St. Mary's Law Journal

Volume 2 | Number 1 Article 7

3-1-1970

A Reminder to the Courts of the Purpose of the Nunc Pro Tunc Entry and the Basic Distinction That Serves as a Guide for Its Application.

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> during which the fire occurred, and thus say now, in effect, this is a very good policy from the 10th to the 13th, if no fire occurs, but a void one if there does.

One would be hard pressed to find a better example of an unconscionable contract. Furthermore, the insurance company has several available means of protecting itself against the feared abuses. First, the company is always free to refuse antedated policies, provided they are also willing to decline the premium.[31] Secondly, the company may direct an investigation to ascertain if a loss has occurred prior to accepting the risk.[32] Finally, if abuse has occurred, the company may avoid the contract by proving the abuse in court.[33]

These safeguards are sufficient to protect the insurance companies from the dishonest applicant. As a result of this case, the insured is now protected as well. He is protected from a misguided public policy that gave the insurance companies the option of avoiding their contract in the event they should be called upon to perform their part of the bargain.[34]

Barry Snell

JUDGMENT NUNC PRO TUNC—CLERICAL OR JUDICIAL ERROR—A REMINDER TO THE COURTS OF THE PURPOSE OF THE NUNC PRO TUNC ENTRY AND THE BASIC DISTINCTION THAT SERVES AS A GUIDE FOR ITS APPLICATION. *Comet Aluminum Company, Inc. v. Joe B. Dibrell*, 450 S.W.2d 56 (Tex. Sup. 1970).

Petitioner filed suit against Levine for recovery of a debt. By its first amended petition, Comet expressly sought three items of recovery: (1) a debt of $4,354.98; (2) prejudgment interest at the maximum legal rate from September 12, 1964; and (3) attorney's fees in the sum of $1,000.00. At the conclusion of the case the judge pronounced judgment in open court on the first and third issues, but did not pronounce

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31 *Id.*

32 This was recognized by Justice Funderburk in Banker's Lloyds v. Montgomery, 42 S.W.2d 285 (Tex. Civ. App.—Eastland 1931), *rev'd*, 60 S.W.2d 201 (Tex. Comm'n App. 1933, jdgmt adopted).

33 Matlock v. Hollis, 109 P.2d 119, 132 A.L.R. 1325 (Kan. 1941); Barry v. Aetna Ins. Co., 81 A.2d 551 (Pa. 1951); State Farm Mutual Auto Ins. Co. v. Calhoun, 112 So.2d 366 (Miss. 1959); Broome v. State Farm Mut. Automobile Ass'n, 152 So.2d 827 (La. App. 1963); Hunt v. Aetna Casualty & Surety Co., 387 P.2d 405 (Colo. 1963); Arley v. United Pac. Ins. Co., 379 F.2d 183 (9th Cir. 1967).

34 Burch v. Commonwealth Co. Mutual Ins. Co., 440 S.W.2d 410 (Tex. Civ. App.—Beaumont 1969), *rev'd*, 450 S.W.2d 187 (Tex. Sup. 1970) *(dissenting opinion). See also* Service v. Pyramid Life Ins. Co., 440 P.2d 944 (Kan. 1968):

". . . [C]onsiderations of public policy make it fundamentally unfair for an insurer to collect a premium while providing no coverage . . . ."

judgment on the second issue. Conversely, the court's written draft of the judgment disposed of all three issues: recovery of the debt, recovery of interest at 6 percent from September 12, 1964, to the date of judgment, and denial of attorney's fees. The written draft was signed by the judge on August 23, 1968. On December 5, 1968, Levine filed motion for a nunc pro tunc judgment seeking to correct the written judgment by eliminating the interest award. On January 6, 1969, the judge refused Levine's motion, whereupon Levine gave notice for appeal. The judge, on his own motion, rendered and entered a nunc pro tunc judgment, which, after reciting that judgment for prejudgment interest had not been rendered on August 21, 1968, and that inclusion of such interest in the August 23, 1968, draft of judgment was therefore a clerical error, awarded Comet judgment for only the principal sum of $4,354.98. Subsequently, Levine moved for a new trial and Comet moved to set aside the nunc pro tunc judgment of the judge; the court granted Levine a new trial and refused Comet's motion to set aside the judgment. Held—*Petition for writ of mandamus denied.* The motions of the petitioner and respondent will be set aside and a writ of mandamus will issue should this order be refused.

The courts have had the power to correct, modify or vacate their judgments[1] since the first half of the fourteenth century.[2] This power however, must be distinguished from the entry nunc pro tunc,[3] which gives a court the authority to correct mistakes or supply omissions after final judgment and at the end of the court's term.[4] The nunc pro tunc entry was derived from an English statute of the fourteenth century[5] under which the courts established the principle that:

> . . . [T]he king's judges of the courts should have the power to examine records, processes, words, pleas, etc., by them and their clerks, to reform and amend the same in affirmance of the judgments of such records and processes, where the defect appeared to be due to the misprison of the clerk, so that by such misprison of the clerk no judgment should be reversed or annulled.[6]

This method of correction founded in English legislation and common law has been adopted by the judicial system of the United States.[7] In

1 Deposit Bank v. Frankfort, 191 U.S. 499, 24 S. Ct. 154, 48 L. Ed. 276 (1903).
2 Makepeace v. Lukens, 27 Ind. 435 (1857).
3 Gagnon v. United States, 193 U.S. 451, 24 S. Ct. 510, 48 L. Ed. 745 (1904).
4 Coleman v. Zapp, 105 Tex. 491, 151 S.W. 1040 (1912).
5 Clouser v. Mock, 155 N.E.2d 745 (Ind. 1959).
6 46 AM. JUR. 2d *Judgments* § 188 (1969).
7 FED. R. CIV. P. 60; Norwich Union Indemnity Co. v. Simmonds, 294 U.S. 711, 55 S. Ct. 407, 79 L. Ed. 496 (1935); Bank of Hamilton v. Dudley, 2 U.S. (2 Pet.) 492, 7 L. Ed. 490 (1829); Illinois Printing Co. v. Electric Shovel Corp., 20 F. Supp. 181 (E.D. Ill. 1937): "Every court has the power to control, vacate, or correct its own decrees in the interests of justice."

an early case, a Texas court followed the same pattern of development in its method of correcting and amending errors by stating:

> When, in the record of any judgment or decree of any District Court there shall be any mistake, miscalculation, misrecital, of any sum or sums of money, or of any name or names, and there shall be among the records of the proceedings in the suit which such judgment or decree shall be rendered any verdict or instrument of writing whereby such judgment or decree may safely be amended, it shall be the duty of the court in which such judgment or decree shall be rendered, and the judge thereof to amend the judgment or decree thereby according to the truth and justice of the case, provided that the opposite party, his agent or attorney of record, shall have reasonable notice of the application for such amendment; and if the transcript of such judgment or decree, at the time of such amendment, or at any time thereafter, shall be removed to the Supreme Court, it shall be the duty of that court upon inspection of such amended record, to be brought before it by certiorari, if need be, to affirm such judgment, if there be no other error apparent in such record.[8]

The Texas Rules of Civil Procedure provide for the correction or amendment of mistakes in judgments under rules 316 and 317, the nunc pro tunc judgment being specifically provided for by rule 316.[9] A liberal interpretation of these rules would seem to allow a trial court almost any type of correction in its judgment at almost any time,[10] thus extending the nunc pro tunc judgment from its primary purpose, the correction of clerical errors,[11] to include judicial errors. This, however, is not the case. The law in Texas is well settled: a clerical error in the entry of a judgment previously rendered may be corrected after *final judgment* and at the *end* of the court's term by a judgment nunc pro tunc,[12] but a judicial error may not be so corrected.[13] While

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8 Ramsey v. McCauley, 9 Tex. 106, 107 (1852); *see also* Ximenes v. Ximenes, 43 Tex. 458 (1875); Texas State Board of Dental Examiners v. Blankfield, 433 S.W.2d 179 (Tex. Civ. App.—Houston 1968, writ ref'd n.r.e.).

9 TEX. R. CIV. P. 316, 317 (1967).

10 Finley v. Jones, 435 S.W.2d 139 (Tex. Sup. 1968).

11 Goodman v. Mayer, 133 Tex. 319, 128 S.W.2d 1156 (1939). "The purpose of a nunc pro tunc judgment is to record a judgment theretofore pronounced by the court but which has been imperfectly or erroneously entered;" Huggins v. Johnston, 120 Tex. 21, 35 S.W.2d 688 (1931). "The purpose of a nunc pro tunc entry is to correct evidence upon the records of a court judgment, decree, or order actually made by the court but for some reason not entered of record at a proper time;" Stonedale v. Stonedale, 401 S.W.2d 725 (Tex. Civ. App.—Corpus Christi 1966, no writ); Conley v. Conley, 229 S.W.2d 926 (Tex. Civ. App.—Amarillo 1950, writ dism'd).

12 Coleman v. Zapp, 105 Tex. 491, 151 S.W. 1040 (1912); Perkins v. Dunlavy, 61 Tex. 241 (1884).

13 Knox v. Long, 152 Tex. 291, 257 S.W.2d 289 (1953); Fischer v. Huffman, 254 S.W. 2d 878 (Tex. Civ. App.—Amarillo 1952, no writ).

the general principle of law may be well settled, the difficulty in the utilization of the nunc pro tunc entry lies in determining what is a clerical error and what is a judicial error. The criterion for determination, as established in the case of *Coleman v. Zapp*,[14] is that an alteration to ". . . correct a judgment because of its *rendition*, whereby an improper judgment is rendered but is in accordance with the rendition . . ." is judicial, whereas ". . . a proceeding to correct or supply the minutes of the court so as to have them *truly recite* the judgment as actually rendered . . ." is clerical.

Two early cases, which held the judgment error judical, illustrate this basic distinction. In the case of *Bates v. DeCamp*,[15] the defendants asked the court to correct the judgment to allow recovery of damages against the individual members of a partnership as opposed to recovery against the partnership itself. This application was denied because it sought an amended rendition of a judgment rather than a correction of what had actually been rendered. In *Missouri Pac. Ry. Co. v. Haynes*,[16] the trial judge awarded to the plaintiffs damages for injury to three cotton bales. In computing the final damages, which were measured by the weight of the three lots times a dollar value, the trial judge through oversight omitted the third lot and accordingly rendered a wrong amount. In holding the error judical, the court reasoned that since there was nothing in the record to show how the omission occurred, the manner of committing the error could not be ascertained and the correction, if allowed, would be making a new verdict for the court. The court in *Coleman v. Zapp*[17] distinguishes a clerical error from the above cases by ruling that the purpose of the proceeding in its case was ". . . to correct an entry on the minutes . . ." as opposed to a correction of a judgment rendered by the court. Having once laid a predicate for the basic distinction as to what constitutes a clerical error, the Texas courts have followed this distinction in numerous cases and have given examples of the clerical error: mistakes in judgments in the names of the parties,[18] mistakes in designation of parties themselves,[19] errors in

14 105 Tex. 491, 151 S.W. 1040 (1912).

15 37 S.W. 644 (Tex. Civ. App. 1896, writ ref'd).

16 82 Tex. 448, 18 S.W. 605 (1891).

17 105 Tex. 491, 151 S.W. 1040 (1912).

18 Chandler v. Scherer, 32 Tex. 573 (1870); Ramsey v. McCauley, 9 Tex. 108 (1852); McKay v. Speak, 8 Tex. 376 (1852); Goodyear Tire & Rubber Co. v. Pearcy, 80 S.W. 2d 1096 (Tex. Civ. App.—Eastland 1935, no writ); Rogers v. Allen, 80 S.W.2d 1085 (Tex. Civ. App.—Eastland 1935, no writ).

19 Whittaker v. Gee, 63 Tex. 435 (1885); Russel v. Miller, 40 Tex. 494 (1894); O'Neil v. Norton, 33 S.W.2d 733 (Tex. Comm'n App. 1931, holding adopted); Batson v. Bently, 297 S.W. 769 (Tex. Civ. App.—Amarillo 1927, no writ); Brite v. Atascosa County, 247 S.W. 878 (Tex. Civ. App.—San Antonio 1923, writ dism'd); Smith v. Moore, 212 S.W. 988 (Tex. Civ. App.—El Paso 1919, writ dism'd).

calculation and awarding amounts,[20] errors in calls of land description,[21] and miscellaneous clerical errors.[22] Judicial errors have been grouped into the following categories: errors attempted to be corrected on the merits of the case,[23] corrections that would enlarge the judgment,[24] amendments supplying a judicial omission,[25] and attempts to correct what the court might have done from what the court actually did.[26]

In the instant case the court determined that the rendition of the judgment was judicial error. The court initially had to determine whether the judgment was in fact final, and in concluding this point, relied on *Coleman v. Zapp*,[27] which held that ". . . a judgment's rendition is the judicial act which the court settles and declares the decision of the law upon the matters at issue." In *Knox v. Long*,[28] the court quoted *Freeman on Judgments*[29] as stating that a judgment is rendered when the decision is officially announced, either orally in open court or by memorandum filed with the clerk. The court in the instant case reasoned that prejudgment interest is always recoverable when the principal damages are fixed by conditions existing at the time the injury is inflicted,[30] and since Comet expressly sought these damages, the trial court has a *duty* to decide the issue and render judgment with respect to them. This duty was not discharged by the oral rendition of the judgment on the other two issues. The fact that a denial of prejudgment

20 DeHymel v. Scottish American Mortg. Co., 80 Tex. 493, 16 S.W. 311 (1891); Stevens v. Lee, 70 Tex. 279, 8 S.W. 40 (1888); Swift v. Farris, 11 Tex. 18 (1853); Webster v. Smith, 226 S.W.2d 250 (Tex. Civ. App.—Eastland 1950, no writ); Luck v. Riggs Optical, 149 S.W.2d 204 (Tex. Civ. App.—Fort Worth 1941, no writ); Taylor v. Doom, 95 S.W. 4 (Tex. Civ. App. 1906, no writ); Ellis v. National City Bank, 94 S.W. 437 (Tex. Civ. App. 1906, no writ).

21 Sabine Hardwood v. West Lumber Co., 248 F. 123 (5th Cir. 1916); Johnson v. McBee, 205 S.W. 159 (Tex. Civ. App.—Amarillo 1918, writ dism'd); Poietevent v. Scarborough, 117 S.W. 443 (Tex. Civ. App. 1909), *rev'd on other grounds*, 103 Tex. 111, 124 S.W. 87 (1910); Getzlander v. Trinity Valley R. Co., 102 S.W. 161 (Tex. Civ. App. 1907, no writ); Mansel v. Castles, 54 S.W. 299 (Tex. Civ. App. 1899) *rev'd on other grounds*, 93 Tex. 402, 55 S.W. 559 (1900).

22 Knox v. Long, 152 Tex. 291, 257 S.W.2d 291 (1953); Zamora v. Salinas, 422 S.W.2d 253 (Tex. Civ. App.—Corpus Christi 1967, no writ); Wiseman v. Zorn, 309 S.W.2d 253 (Tex. Civ. App.—Houston 1958, no writ).

23 Texas State Board of Examiners of Optometry v. Lane, 337 S.W.2d 801 (Tex. Civ. App.—Fort Worth 1960, writ ref'd); Acosta v. Realty Trust, 111 S.W.2d 777 (Tex. Civ. App.—Austin 1937, no writ); State Bank and Trust Co. of San Antonio v. Love, 57 S.W.2d 924 (Tex. Civ. App.—Waco 1933, no writ).

24 Arlington v. McDaniel, 119 Tex. 291, 25 S.W.2d 295 (1930); Miller v. Texas Life Insurance Co., 123 S.W.2d 756 (Tex. Civ. App.—Dallas 1939, writ ref'd); Montgomery v. Huff, 11 S.W.2d 237 (Tex. Civ. App.—Amarillo 1928, writ ref'd).

25 Finley v. Jones, 435 S.W.2d 139 (Tex. Sup. 1968); Jones v. Bass, 49 S.W.2d 723 (Tex. Comm'n App. 1932, holding approved); Fischer v. Huffman, 24 S.W.2d 878 (Tex. Civ. App.—Amarillo 1953, no writ); Bell v. Rogers, 58 S.W.2d 878 (Tex. Civ. App.—Waco 1933, no writ).

26 Calvia v. Texas Construction Material Co., 380 S.W.2d 641 (Tex. Civ. App.—Houston 1964, no writ).

27 105 Tex. 491, 151 S.W. 1040 (1912).

28 Knox v. Long, 152 Tex. 291, 257 S.W.2d 289 (1953).

29 1 FREEMAN ON JUDGMENTS § 48, at 80.

30 Texas Company v. State, 154 Tex. 494, 281 S.W.2d 83 (1955).

interest would have been implied in the absence of actual decision, as illustrated in the case of *Vance v. Wilson*,[31] is immaterial because the issue of prejudgment interest in the trial court was never raised in the record of the trial. If the interest question had been discussed, and not ruled on, it could have been implied that the interest sought had been denied the petitioner, and thus a correction by a nunc pro tunc entry would have been proper. If this were the case, then the judgment would have been saying what the judge *intended* to say, and the discussion of the interest question in the record would have been evidenced by the record itself. However, since the interest question was not in the record, it could not be implied that this is what the judge had intended, and if it was amended, it would be the correction of a judicial rendition of a judgment, and not a mere clerical error.

While the instant case does not promulgate any new guidelines in the nunc pro tunc entry, it is a *subtle* but *stern* reminder that the Texas courts will not tolerate a liberal interpretation or use of this procedural tool. The opinion forcefully indicates that if errors are made it is the responsibility of the judges and the attorneys to recognize these errors and to use the well-tested remedies designed for that particular mistake.[32] These responsibilities weigh heavily on attorneys and judges in respect to the layman who is so totally ignorant of rules of procedure and issues of law, but yet is required to be governed by them. Due to this necessary, but illusory classification of judicial-clerical errors, it is possible for an individual to have a valid claim in a suit at law, but through honest mistake or unawareness, either lose his claim entirely or be forced to accept a more difficult method of review than was available had the mistake not been made.[33] The layman has little chance of recovery against an officer of the court who errs.

The *Comet* opinion by ruling the error judicial, vividly reminds us of the designed purpose of the nunc pro tunc entry, that it should be used for its intended purpose: the correction of clerical errors, and not ". . . under the guise of correcting a judicial mistake."[34]

Morton L. Herman

31 382 S.W.2d 107 (Tex. Sup. 1964).

32 Coleman v. Zapp, 105 Tex. 491, 151 S.W. 1040 (1912); Jones v. Bass, 49 S.W.2d 723 (Tex. Comm'n App. 1932, opinion adopted); Texas State Board of Examiners of Optometry v. Lane, 337 S.W.2d 801 (Tex. Civ. App.—Fort Worth 1960, writ ref'd). If the mistakes are judicial they may be corrected by appeal; if they are clerical they may be amended by mere motion.

33 Finley v. Jones, 435 S.W.2d 139 (Tex. Sup. 1968).

34 Carpenter v. Pacific Mutual Life Ins. Co. of California, 96 P.2d 796 (Cal. 1939).