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THE ORIGINAL WRIT OF MANDAMUS IN THE SUPREME COURT OF TEXAS

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JURISDICTION

While the Texas Supreme Court and the Texas Courts of Civil Appeals are primarily appellate tribunals, both courts are vested with jurisdiction to issue original writs under circumstances set out in constitutional and statutory enactments. The Supreme Court and the justices thereof are expressly empowered by the Texas Constitution to issue the writs of mandamus, procedendo, certiorari, as may be necessary to enforce its jurisdiction.[1] The Texas Courts of Civil Appeals possess a similar power by virtue of statutory enactment.[2] In addition to the provision authorizing the issuance of writs to enforce its jurisdiction, the Constitution empowers the Legislature to "confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State."[3] Acting under this power, the Legislature has adopted four statutory enactments, namely, Articles 1733, 1734, 1735 and 1735a which provide:

> Art. 1733. The Supreme Court or any Justice thereof, shall have power to issue writs of procedendo, certiorari and all writs of quo warranto or mandamus agreeable to the principles of law regulating such writs, against any district judge, or Court of Civil Appeals or judges thereof, or any officer of the State Government, except the Governor.
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> Art. 1734. Said Court or any judge thereof in vacation may issue the writ of mandamus to compel a judge of the district court to proceed to trial and judgment in a cause agreeably to the principles and usages of law, returnable to the Supreme Court on or before the first day of the term, or during the session of the same, or before any judge of the said Court as the nature of the case may require.
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> Art. 1735. The Supreme Court only shall have power, authority or jurisdiction to issue the writ of mandamus or injunction or any other mandatory or compulsory writ or process against any of the

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1 TEX. CONST. art. V, § 3.
2 TEX. REV. CIV. STAT. ANN. art. 1823 (1964).
3 TEX. CONST. art. V, § 3.

officers of the executive departments of the government of this state and also the Board of County and District Road Indebtedness to order or compel the performance of any act or duty which, by the laws of this state, they, or either of them, are authorized to perform, whether such act or duty be judicial, ministerial or discretionary.

Art. 1735a. The Supreme Court or any court of civil appeals shall have jurisdiction and authority to issue the writ of mandamus, or any other mandatory or compulsory writ or process, against any public officer or officer of a political party, or any judge or clerk of an election, to compel the performance, in accordance with the laws of this state, of any duty imposed upon them, respectively, by law, in connection with the holding of any general, special, or primary election or any convention of a political party. Any proceeding seeking to obtain such a writ shall be conducted in accordance with the rules pertaining to original proceedings in the court wherein the petition is filed. When presented to a court of civil appeals, any petition pertaining to an election on an office or proposition which is voted on by the voters of the entire state shall be presented to the court of the supreme judicial district in which the respondent resides, or in which one of the respondents resides, if there is more than one, and any petition pertaining to an election on an office or proposition which is voted on by the voters of only a portion of the state shall be presented to the court of a supreme judicial district in which the territory covered by the election or a portion thereof is located. A petition presented to a court of civil appeals which pertains to a precinct or county convention shall be presented to the court of the supreme judicial district in which the precinct or county is located; a petition pertaining to a district convention shall be presented to the court of a supreme judicial district in which the district or a portion thereof is located; and a petition pertaining to a state convention shall be presented to the court of a supreme judicial district in which the respondent resides, or in which one of the respondents resides, if there is more than one.

The constitutional provision relating to the jurisdiction of the Texas Courts of Civil Appeals to issue original writs simply provides that, "Said courts [of civil appeals] shall have such other jurisdiction, original and appellate, as may be prescribed by law."[4] In addition to Article 1823 authorizing the issuance of writs to enforce its jurisdiction, the Legislature has authorized the courts of civil appeals (or any judge thereof, in vacation) to "issue the writ of mandamus to com-

4 TEX. CONST. art. V, § 3.

pel a Judge of the District or County Court to proceed to trial and judgment in a cause, returnable as the nature of the case may require."[5]

The supreme court and the courts of civil appeals have concurrent jurisdiction in certain areas. Both types of courts may issue writs of mandamus to protect their jurisdiction, order a district judge to proceed with the trial of a cause, or issue a writ in an election proceeding. The court of civil appeals, however, has the exclusive jurisdiction to order a county judge to proceed with the trial of a cause.[6] Whenever a court of civil appeals has concurrent jurisdiction with the Texas Supreme Court, the general but not invariable rule is that application for relief should be first made to the court of civil appeals and if this is not done, the supreme court may refuse to consider an application for mandamus.[7] Under extraordinary circumstances, particularly where time is an important factor, the supreme court may consider an application although no relief was first requested of a court of civil appeals.[8]

The original mandamus power of the Texas Supreme Court is much broader than that vested in either the courts of civil appeals or the court of criminal appeals. The limited mandamus power of the Texas Court of Criminal Appeals[9] is somewhat of an anachronism and is inconsistent with the civil-criminal division of jurisdiction between the two highest Texas courts. However, it is the supreme court and not the court of criminal appeals that is vested with the power to order a district judge to proceed with the trial of a criminal case.[10]

While the constitutional provision relating to the original jurisdiction of the supreme court does not expressly limit the court's authority to issue writs to those cases involving no fact issues, it has been categorically stated that, except in those cases where it is necessary to determine some factual matter relating to the court's jurisdiction,[11] the mandamus power of the court extends only to questions of law. In *Depoyster v. Baker*[12] the relator Depoyster sought mandamus

5 TEX. REV. CIV. STAT. ANN. art. 1824 (1964).

6 *Compare* TEX. REV. CIV. STAT. ANN. art. 1734 (1962) and art. 1824 (1964).

7 Houtchens v. Mercer, 119 Tex. 244, 27 S.W.2d 795 (1930); Dallas Railway & Terminal Co. v. Watkins, 126 Tex. 116, 86 S.W.2d 1081 (1935).

8 Hidalgo County Water Improvement District No. 2 v. Blalock, 157 Tex. 206, 301 S.W.2d 593 (1957); State v. Ferguson, 133 Tex. 60, 125 S.W.2d 272 (1939).

9 The writ is restricted to enforcing the jurisdiction of the court. "The Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus and under such regulations as may be prescribed by law, issue such writs as may be necessary to enforce its own jurisdiction." TEX. CONST. art. V, § 5.

10 State *ex rel* Moreau v. Bond, 114 Tex. 468, 271 S.W. 379 (1925).

11 TEX. REV. CIV. STAT. ANN. art. 1732 (1962); Smirl v. Globe Laboratories, 144 Tex. 41, 188 S.W.2d 676 (1945); Tarpley v. Epperson, 125 Tex. 63, 79 S.W.2d 1081 (1935).

12 89 Tex. 155, 34 S.W. 106 (1896).

in the Supreme Court against A. J. Baker, Commissioner of the General Land Office, to compel Baker to issue a certificate under a statute. The application was refused and the Texas Supreme Court, speaking through Mr. Justice Brown, held that a discretionary act, that is, one involving the exercise of the judgment of the Land Commissioner upon the facts and the law of the case, was involved and it was not the province of the supreme court to examine the records in the Land Commissioner's office to determine whether or not the Commissioner had arrived at a correct conclusion.

In discussing the power and authority to issue a writ of mandamus where the determination of fact issues is involved, Justice Brown pointed out that:

> This court is not provided with the means of ascertaining the facts in any controversy. It has none of the powers conferred by law upon the district court to take depositions, issue subpoenas, writs of attachment, or other process necessary to the trial of issues of fact; and in this court the right of trial by jury, which is secured by the constitution to every person demanding it, could not be accorded. We therefore conclude that it was not the intention of the framers of the constitution or the legislature to empower this court to issue writs of mandamus, except where the facts were undisputed, and the right clear and unquestioned.[13]

Since the decision in *Depoyster,* there have been a number of decisions which categorically state that the Texas Supreme Court has no power to determine fact issues in connection with an application for mandamus or other original writs.[14]

Circumstances Restricting the Use of the Writ

Mandamus will issue only in those cases where there is no other adequate remedy. Hence, there are numerous situations in which mandamus is unavailable because of this rule. When remedy by appeal is adequate, the writ will not issue.[15] And in accordance with the general rule applicable to mandamus, the writ will not lie to control discretion.[16] Only those actions which are classified as ministerial come within the ambit of mandamus.[17] The writ is not available to compel

[13] *Id.* at 160, 34 S.W. at 108.

[14] Rogers v. Lynn, 121 Tex. 467, 49 S.W.2d 709 (1932); Wooten v. Rogan, 96 Tex. 434, 73 S.W. 799 (1903).

[15] Aycock v. Clark, 94 Tex. 375, 60 S.W. 665 (1901); Smith v. Conner, 98 Tex. 434, 84 S.W. 815 (1905).

[16] Rush v. Browning, 103 Tex. 649, 132 S.W. 763 (1910).

[17] Arberry v. Beavers, 6 Tex. 457, 55 Am. Dec. 791 (1851). In Commissioner of the Gen-

a trial court to set aside an order of severance as any error that might be involved in ordering the severance could be taken by appeal.[18] Similarly, mandamus will not lie to compel a County Clerk to correct an order so as to reflect that relator had not appeared at a condemnation hearing and had received no notice of a decision and award until after the time for filing objections had expired. In this situation, the remedy is by bill of review.[19] Since the 1953 amendments to Articles 1728 and 1821, mandamus will no longer issue to compel the courts of civil appeals to certify a question of law to the supreme court for decision in a plea of privilege cause because if there is a conflict of decisions, the case may reach the supreme court by writ of error.[20] As a general rule, an original writ of mandamus will not issue from the supreme court if relief may be afforded by a district court.[21] The Texas Supreme Court does not have jurisdiction to issue an original writ of injunction except as it might be ancillary to some relief which it is authorized to grant, and mandamus will not issue commanding an officer to perform an act which he is willing to perform.[22]

EXPUNGING VOID ORDERS—ARTICLE 1733

Under the power vested in the Texas Supreme Court by the provisions of Article 1733, the writ of mandamus is commonly used to require the vacation or expunging of a *void* as distinguished from an *erroneous* order of a lower court. An order is void when issued by a court having no jurisdiction or authority to issue the same,[23] when such order is violative of some constitutional right of a party, or is issued as a result of an abuse of discretion by a judicial officer. It lies within the absolute discretion of a trial judge to grant a new trial, and a court of civil appeals has no power to control this discretion, hence an order

eral Land Office v. Smith, 5 Tex. 471, 479 (1849) Mr. Justice Wheeler pointed out the distinction between ministerial and discretionary acts:

> The distinction between ministerial and judicial and other official acts seems to be that where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but where the act to be done involves the exercising of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial.

18 Burke v. Loughridge, 314 S.W.2d 957 (Tex. Civ. App.—San Antonio 1958, no writ). The court of civil appeals also pointed out that it had no authority to grant the relief prayed for, namely, to order a trial court to set aside a severance order.

19 Littlejohn v. Carroll, 342 S.W.2d 622 (Tex. Civ. App.—Waco 1961, no writ).

20 Williams v. Murray, 162 Tex. 616, 350 S.W.2d 332 (1961).

21 Brazos River Conservation & Reclamation District v. Belcher, 139 Tex. 368, 163 S.W.2d 183 (1942).

22 Lane v. Ross, 151 Tex. 268, 249 S.W.2d 591 (1952).

23 State v. Ferguson, 133 Tex. 60, 125 S.W.2d 272 (1939).

of a court of civil appeals directing a trial judge to set aside its order granting a new trial is wholly unauthorized and the Texas Supreme Court may by mandamus order the court of civil appeals to expunge its void order.[24] A district court is not authorized to interfere with a condemnation proceeding and a mandamus ordering a vacation of an order so interfering may be rendered.[25]

A mandamus requiring a trial judge to vacate an order which is beyond the jurisdiction of the lower court or the result of an abuse of discretion has been issued in a great variety of cases. Among these are orders directing a district court to vacate an order staying proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940, when the trial court under all the circumstances of the case should have ordered a separate trial of a severable action that did not involve the person who would be entitled to a stay under the Congressional Act;[26] to vacate an order restraining a party appointed by another court as acting sheriff in an ouster proceeding from performing his duties as sheriff;[27] to vacate an order restraining a district attorney from enforcing a Sunday closing law;[28] to expunge an order directing a party to disclose her income tax returns when it appeared that the district judge had not previously examined the returns and determined what portions thereof were material to the case;[29] to require a district judge to vacate an order entered prior to the trial of a divorce suit commanding a husband to pay certain expenses and attorney's fees incurred or to be incurred by the wife, as such order was beyond the power of the court (the order was interlocutory and non-appealable and mandamus was the only available remedy);[30] to set aside an order granting a motion for new trial, which order was void because rendered after the motion for new trial had been overruled by operation of law.[31]

Under the general heading of Pre-Trial Procedure, the Texas Rules of Civil Procedure contain a number of discovery rules which may operate in a harsh and drastic manner under certain circumstances. The purpose of the rules is to implement the theory that law suits should be tried and the rights of litigants determined with all cards

24 Johnson v. Court of Civil Appeals, 162 Tex. 613, 350 S.W.2d 330 (1961).
25 State v. Giles, 368 S.W.2d 943 (Tex. Sup. 1963).
26 Womack v. Berry, 156 Tex. 44, 291 S.W.2d 677 (1956).
27 State of Texas v. Gary, 163 Tex. 565, 359 S.W.2d 456 (1962).
28 Crouch v. Craik, 369 S.W.2d 311 (Tex. Sup. 1963).
29 Crane v. Tunks, 160 Tex. 182, 328 S.W.2d 434 (1959).
30 Wallace v. Briggs, 162 Tex. 485, 348 S.W.2d 523 (1961).
31 Finlay v. Jones, 435 S.W.2d 136 (Tex. Sup. 1968). *See also*, Buttery v. Betts, 422 S.W.2d 149 (Tex. Sup. 1968).

upon the table, so to speak. Certain clauses and provisions in these discovery rules were adopted as a result of compromises between those attorneys who usually represent claimants and those who generally represent defendants. However, despite the natural differences of viewpoint, it is safe to say that both sides joined with other disinterested persons such as judges and instructors in law in devising a plan which would in the main promote greater accuracy and effectiveness in the administration of justice by our courts. It was recognized, however, that discovery, if not properly controlled and directed, could become an instrument of harassment and oppression. For that reason, the Texas Supreme Court adopted Rule 186b which vests district judges with a substantial discretionary authority to curb unwarranted and oppressive attempts at discovery by deposition. This rule provides that after hearing, the trial judge may order that a deposition not be taken, or that it be taken under such circumstances as the court may direct, including a restriction that certain matters shall not be inquired into.[32]

If, after applying to the trial judge for relief from oppressive discovery, a litigant is still dissatisfied, he may under a special and admittedly unusual set of facts, obtain relief in the supreme court. Obviously, any order rendered by a trial judge, either granting, modifying or refusing a demand for discovery, is interlocutory and hence cannot be appealed[33] although it may serve as a point of error upon an appeal taken from a final judgment in the case. It is primarily the func-

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32 TEX. R. CIV. P. 186b as amended March 19, 1957, effective September 1, 1957, reads as follows:

Notice to take the deposition of a party or a witness upon written or oral interrogatories, other than depositions under Rule 187, shall not be given, served or published prior to appearance day, unless leave of court has been obtained upon a sworn motion showing good cause therefor, which leave may be granted with or without notice as the court may require. After notice is served for taking a deposition on written interrogatories or by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only before the court or at some designated place other than that stated in the notice or subpoena, or that it may be taken only on written interrogatories, or that it may be taken only by oral examination, or that certain matters shall not be inquired into, or that the examination shall be held with no one present except the witness and his counsel and the parties to the action and their officers and counsel, or that the deposition shall not be taken by or before the officer having the commission, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments or research need not be disclosed or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from undue annoyance, embarrassment, oppression, or expense.

33 As to attempted appeals from interlocutory orders where there is no statute providing for an appeal, *see* McCauley v. Consolidated Underwriters, 157 Tex. 475, 304 S.W.2d 265 (1957).

tion of the supreme court to review causes decided by the fourteen courts of civil appeals in the state, and not to stand behind trial judges as an umpire to immediately second guess the numerous decisions necessarily made by a trial judge with reference to interlocutory rulings made during the course of a trial. This would not only interfere with the proper function of the supreme court but constitute a waste of time as the great majority of these rulings are either correct, lie within the ambit of the trial court's discretion or are harmless. And, even those which could be classified as prejudicial may be corrected on appeal without any further harm resulting to a litigant other than that delay necessarily incident to the appellate process. There are situations, however, when the discovery of a certain document may in itself cause irreparable harm to a litigant and if no light is thrown upon the issues in dispute by the document, protective measures are in order and if these are not forthcoming in the trial court, relief may be had in the supreme court.

A court order which if enforced would infringe upon a right protected by the Constitution of the United States or the Constitution of Texas, is not merely erroneous but void and subject to collateral attack by habeas corpus.[34] The Texas Supreme Court has also construed Article 1733[35] as authorizing mandamus compelling a trial judge to nullify and expunge an order which is repugnant to a valid statutory enactment.[36]

A leading authority relating to the function of the Texas Supreme Court in original mandamus cases is *Crane v. Tunks*.[37] Mrs. Crane had sued P. J. Glenney, a former employee, for money which Glenney had allegedly overdrawn from his salary account and otherwise obtained by fraud. Glenney sought discovery under Rule 737[38] and prayed for a court order directing Mrs. Crane to produce for his examination a rather extensive list of documents, including income tax records for the years 1939 to 1958, the date of the filing of the bill of discovery.

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34 *Ex parte* Henry, 147 Tex. 315, 215 S.W.2d 588 (1948).

35 *See* text of article set forth at page 177.

36 In State v. Ferguson, 133 Tex. 60, 125 S.W.2d 272 (1939), the trial court had enjoined the Texas Department of Public Safety from enforcing those provisions of the Penal Code which proscribed the use of the highways by motor trucks transporting loads in excess of the weight limits set by statute. The trial court's order forbade the enforcement of a valid legislative enactment and was declared void for that reason.

37 160 Tex. 182, 328 S.W.2d 434 (1959).

38 TEX. R. CIV. P. 737 provides:

> All trial courts shall entertain suits in the nature of bills of discovery, and grant relief therein in accordance with the usages of courts of equity. Such remedy shall be cumulative of all other remedies. In actions of such nature, the plaintiff shall have the right to have the defendant examined on oral interrogatories, either by summoning him to appear for examination before the trial court as in ordinary trials, or by taking his oral deposition in accordance with the general rules relating thereto.

The trial court granted discovery as prayed for with the exception of the income tax returns for the years 1939 through 1949 and another item deemed immaterial to the case. Discovery was allowed, however, as to the returns for 1950 to 1958, inclusive. The court also ordered Mrs. Crane's attorney specifically to deliver her 1950 return to Glenney's attorney for examination. The attorney refused to obey this order. The supreme court pointed out that the discovery order was interlocutory and that no appeal could be taken therefrom until final judgment had been rendered in the cause. However, the court said:

> To require relators to proceed with the trial of the main cause and bring up the question of the validity of the trial court's order to turn over the income tax return of Mrs. Crane for the years 1950-1958 would be to deprive relators of any remedy from an erroneous ruling of the court. After the returns had been inspected, examined and reproduced by respondent a holding that the court had erroneously issued the order would be of small comfort to relators in protecting their papers. The question of the legality of the court's order would become an academic one, and the objection to the order would be moot.

In a concurring opinion, Mr. Justice Calvert (now Chief Justice) said:

> The other order which relators seek to have vacated or revised is the order directing delivery to Glenney's counsel of the 1950 income tax return for examination and copying. My agreement with the majority that the entry of that order constituted an abuse of discretion is not based upon the failure of the judge to inspect the return before ordering it delivered up for examination and copying, however more cautious and desirable that might have been, but is based upon the fact that the record before us shows clearly that the return contains much information of a purely private nature which is not relevant and material to any issue in the main cause. In this state of the record it would be an unreasonable invasion of Mrs. Crane's right of privacy to require her to disclose information concerning strictly personal affairs to Glenney's counsel.

Mr. Justice Smith in a dissenting opinion took the position that the proper and exclusive remedy in the situation was the writ of habeas corpus which would afford relief whenever one was incarcerated under a void order.

While the opinions in the *Tunks* case do not specifically mention or cite the fourth amendment to the Constitution of the United States,[39]

[39] Crane v. Tunks, 160 Tex. 182, 189, 328 S.W.2d 434, 439 (1959).

nor article I, § 9 of the Texas Constitution,[40] it seems rather clear that the broad order of the district court violated such constitutional provisions. One has a right to be secure in his paper and free from unwarranted disclosures. When, therefore, it appears that documents or papers which bear no relation to the issues of the cause are sought to be disclosed by the discovery process, the order is void at least to the extent that there is an unwarranted disclosure and an invasion of the right of privacy. Technically, such an order also constitutes an abuse of discretion. The order in the *Tunks* case, rendered in the absence of an examination of the pertinent documents and a failure to separate the relevant matters from the irrevelant materials contained in the income tax returns rendered the discovery order void.

ARTICLE 1735

Article 1735 is narrower in scope and to some extent overlaps the grant of power granted in Article 1733, which latter article provides that in addition to judicial bodies or members thereof, the writ of mandamus may issue to "any officer of the State Government, except the Governor." Those who may be compelled to act under the provisions of Article 1735 are "any of the officers of the executive departments of the government of this state and also the Board of County and District Road Indebtedness." The Texas Constitution specifically designates the officers of the executive department. They are the Governor, Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office and the Attorney General.[41] The Governor is, of course, constitutionally exempt from the supreme court mandamus,[42] and it has been held that the phrase "executive officers of the state" embraces only those named in the Texas Constitution.[43]

Article 1735 does not authorize the supreme court to control the discretion of the officers of the Executive Department of the state govern-

40 *Id.* at 193-94, 328 S.W.2d 441-42.
41 *Id.* at 196-97, 328 S.W.2d 443-44.
42 U.S. CONST. amend. IV provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
43 TEX. CONST. art. I, § 9 provides:
The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

ment or the Board of County and District Road Indebtedness. It may compel action, that is, order the parties named to exercise the powers vested in them, whether they be judicial, ministerial or discretionary in nature, but the court cannot direct how the power should be exercised or what should be done, when the act compelled is not ministerial in nature.[44]

MANDAMUS AGAINST THE ATTORNEY GENERAL

The Attorney General is designated as the head of one of the executive departments of State[45] and is subject to mandamus by the Texas Supreme Court under Article 1735 as well as Article 1733. A number of statutes require the Attorney General to examine the bond record of various governmental or public bodies of the State to ascertain if the necessary prerequisites of law have been followed.[46] The most frequent use of the supreme court mandamus is to require an Attorney General to approve a bond issue. The handling of such issues is a specialty practice but certain aspects thereof may be noticed here.

The writ has been effectively employed to compel approval of bonds issued by a city,[47] a water district[48] and other public authorities.[49] When

[44] TEX. CONST. art. IV, § 1.

[45] TEX. CONST. art. V, § 3; McFall v. State Board of Education, 101 Tex. 572, 110 S.W. 739 (1908).

[46] Betts v. Johnson, 96 Tex. 360, 73 S.W. 4 (1903); Texas Liquor Control Board v. Continental Distilling Sales Co., 199 S.W.2d 1009 (Tex. Civ. App.—Dallas 1947, writ ref'd).

[47] United Production Corp. v. Hughes, 137 Tex. 21, 152 S.W.2d 327 (1941).

[48] TEX. CONST. art. IV, § 1.

[49] TEX. REV. CIV. STAT. ANN. arts. 709 (Examination of bonds; municipal and county); 2670 (Purchase of bonds); 4398 (To examine bonds); 709a (Approval of bonds of improve ment districts of home rule cities); 709b (Home rule cities; validation of bonds); 717a § 1 (Refunding Bonds; unorganized counties since organized); 752y (Public Road Bonds validated: Tax levy); 802b-1 § 4 (Home rule cities—specified utilities—authorized to issue funding bonds or warrants); 802b-2 § 4 (Refunding Bonds—Issuance by cities operating under charters); 802b-4 § 5 (Exposition and convention halls or coliseum bonds, refunding, cities over 100,000); 802b-5 § 4 (Bonds to pay existing judgments—Home rule or special charter cities); 802c § 3 (Refunding bonds of cities operating utilities); 802d § 4 (Refunding bonds of cities whose streets link state highways); 835e-1 § 1 (Refunding bonds); 1109a § 6 (extension or enlargement of water system); 1109i § 6 (Trinity River Authority—Bonds); 1111a § 1 (Additional Bonds; Refunding bonds; water or sewer systems; cities or towns); 1111b § 3 (Public utilities, improving and extending); 1118n-3 § 4 (Refunding Bonds; issuance by cities operating under general law and owning water works or sewer systems); 1118n-4 § 8 (Redemption of outstanding revenue bonds: additional revenue bonds); 1118u § 2 (Water works, sewer systems and swimming pools, revenue bonds); 1182c-4 (Issuance by cities over 500,000 in lieu of unissued bonds of annexed water district); 1182c-4 § 1 (Bonds issued in lieu of unissued bonds of annexed water district); 1187b § 6 (Public improvement bonds, cities on navigable streams); 1187e (c) (Refunding bonds; cities on navigable streams); 1269k § 17 (Housing authorities); 2372d-1 § 2 (Agriculture and livestock exhibition buildings); 2613a-1 § 5 (Agriculture and mechanical college); 2613a-4 § 9 (Agriculture and mechanical college); 2613a-6 § 7 (Tarleton State dormitories); 2643g § 3 (Building and Improvements; Lamar State and Texas Southern University); 2654c-1 § 9 (Capital improvements—collegiate level—educational institution); 2654g, art. II, § 1 (College student loan program); 2786b § 4 (Assumption of bonded indebtedness by school dis-

the Attorney General's refusal to approve bonds was based upon a decision of the court of civil appeals holding a statute invalid, the Texas Supreme Court declared the statute valid and stated its disagreement with the court of civil appeals and directed that mandamus issue.[50] Since the object and purpose of the writ is to compel the performance of a duty imposed by law upon the Attorney General, relator must show that he has no other adequate means of redress and that the Attorney General has clearly failed to perform a ministerial duty imposed on him by law.[51] Also, before a writ of mandamus will lie in connection with the approval of a bond issue, the relator must establish that he has complied with the requisite statutes authorizing the bonds and that a demand has been made upon the Attorney General for approval. For example, Article 709 providing for the approval of county or municipal bond issues, contains a phrase which states, "Such county judge or mayor shall also furnish the Attorney General with any additional information he may require." This phrase vests some discretion with the Attorney General to require additional information before approval.[52] However, in accordance with the general rule governing mandamus, when it appears that the applicable statutes have been complied with the Attorney General's duty becomes ministerial and he has no alternative other than to approve the issue. However, the statutory duty must be unequivocal, unconditioned and present and the Attorney General cannot be forced to grant conditional

tricts when boundaries are extended); 2789c § 3 (Refunding bonds to pay tax anticipation notes or certificates of indebtedness; independent school districts); 2802e-1 § 6 (Construction and mortgaging of gymnasia, stadia, etc., by districts authorized; self-liquidating; proceedings validated; required bonds); 2802f-2 § 3 (Refunding bonds to pay delinquent tax notes or certificates); 2815g-18 § 2 (Independent school district; refunding indebtedness on segregation from another district); 2815h-5 § 2 (Refunding bonds of junior college districts); 2909a § 7 (Capital improvements; educational institution); 4437e § 13 (Hospital Authorities; Hospital Authority Act); 4494p § 5 (Hospital districts; Optional Hospital District Law of 1957); 5421m § 3 (Veteran's Land Board); 7807c § 1 (Refunding bonds; water and improvement; irrigation district); 7807m § 5 (Supplying water to military camps: water improvement districts); 7880-147x-147z (Water control and improvement district bonds); 7937 (Fresh water supply district); 7941a (Refunding bonds); 8018 (Refunding bonds; Levee improvement districts); 8132 (Drainage District; drainage bonds); 8150 (Investment for benefit of district); 8176a § 4 (Refunding bonds; conversion of drainage district into conservation and reclamation districts); 8197b (Conservation and reclamation district refunding bonds); 8197d § 3 (Conservation and reclamation improvement and maintenance bonds); 8263e § 46 (Navigation districts creating self-liquidating and supporting districts); 8263g § 3 (Refunding bonds; navigation districts); 8280-9 § 4 (Texas Water Development Board); 8280-107 § 10 (Lower Colorado River Authortiy); 8280-203 (Jefferson Water and Sewer District System); TEX. CONST. art. VII, § 3a: School districts; TEX. CONST. art. VII, § 18: University of Texas, Texas A & M; bonds payable from income of permanent University Fund.

50 City of Waco v. Mann, 133 Tex. 163, 127 S.W.2d 879 (1939).

51 Tarrant County Water Control & Improvement District No. 1 v. Pollard, 118 Tex. 138, 12 S.W.2d 137 (1929).

52 Texas Turnpike Authority v. Shepperd, 154 Tex. 357, 279 S.W.2d 302 (1955).

approval of a new bond issue designed to take up a previous issue in the absence of proof of a satisfactory arrangement to carry out the details of the refunding program.[53]

If there be doubt as to the Attorney General's duty, the writ will not issue.[54] The original jurisdiction of the Texas Supreme Court to issue writs of mandamus to the Attorney General cannot be exercised to decide issues invoked in pending litigation before a district court and the Attorney General cannot be compelled to approve a bond issue which is the subject of pending litigation.[55] The writ has also been denied when it appears that proper notice was not given as to the securities to be issued,[56] or that necessary parties are not before the court.[57]

Use of the Writ in Connection with Primary and General Elections

Article 1735a, heretofore set out, grants to the Texas Supreme Court and the Texas Courts of Civil Appeals the authority to issue the writ of mandamus to compel the performance of any duty imposed by law upon any public officer, officer of a political party, judge or clerk of an election in connection with the holding of any general, special or primary election or any convention of a political party.[58]

In *Love v. Wilcox*[59] it was held that the act giving the Texas Supreme Court and the Texas Courts of Civil Appeals concurrent jurisdiction with that of the trial courts to issue writs of mandamus in election cases was constitutional. The court reasoned that it was the intent of the Texas Constitution and statutes passed thereunder that the remedy

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53 Tarrant County Water Control & Improvement District No. 1 v. Pollard, 118 Tex. 138, 12 S.W.2d 137 (1929).

54 City of Galveston v. Mann, 135 Tex. 319, 143 S.W.2d 1028 (1940).

55 Trinity River Authority v. Carr, 386 S.W.2d 790 (Tex. Sup. 1965).

56 City of Huntsville v. McCraw, 130 Tex. 121, 108 S.W.2d 204 (1937).

57 City of Killeen v. Sheppard, 155 Tex. 13, 291 S.W.2d 728 (1953); City of Houston v. Allred, 123 Tex. 35, 66 S.W.2d 655 (1934).

58 The election code also contains a provision relating to mandamus of officers or officials connected with primary elections and party conventions. Tex. Election Code Ann. art. 13.41 (Supp. 1968-69) provides:

> Any executive committee or committeeman or primary officer or other person charged under any provision of this code with any duty relative to the holding of the primary election, or the canvassing, determination or declaration of the result thereof, or the holding of any party convention, may be compelled by mandamus to perform the same in accordance with the provisions of this code.

59 119 Tex. 256, 28 S.W.2d 515 (1930).

of mandamus should be pursued in the lower courts in the absence of an urgent necessity calling for the exercise of the original jurisdiction of an appellate court. As the purpose of the power was to protect the general rights and interests of the people and State, the court sustained the legislative act vesting it with a jurisdiction to be exercised in cases of urgent necessity. The court pointed out that ordinarily rights may be enforced in a mandamus proceeding by suit in the district court, appealed to the court of civil appeals, and brought to the Texas Supreme Court by writ of error and that it is only when these remedies are incomplete or inadequate that the Texas Supreme Court will exercise its original jurisdiction. However, a writ will not issue if there be a fact question affecting the rights of the parties.[60] Mandamus will issue against county officials if they are members of election boards or if action by them is required to give the plaintiff the relief he is entitled to.[61]

Although the Texas Supreme Court has no jurisdiction to issue original injunctions, it may issue ancillary restraining writs to effecuate its mandamus powers. When it is shown that a relator is entitled to a writ of mandamus and an injunction is essential to his securing the relief he is entitled to, such writ may issue against an election board or official.[62]

A writ of mandamus will issue to compel an election board or official to canvass the votes cast at an election and certify the result of such election[63] and, in a proper case, to compel a party executive committee to place a person's party's name upon a primary ballot.[64]

Mandamus has been refused under various factual circumstances. When it appears that one has been an unsuccessful candidate in the Democratic primary, his supporters may not obtain a writ ordering the Secretary of State to place his name on the general election ballot as the candidate of another political party[65] or as an independent can-

60 Dick v. Kazen, 156 Tex. 122, 292 S.W.2d 913 (1956); Ferris v. Carlson, 314 S.W.2d 295 (Tex. Civ. App.—Dallas 1958, no writ); Donald v. Carr, 407 S.W.2d 288 (Tex. Civ. App.—Dallas 1966, no writ); Stevens v. Link, 433 S.W.2d 779 (Tex. Civ. App.—Texarkana 1968, no writ).

61 Benavides v. Atkins, 132 Tex. 1, 120 S.W.2d 415 (1938).

62 Lane v. Ross, 151 Tex. 268, 249 S.W.2d 591 (1952); Love v. Wilcox, 119 Tex. 256, 28 S.W.2d 515 (1930); Cleveland v. Ward, 116 Tex. 1, 285 S.W. 1063 (1926).

63 Grant v. Ammerman, 437 S.W.2d 547 (Tex. Sup. 1969).

64 Spears v. Davis, Calhoun v. Davis, 398 S.W.2d 921 (Tex. Sup. 1966); Love v. Wilcox, 119 Tex. 256, 28 S.W.2d 515 (1930); Stanford v. Butler, 142 Tex. 692, 181 S.W.2d 269 (1944); Westervelt v. Yates, 145 Tex. 38, 194 S.W.2d 395 (1946); Burris v. Gonzalez, 269 S.W.2d 696 (Tex. Civ. App.—San Antonio 1954, no writ).

65 Rummler v. Reavley, 156 Tex. 138, 293 S.W.2d 638 (1956).

didate;[66] nor, will the writ issue when the prospective candidate is ineligible to hold the office which he seeks,[67] or when it appears that because of a residence qualification, the prospective candidate is ineligible for a place on the ballot.[68] It has also been held that mandamus will not issue directing that a candidate's name be placed upon the ballot upon the theory that an incumbent's term of office has expired when it appears that the incumbent's term was for four years instead of two as contended by the applicant for mandamus.[69]

While the authority to act is actually conferred by Article 1734 rather than by Article 1735a, it has been held that the Texas Supreme Court may order the discontinuance of an election contest when it appears that the issues therein have become moot.[70]

ARTICLE 1734—ORDER TO PROCEED TO TRIAL AND JUDGMENT

As heretofore pointed out, the provisions of Article 1734 relating to the authority to proceed to trial and judgment are practically identical with those of Article 1824 relating to the jurisdiction of the court of civil appeals.[71] In this field of concurrent jurisdiction, the decisions of the courts of civil appeals, while not binding, are persuasive so far as supreme court action on the point.[72] Ordinarily, an application to order a district judge to proceed to trial and judgment is first made to a court of civil appeals[73] and while no appeal lies to the Texas Supreme Court from the action of a court of civil appeals upon matters relating to the original jurisdiction of those courts, the orders of the courts of civil appeals may be superseded by an exercise of original jurisdiction by the Texas Supreme Court.[74]

Prior to 1953, the writ of mandamus from the supreme court was

66 Westerman v. Mims, 111 Tex. 29, 227 S.W. 178 (1921).
67 Purcell v. Lindley, 158 Tex. 541, 314 S.W.2d 283 (1958).
68 Canady v. Democratic Executive Committee of Travis County, 381 S.W.2d 321 (Tex. Sup. 1964). The court of civil appeals had ordered the name of Curtis Lacy placed upon the primary ballot as a candidate for Justice of the Peace, Precinct 3, Place 1 of Travis County. This order was superseded by the Texas Supreme Court decision.
69 Eades v. Drake, 160 Tex. 381, 332 S.W.2d 553 (1960).
70 Polk v. Davidson, 145 Tex. 200, 196 S.W.2d 632 (1946).
71 *See* comments on Jurisdiction in forepart of this paper.
72 *See*, Norvell, *Original Jurisdiction of the Courts of Civil Appeals to Issue Extraordinary Writs*, 8 Sw. L.J. 389 (1954).
73 Houtchens v. Mercer, 119 Tex. 244, 27 S.W.2d 795 (1930).
74 Houtchens v. Mercer, 119 Tex. 244, 27 S.W.2d 795 (1930); State v. Ferguson, 133 Tex. 60, 125 S.W.2d 272 (1939); Texas State Board of Examiners in Optometry v. Carp, 388 S.W. 2d 409 (Tex. Sup. 1965); Gulf C.&S.F. Ry. Co. v. Muse, 109 Tex. 352, 207 S.W. 897 (1919); Yett v. Cook, 115 Tex. 175, 268 S.W. 715 (1925); Dallas Railway & Terminal Co. v. Watkins, 126 Tex. 116, 86 S.W.2d 1081 (1935) and cases cited; Canady v. Democratic Executive Committee of Travis County, 381 S.W.2d 321 (Tex. Sup. 1964).

available to a litigant to compel a court of civil appeals to certify a question to the Texas Supreme Court in cases in which a decision of the court of civil appeals was in conflict with a prior decision of another court of civil appeals or with a decision of the supreme court.[75] However, since the amendments to Articles 1728[76] and 1821[77] in 1953, the mandamus remedy is no longer available for the reason that there now exists an adequate remedy by application for writ of error.

The original writ of mandamus is often used to compel a district judge to enter judgment upon a verdict of the jury. Prior to the introduction of the special issue verdict in Texas in 1913, the entry of a judgment upon a general verdict was regarded as a ministerial act which could be compelled by mandamus.[78] The same rule is applicable to a special issue verdict, although there are unique features involved. Under the Texas practice, the granting of a new trial rests within the absolute discretion of the trial judge.[79] Therefore, before mandamus will issue the record must show that the only reason the trial judge did not render judgment on a special issue verdict was his belief that there was one or more irreconcilable conflicts among the jury's findings.[80] If the Texas Court of Civil Appeals or the Texas Supreme Court finds that there is no conflict in the special issues, an order to render judgment will be issued upon the theory that a ministerial duty only is involved and the situation is legally the same as that presented by a general verdict.

The question of whether or not a special issue verdict is conflicting may present difficulty and the courts have devised certain tests to solve the problem. In *Little Rock Furniture Company v. Dunn*,[81] a "test" of the existence of a conflict was approved. The court examines each of the answers alleged to be in conflict, disregarding the claimed conflicting answer but taking into consideration the rest of the verdict, and if, so considered, one of the answers would require a judgment in favor of the plaintiff and the other would require a judgment in favor of the defendant, then the answers are in fatal conflict. The court stated:

> It is essential that the party seeking to set aside a verdict on the ground of conflict must be able to point out that one of the con-

75 Simpson v. McDonald, 142 Tex. 444, 179 S.W.2d 239 (1944).
76 TEX. REV. CIV. STAT. ANN. art. 1728 (1962).
77 TEX. REV. CIV. STAT. ANN. art. 1821 (1964).
78 Lloyd v. Brinck, 35 Tex. 1 (1871); *cf.* Williams v. Wyrick, 151 Tex. 40, 245 S.W.2d 961 (1952).
79 Aycock v. Kimbrough, 71 Tex. 330, 12 S.W. 71 (1887).
80 Friske v. Graham, 128 S.W.2d 139 (Tex. Civ. App.—San Antonio 1939, no writ).
81 148 Tex. 197, 222 S.W.2d 985 (1949).

> flicting answers of the jury, in connection with the rest of the verdict except the issue with which it conflicts, necessarily requires the entry of a judgment different from that which the court has entered.[82]

This "Little Rock rule" was qualified in *Bradford v. Arhelger*.[83] In *Bradford,* there was a conflict in the jury's findings in response to the special issues submitted in that the jury found that (1) plaintiff's negligence had been a proximate cause of the automobile collision, (2) defendant's negligence had been a proximate cause of the collision and (3) the collision was the result of an unavoidable accident. As to these issues the court reasoned as follows:

> If we disregard the finding of unavoidable accident but take into consideration all of the rest of the verdict, a judgment for the defendant would be required because of the finding that the plaintiff's negligence was a proximate cause of the collision. If we disregard the finding that the defendant's negligence was a proximate cause of the collision and consider all of the rest of the verdict, a judgment for the defendant would also be required because there would be no finding that the defendant was negligent or that such negligence was a proximate cause of the collision. * * * If we disregard the finding of unavoidable accident and consider all of the rest of the verdict, a judgment for the defendant would be required because of the finding that the plaintiff's negligence was a proximate cause of the collision. If we disregard the finding that the plaintiff's negligence was a proximate cause of the collision and consider all of the rest of the verdict, we are left with findings that the defendant's negligence was a proximate cause of the collision and that the collision was an unavoidable accident. Quite obviously, in that situation a judgment could not be rendered for the defendant. The situation which then confronts us is just as though the jury had found that the plaintiff was not negligent, that the defendant's negligence was a proximate cause of the collision and that the collision was an unavoidable accident. Such findings are themselves in fatal conflict and will not support a judgment. Bransford v. Pageway Coaches, 129 Tex. 327, 104 S.W.2d 471; Texas Interurban Railway Co. v. Hughes, Tex. Com. App., 53 S.W.2d 448.[84]

The court concluded that " 'the Little Rock' rule must be qualified, for we cannot permit a verdict to stand when the findings are in such

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82 *Id.* at 206, 222 S.W.2d at 991.

83 340 S.W.2d 772 (Tex. Sup. 1960).

84 *Id.* at 773.

conflict that an application of the Little Rock rule develops a situation in which a judgment cannot be entered for either party."[85]

In *Texas Employers' Insurance Association v. Collins*,[86] the court held that when a jury disregarded instructions and improperly answered conditionally submitted issues, such "extra-findings" could not be disregarded in order to resolve a conflict. The court said:

> The use of conflict-avoiding "formulas" such as Mr. McDonald, supra, describes as "escape mechanisms" that "give ample room for metaphysical exercise" (Vol. 3, pp. 1273 and 1275) does, indeed, serve the generally laudable purpose of avoiding the trouble, delay and expense of new trials. But, since such rules are essentially somewhat "technical" in tending to resolve, at the expense of one of the litigants, a situation wherein the intent of the jury is actually in doubt, new ones should not be adopted nor the established ones extended, except with considerable caution. With this policy in mind we conclude that justice will be better served in the instant and similar cases by not disregarding the answers creating the conflict, even though they were given in violation of the conditions attached to the corresponding issues. We thus avoid the not at all unlikely possibility of a final decision based on findings that the jury did not intend.[87]

Similarly, in *City of Panhandle v. Byrd* it was held that an erroneously submitted issue could serve as the basis of a conflict.[88]

While the cases immediately above cited were decided upon appeal rather than in original mandamus proceedings, the rules therein set forth are applicable to those mandamus cases wherein it is asserted that a trial judge failed to render a judgment because of a mistaken belief that there was conflict in the jury findings. Because of the rule applicable to those situations wherein the Texas Supreme Court and the Texas Courts of Civil Appeals have concurrent jurisdiction which requires that an application for mandamus be first presented to a court of civil appeals, the majority of cases in this category—ordering a district judge to proceed to trial and judgment—are those decided by the courts of civil appeals.

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85 *Id.* at 774.

86 156 Tex. 376, 295 S.W.2d 902 (1956).

87 *Id.* at 381-82, 295 S.W.2d 905-6.

88 City of Panhandle v. Byrd, 130 Tex. 96, 106 S.W.2d 660 (1937), wherein the court said:

> The court should not have submitted the requested issue. It comprehended but one element of the ultimate issue of proximate cause, which had been submitted in the main charge. But our question is not whether it should have been submitted. It is one of conflict of findings, and we are unable to reconcile them on any reasonable ground. They are so conflicting on a material and essential issue in the case as to be mutually destructive.

ENFORCE AND PROTECT JURISDICTION

The Texas Supreme Court possesses a constitutional grant of authority to issue the writs necessary to enforce and protect its jurisdiction. This provision states in part:

> [t]he said courts and the justices thereof may issue the writs of mandamus, procedendo, certiorari, and such other writs, as may be necessary to enforce its jurisdiction.[89]

This power to issue the writs necessary to enforce the jurisdiction of the Texas Supreme Court has been held to find its sanction in the Texas Constitution and exists apart from statutory omissions or declarations.[90] However, before the supreme court can issue such a writ for this purpose, it must have potential appellate jurisdiction over the case resulting from a final judgment or an appealable order of the district court.[91] The Texas Courts of Civil Appeals possess the same power by legislative enactment.[92]

The power to enforce and protect its jurisdiction is held to be a power which is essential to the existence of the court and is a proper exercise of its unquestioned jurisdiction. This would include the authority to compel the performance of those essential acts provided by law and the rules of appellate procedure to bring cases before it for review.[93]

As a corollary, the Texas Supreme Court may issue those writs necessary to give force and effect to its judgments.[94] This authority includes the power to issue a writ of injunction, a writ which the Texas Supreme Court does not otherwise possess,[95] and may be directed against the parties to the suit in order to protect its judgments.[96] The writ of mandamus has been held to be but "the means" or "execution" to enforce the judgment in favor of those to whom the writ has been awarded.[97] Where there would otherwise be a failure of justice, the writ of mandamus is available to enforce a judgment and enjoin further litigation because there is no other established remedy.[98]

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89 TEX. CONST. art. V, § 3.
90 Cleveland v. Ward, 116 Tex. 1, 285 S.W. 1063 (1926).
91 Grigsby v. Bowles, 79 Tex. 138, 15 S.W. 30 (1890).
92 TEX. REV. CIV. STAT. ANN. art. 1823 (1964).
93 Roth v. Murray, 105 Tex. 6, 141 S.W. 515 (1911); Park v. Archer, 158 Tex. 274, 311 S.W.2d 231 (1958).
94 Gulf, Colorado and Santa Fe Railway Company v. City of Beaumont, 373 S.W.2d 741 (Tex. Sup. 1964).
95 Texas Employers' Ins. Ass'n v. Kirby, 137 Tex. 106, 152 S.W.2d 1073 (1941); Lane v. Ross, 151 Tex. 268, 249 S.W.2d 591 (1952).
96 Sparenberg v. Lattimore, 134 Tex. 671, 139 S.W.2d 77 (1940).
97 Yett v. Cook, 115 Tex. 175, 268 S.W. 715 (1925).
98 *Id.*

In *City of Dallas v. Dixon*,[99] the Texas Supreme Court held that it had jurisdiction to compel a court of civil appeals by writ of mandamus to enforce its own jurisdiction and to protect its own judgments. The court reasoned that a court of civil appeals is under a mandatory duty to protect its jurisdiction and judgments. In this case the parties sought to relitigate issues after the Texas Supreme Court had refused to issue a writ of error from the court of civil appeals. The Texas Court of Civil Appeals refused to issue the necessary writs to prohibit relitigation of the suit. The Texas Supreme Court, through Chief Justice Calvert, stated:

> Interference with enforcement of a court's judgment is interference with its jurisdiction, and the quoted constitutional and statutory provisions confer jurisdiction on Courts of Civil Appeals to issue whatever writs are necessary, including the writ of injunction, to enforce their judgments.[100]
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> * * *
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> And we hold, further, that exercise of such jurisdiction is mandatory when an actual interference with enforcement of the judgment is coupled with the second suit or when the mere prosecution of the suit destroys the efficacy of the judgment.[101]

By the use of the writ of mandamus and other available writs, the Texas Supreme Court is protecting its jurisdiction by guaranteeing absolute finality to its judgments. Thus, it appears that the use of a writ of mandamus is an effective, though seldom needed, remedy to enforce and protect the jurisdiction of the Texas Supreme Court.

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99 City of Dallas v. Dixon, 365 S.W.2d 919 (Tex. Sup. 1963), *rev'd sub nom.* Donovan v. City of Dallas, 377 U.S. 408, 88 S. Ct. 1579, 12 L. Ed. 409. The reversal was to the effect that state courts were without power to enjoin the litigants from prosecuting the present action in the Federal District Court and, further, that it was for the federal court to decide whether or not a plea of res judicata in the second suit would be good.

100 City of Dallas v. Dixon, 365 S.W.2d 919, 922 (Tex. Sup. 1963).

101 *Id.* at 925.