5) all local rules or amendments adopted and approved in accordance herewith are made available upon request to the members of the bar;

(6) no local rule, order, or practice of any court, other than local rules and amendments which fully comply with all requirements of this Rule 3a, shall ever be applied to determine the merits of any matter.

AN ACT

relating to the administration of the justice courts of Harris County.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Sections 75.404(d), (e), and (h), Government Code, are amended to read as follows:

(d) The presiding judge shall:

(1) preside at any session of the judges;

(2) keep a record of the decisions of the judges;

(3) appoint special or standing committees necessary for court management and administration;

(4) implement local rules, including assignment, docketing, transfer, and hearings of cases; and

(5) provide statistical and management information requested by the supreme court or the Office of Court Administration of the Texas Judicial System.

(e) If a justice of the peace in Harris County is absent or for any reason unable to preside, the presiding judge may appoint, in addition to a qualified person authorized by law, a former justice of the peace or a former county court, statutory county court, or district court judge who served as a judge in this state and who consents to the appointment as a special judge to preside for the justice of the peace. The presiding judge may designate the duration of the appointment, not to exceed 60 days, and may revoke an appointment at any time. The duties and powers of a special judge are the same as for the regular justice of the peace.

(h) A local rule may be adopted [only] by two-thirds [the unanimous] vote of the [all 16] justices of the peace.

SECTION 2. This Act takes effect September 1, 2001.

President of the Senate

Speaker of the House

I certify that H.B. No. 3662 was passed by the House on April 27, 2001, by a non-record vote.

Chief Clerk of the House

I certify that H.B. No. 3662 was passed by the Senate on May 17, 2001, by the following vote: Yeas 30, Nays 0, 1 present, not voting.

Secretary of the Senate