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When a Servant Is Following the Express Orders of His Master by Going to Work in His Own Automobile, but It Is Not within Usual Working Hours and Not for the Performance of Regular Duties, the Special Errand Rule May Be Applied in Determining the Necessary Venue Facts under Article 1995.

Edward K. Gurinsky

MASTER AND SERVANT—PROCEDURE—PLEA OF PRIVILEGE—RESPONDEAT SUPERIOR—SCOPE OF EMPLOYMENT—AUTOMOBILES—WHEN A SERVANT IS FOLLOWING THE EXPRESS ORDERS OF HIS MASTER BY GOING TO WORK IN HIS OWN AUTOMOBILE, BUT IT IS NOT WITHIN USUAL WORKING HOURS AND NOT FOR THE PERFORMANCE OF REGULAR DUTIES, THE "SPECIAL ERRAND" RULE MAY BE APPLIED IN DETERMINING THE NECESSARY VENUE FACTS UNDER ARTICLE 1995. *Stapp Drilling Company v. Roberts*, 471 S.W.2d 131 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.).

Plaintiff brought action against the defendant employer to recover damages for the death of the plaintiff's husband who was fatally injured in an automobile accident with the defendant's employee, Hester. For the three days prior to the accident, Hester had been working as a derrick hand for the defendant. He had not worked continuously prior to that period of time, having been off work for three months. Due to heavy rains, Hester was either told or reasonably believed that he would not be working the next day. On the following morning, the day of the accident, the defendant company called Hester to report to work in order to help move the rig. Hester was not at home so the message was relayed to him by his wife who repeated the defendant's instructions that Hester was needed and should come out to the job-site in his own car as soon as he came home. After receiving the message, Hester proceeded to the work-site as ordered but became involved in the aforesaid automobile accident. The trial court ruled in favor of the plaintiff and overruled the defendant's plea of privilege reasoning that the plaintiff had proved the requisite venue facts under article 1995.[1] Held: *Reversed and rendered.* When a servant is following the express orders of his master by going to work in his own automobile, but it is not within usual working hours and not for the performance of regular duties, the "special errand" rule may be applied in determining the necessary venue facts under article 1995.

In order to hold an individual liable for the negligent acts of another, it is essential to establish the existence of a master-servant relationship between the actual tort-feasor and the person who is being held responsible.[2] Early in the stages of the development of the law of master and

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1 TEX. REV. CIV. STAT. ANN. art. 1995, § 9a (1964).
A suit based upon negligence per se, negligence at common law or any form of negligence, active or passive, may be brought in the county where the act or omission of negligence occurred or in the county where the defendant has his domicile. The venue facts necessary for plaintiff to establish by a preponderance of the evidence to sustain venue in a county other than the county of defendant's evidence are . . . 2. That such act or omission was that of the defendant, in person, or that of his servant, agent or representative acting within the scope of his employment.
2 Moreland v. Leslie, 140 Tex. 170, 166 S.W.2d 902 (1942).

servant, the general rule was that the master was liable for the negligent or wrongful acts of his servant only where the act was expressly ordered by the master.[3] However, it is now generally accepted, under the doctrine of respondeat superior, that the employer is responsible to a third person for any injury to either person or property which proximately results from tortious conduct of an employee acting "within the scope of employment."[4] The principle of vicarious liability under this doctrine has its foundation in considerations of public policy, convenience, and justice.[5] Thus, the employer is held liable for the employee's acts because they are considered to be the acts of the employer himself.

"Scope of employment is a relative term, difficult of exact definition."[6] Thus, the authority from the master is to be determined by the surrounding facts and circumstances, which include the character of the employment, the nature of the wrongful act, and the time and place of its completion.[7] A common test used to determine the master's liability is whether the act of the employee at the time of its occurrence was within the general authority of the servant, in furtherance of the master's business, and for the accomplishment of the object for which the servant was hired.[8] This question of scope of employment is generally for the jury's determination, except where the outer limits of the servant's duties are clearly shown.[9]

One method by which the liability of the employer may be avoided is by use of the "going and coming" rule.[10] Under this rule an employee going to and from work is ordinarily considered outside the scope of his

3 Penas v. Chicago, M & St. P. Ry., 127 N.W. 926, 927 (Minn. 1910).

4 *E.g.*, Stapleton v. Stapleton, 70 S.E.2d 156, 158 (Ga. App. 1952); Laver v. Kingston, 137 N.E.2d 113, 115 (Ill. App. 1956); East Coast Freight Lines v. Mayor & City Council, 58 A.2d 290, 303 (Md. App. 1948); Sperry v. Greiner, 122 N.W.2d 463, 466 (Neb. 1963). The servant is acting within the scope of employment when he is acting under the express or implied authority of the master.

5 Penas v. Chicago, M. & St. P. Ry., 127 N.W. 926, 932 (Minn. 1910); Watkins v. Southcrest Baptist Church, 399 S.W.2d 530, 533 (Tex. Sup. 1966).

6 Horton v. Jones, 44 So. 2d 397, 399 (Miss. 1950).

7 *Id.*

8 Underwood v. Mitchel, 389 S.W.2d 106, 108 (Tex. Civ. App.—Eastland 1965, no writ); Glasgow v. Floors, Inc., 356 S.W.2d 699, 704 (Tex. Civ. App.—Dallas 1962, no writ).

9 National Life & Accident Ins. Co. v. Ringo, 137 S.W.2d 828, 830 (Tex. Civ. App.—Dallas 1940, writ ref'd).

10 Many situations dealing with the determination of whether the employee's acts are within the scope of employment so as to bind the employer are dealt with in workmen's compensation cases. The special errand rule is one which aids the industrial commission in determining when the employment begins and ends. Bengston v. Greenig, 41 N.W.2d 185, 186 (Minn. 1950). In order for the employee to recover from the employer, in workmen's compensation cases, the employee's act must be a consequence of risks and hazards "to do with and originating in the work, business, trade or profession of the employer." Texas Employers' Ins. Ass'n v. Grammar, 157 S.W.2d 701, 704 (Tex. Civ. App.—Dallas 1942, writ ref'd w.o.m.). The test for a third party to hold the employer liable is "scope of employment" under the respondeat superior doctrine. Thus, although the two tests are not identical, they are very closely related because the decisive issue to be determined is whether at the time of the accident the employee was engaged in the exercise of functions for which he was employed. O'Brien v. Traders & Gen. Ins. Co., 136 So. 2d 852, 862 (La. App. 1961).

employment so that the employer is not responsible for his torts.[11] The first Texas case to promulgate the rule was *American Indemnity Co. v. Dinkins*,[12] in which the court held that the employee was not within the course of his employment at the time of the accident and that the injury was one that might happen to any person on any street regardless of his employment. The rule in this case has been generally followed in Texas.[13]

The "going and coming" rule is based on the theory that the employment relationship is suspended from the time the employee leaves his job to go home until he resumes it.[14] Thus, the rationale is that one who negligently injures another upon the streets or highways while going to or from work does so as a consequence of risks and hazards of the streets and highways to which all members of the general public are subject, and not as a consequence of risks and hazards contemplated in the employment of the tort-feasor.[15] The rule recognizes that traveling from work to home and vice versa is basically for the employee's benefit,[16] so he is rendering the employer no service. It is generally applied in those situations where the employee performs services at or in a particular plant or upon particular premises.[17] It may also be invoked where there are vehicle accidents of employees whose jobs do not encompass driving.[18]

An exception to the "going and coming" rule is the "special errand," "special benefit" or "special mission" doctrine.

> If the employee is not simply on his way from his home to his normal place of work or returning from said place to his home for his own purpose, but is coming from his home or returning to it on a specific errand either as part of his regular duties or at a special order or request of his employer, the employee is considered to be

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11 Harvey v. D & L Constr. Co., 59 Cal. Rptr. 255 (Ct. App. 1967).

12 211 S.W. 949, 952 (Tex. Civ. App.—Beaumont 1919, writ ref'd). The employee had quit work for the day, left the employer's premises to go home by way of his own motorcycle and collided with an automobile on a public thoroughfare, several blocks away. The court further added that the employee was not within the scope of his employment because ". . . he was bent on his own rest and refreshment and that at the time of the injury the employer was exercising no control whatever over him. . . ."

13 *E.g.*, Smith v. Texas Employers' Ins. Ass'n, 129 Tex. 573, 577, 105 S.W. 192, 193 (1937); Texas Employers' Ins. Ass'n v. Adams, 381 S.W.2d 340, 344 n.1 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.); Glasgow v. Floors, Inc., 356 S.W.2d 699 (Tex. Civ. App.—Dallas 1962, no writ); St. Paul Mercury Ins. Co. v. Dorman, 341 S.W.2d 480, 481 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.); Henshaw v. Texas Employers' Ins. Ass'n, 282 S.W.2d 928, 930 (Tex. Civ. App.—Amarillo 1955, writ ref'd n.r.e.).

14 Hinman v. Westinghouse Elec. Co., 471 P.2d 988, 990 (Cal. 1970).

15 Smith v. Texas Employers' Ins. Ass'n, 129 Tex. 573, 576, 105 S.W.2d 192, 193 (1937). The injuries do not fall within the course of employment if they result from ordinary hazards of a journey which are borne by all travelers and are not related to the employer's business. Sendejaz v. Industrial Comm'n, 420 P.2d 32, 34 (Ariz. App. 1966).

16 Harris v. Oro-Dam Constructors, 75 Cal. Rptr. 544, 548 (Ct. App. 1969).

17 Robinson v. George, 105 P.2d 914, 917 (Cal. 1940).

18 Harris v. Oro-Dam Constructors, 75 Cal. Rptr. 544, 548 (Ct. App. 1969).

> in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons.[19]

The servant does not have to be directly engaged in the duties which he was employed to perform for the "special errand" rule to be applicable. The rule may be satisfied where the services only indirectly or incidentally benefit the employer.[20] This exception is not confined to acts performed on the premises or business grounds of the employer.[21] The "special errand" rule is ordinarily applied where "(a) there is an express or implied request that the service be performed after working hours by an employee who has fixed hours of employment; (b) the trip involved on the errands be an integral part of the services performed; and (c) the work performed, although related to the employment, be special in the sense that the task requested was not one which was regular and recurring during the normal hours of employment."[22]

The exact factual question before the court in *Stapp v. Roberts* has not drawn the attention of any Texas court.[23] The question as posed by the court is:

> Where an employee has left work on one day, and being advised that he will not be working the next day, but is later called to work at an irregular time and is directed by his employer to use his own automobile to transport himself to a remote work-site to do a specific type of job, and in doing so negligently causes the death of the other, would such facts in this situation, bring the employee within the scope of his employment so as to make his employer liable for his negligent acts?[24]

Thus, the problem involved here is whether the facts bring the instant case within the general rule, or cause it to fall within the "special errand" exception.

The majority relies in part on the general rule as set out as follows:

> [T]he mere fact that one in the general employment of another, driving the employee's own vehicle, is [sic] traveling to his job is insufficient, in the absence of special circumstances, to justify the conclusion that the employee is acting in the scope of his employment so as to charge the employer with responsibility for the negligent operation of the vehicle.[25]

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19 Boynton v. McKales, 294 P.2d 733, 740 (Cal. App. 1956).
20 Vivion v. National Cash Register Co., 19 Cal. Rptr. 602, 608 (Ct. App. 1962).
21 Western Pipe & Steel Co. v. Industrial Accident Comm'n, 121 P.2d 35, 37 (Cal. App. 1942).
22 Youngberg v. Donlin Co., 119 N.W.2d 746, 749 (Minn. 1963).
23 Stapp Drilling Co. v. Roberts, 471 S.W.2d 131, 137 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.) (dissent).
24 *Id.* at 137.
25 Annot., 52 A.L.R.2d 287, 303 (1957).

In other words there is no inference in such a situation that the act of the servant was within the course of employment[26] and by and of itself could not be legally sufficient to raise an issue that the employee was performing in the scope of his employment.

In holding that the fact situation of the *Stapp* case falls within the general rule, the majority also bases much of its opinion on *American National Insurance Co. v. Denke*.[27] In this case Saunders, an insurance agent of the defendant company, ran his car into the plaintiff Denke while driving across town to solicit insurance.[28] The court, agreeing that there were a number of provisions in the contract which indicated control over Saunders, stated that this control basically was concerned with the contractual aspects of the employment, and the final results, and not to "physical details as to the manner of performance" of his travelling and soliciting.[29] It held that the amount of control exercised by the company was not such as to bind the company for the negligent acts of Saunders while driving the car, even though at that time he was furthering his master's business.[30]

However, the *Denke* case can be distinguished from *Stapp*. In the latter case the majority argues that since there was no evidence to show that defendant employer had the right to direct Hester as to the manner of use of the car or in what route to follow in travelling to the place of work, the defendant company had no right to direct and control Hester in the performance of the act; thus no liability would attach to the company.[31] In both cases there is no evidence to show that the employers had the right to require their respective employees to use their own car,[32] but in *Stapp* the employee was expressly authorized to use his car to get to work on the day of the accident.[33]

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26 East Coast Freight Lines v. Mayor & City Council, 58 A.2d 290, 303 (Md. 1948).

27 128 Tex. 229, 95 S.W.2d 370 (1936).

28 *Id.*

29 *Id.*

30 *Id.* Agent Saunders was not furnished a car to use in the business and neither was he required by the defendant to use one, but Saunders did in fact frequently use his automobile for business purposes, with the knowledge and acquiescence of defendant. Thus there were no restrictions on Saunders' contract, either expressly or impliedly, which would enable the defendant to control the physical movements of Saunders while doing his work; neither were there directions that he should or should not travel by car, foot, or otherwise.

31 The master-servant relationship does not cease to exist simply because the employer has no right to control the manner and means of employee's operation of the car. Konick v. Berke, Moore Co., 245 N.E.2d 750 (Mass. 1969) (contra to statement in text).

32 In "going to and returning from work," based on plaintiff's being struck by automobile owned and operated by employee, no liability attached to employer where employee was not obligated to use automobile in work, and employer was not concerned with employee's transportation. Glasgow v. Floors, Inc., 356 S.W.2d 699, 704 (Tex. Civ. App.—Dallas 1962, no writ).

33 The fact that the automobile driven by the servant at the time of the accident belonged to the servant was immaterial if he was using it in the performance of a duty owed the employer; the ownership of the automobile being simply an incident of the performance of the service, and the thing done by the servant being the ultimate act making

The decisive factor then is the special request for the unusual service,[34] which brings the employee, throughout the whole trip, in the course of employment. It is the existence of the right to control the trip and not the existence of physical control over the actual driving which is of utmost importance,[35] and it is the special request for the service that determines this right of control. The majority contends that Hester was simply returning to the place of work in order to carry out his duties for his employer there and thus there was no special mission ordered or special benefit received by the employer. Even though the service is not within the servant's normal duties, a master is still liable for tortious acts of the servant done only in obedience to his express or implied orders.[36] The express or implied order for the special task is so vital it has even been held, in absence of express or implied authority, that the employer could not be held liable, even though the servant was doing something for the employer's benefit.[37]

The majority also emphasizes that there was nothing in the record showing that Hester normally went to and from work other than in his own car[38] or that he was ordered to do anything in relation to the performance of the work-site or elsewhere. In other words, they assume, in the absence of evidence to the contrary, that Hester regularly took his car to work.[39] Thus, he was furthering his master's business only in the respect that he was making his personal services available at the time and place of his work assignment by travelling to the job-site.[40]

The dissent contends that the majority opinion's arguments are based

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the master liable. Guitar v. Wheeler, 36 S.W.2d 325, 331 (Tex. Civ. App.—El Paso 1931, writ dism'd).

[34] Schreifer v. Industrial Accident Comm'n, 391 P.2d 832, 833 (Cal. 1964). "It is said that the right of control 'goes to the very heart of the ascription of tortious responsibility.'" Harris v. Oro-Dam Constructors, 75 Cal. Rptr. 544, 548 (Ct. App. 1969).

[35] National Cash Register Co. v. Rider, 24 S.W.2d 28, 30 (Tex. Comm'n App. 1930, holding approved).

[36] Heitkamp v. Krueger, 265 S.W.2d 655, 657 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.).

[37] Kennedy v. American Nat. Ins. Co., 130 Tex. 155, 160, 107 S.W.2d 364, 367 (1937).

[38] "It is quite immaterial whether the nature of the employment involves continuous or only occasional exposure to the dangers of the streets. The frequency of the exposure to a risk increases the chance of the occurrence of an accident, but it has no bearing on the question whether it arose out of the employment, which is settled by the fact that such exposure was one of its terms, whether on many occasions or on one." Smith v. Texas Employers' Ins. Ass'n, 129 Tex. 573, 577, 105 S.W.2d 192, 194 (1937).

[39] Stapp Drilling Co. v. Roberts, 471 S.W.2d 131, 138 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.). Evidence of the fact that Hester did take or did not take his car to work regularly was not contained in the records. The establishment of this fact is important in the determination of the special nature of the order. If Hester did drive to work regularly in his own car, then the command by the defendant may not have been out of the ordinary.

[40] Making personal services available at the employer's business premises does not, by itself, bring that act of the employee within the scope of employment. Arboleda v. Workmen's Compensation Appeals Board, 61 Cal. Rptr. 505, 507 (Ct. App. 1967).

on negative inferences gathered from lack of specific evidence.[41] The dissenting opinion bases its reasoning for holding Hester's act to be within the scope of his employment on the recognition of reasonable inferences to be gained from the evidence present.[42] Hester was told or it was reasonably inferred that he would not be needed on the day of the accident, so he did not return home until late that morning, some three hours after he normally went to work.[43] Hester had been working as a derrick hand, but when the employer decided to have him help move the rig, it could reasonably be inferred that the work he was to do then differed from the work he had done previously.[44] When Hester was called at 6:30 in the morning, presumably he was to be picked up by the foreman, but since he was not there, and was still needed, he was directed to take his own car and proceed to work as soon as he came home. From this evidence the implication is that the employer had previously furnished Hester his transportation, but because his services were necessary, he was to drive to work in his own car. Thus, according to the dissent the servant's act amounted to something more than simply going to work to make routine services available there.[45] For example, where the trip is required by the employer to be made in an automobile which makes it possible for the employee to arrive at work more quickly, then, under these special circumstances, the master may be liable.[46] The reason being that since the request to return and do a service is outside his usual duty, then the reason for the trip is primarily to bestow a benefit or assist the employer in his business.[47]

The majority concludes, based upon the reasoning expressed in its opinion, that no evidence was present to even raise the issue or support a judgment that Hester was acting within the scope of his employment at the time of the alleged accident.[48] Thus, a master-servant relationship

41 Stapp Drilling Co. v. Roberts, 471 S.W.2d 131, 138 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.).

42 *Id.*

43 The special errand exception would be applied where the request or order to perform usual services was at an odd hour or special time. Schreifer v. Industrial Accident Comm'n, 391 P.2d 832, 833 (Cal. 1964).

44 "The telephonic order from his superior to report early was not the usual manner of scheduling duty hours. There must have been some special need for his services at that time. The fact that a particular mission is encompassed within the terms of hire, even contemplated at the time employment began, is not determinative. Nearly every employment relationship contemplates that extraordinary needs may arise and must be met. 'Special' means extraordinary in relation to routine duties, not outside the scope of the employment." *Id.* at 835.

45 *See* Sharp v. W. & W. Trucking Co., 421 S.W.2d 213, 219 (Mo. 1967). To bring the act within the scope of employment, the act must amount to something more than making usual services available at the employer's place of business.

46 O'Brien v. Traders & Gen. Ins. Co., 136 So. 2d 852, 863 (La. App. 1961).

47 Los Angeles Jewish Community Council v. Industrial Accident Comm'n, 209 P.2d 991, 993 (Cal. App. 1949).

48 Stapp Drilling Co. v. Roberts, 471 S.W.2d 131, 136 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.).

was not established; the cause of action against the defendant for venue purposes should fail; and the defendant's plea of privilege should have been sustained in the trial court. In contrast, the dissent asserts that there was sufficient circumstantial evidence and direct evidence together with the reasonable inferences to be gathered from the evidence to justify the trial court's overruling of the plea of privilege.[49] Also, because of the position of the defendant company as Hester's employer, the defendant presumably had superior knowledge of the relevant facts concerning the issue of scope of employment. Thus, the dissent reasons that since the defendant did not come forth with any evidence refuting the direct evidence or the reasonable inferences to be derived from the evidence, a strong presumption arises that any evidence the company would have produced would have been favorable to the other party.[50]

It has also been held that where the trip to work could be regarded as part of his employment duties, the driver could be found to have been acting in the scope of his employment.[51] The dissent relies on the case of *Kuehmichel v. Western Union Telegraph Co.*[52] In *Kuehmichel,* the defendant's delivery boy, who regularly worked from 7:00 to 8:00 in the evening and used his bicycle, was told by his superior not to report on the evening in question unless he was called. At about 7:15 that evening he was called and told to report right away but was involved in a collision while on his way to the office.[53] In this case, as in *Stapp,* the servant was acting under orders from the master. In *Kuehmichel* the delivery boy was using his bicycle with the knowledge and assent of the company. The court concluded that by having him serve in such a manner the employer had the right to control and direct his actions at the time of the negligent act, both as to the act itself and as to the means of performing it.[54] However, if it is established that the general purpose for which the car was being used brings the use within the scope of employment, the master may still escape liability if he can show that the employee had abandoned this business purpose and was engaged in a "frolic of his own."[55] In *Stapp* it was neither alleged nor proved that the servant Hester deviated in any manner from his line of duty.

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[49] *Id.* at 138. "On appeal from an order overruling a plea of privilege every reasonable intendment must be resolved in favor of the trial court's judgment." James v. Drye, 159 Tex. 321, 327, 320 S.W.2d 319, 323 (1959).

[50] Stapp Drilling Co. v. Roberts, 471 S.W.2d 131, 139 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.).

[51] Sullivan v. Thompson, 87 P.2d 62, 63 (Cal. App. 1939). An automobile salesman, who was scheduled at the employer's lot from 12:30 to 6:00 was driving to work about an hour early in order to keep an appointment at the lot with a prospective customer, was found to be acting within scope of his employment.

[52] 145 N.W. 788 (Minn. 1914).

[53] *Id.* at 789.

[54] *Id.* at 790.

[55] *E.g.,* Robinson v. George, 105 P.2d 914, 918 (Cal. 1940). The court stated that when the servant is out on a special errand, either at the express orders of his employers, or as

The dissent in the instant case does not challenge the "going and coming" doctrine, but rather its reasoning is based on the proposition that the facts show the case to fall within the "special errand" exception. It is true that the accident occurred on a public road from a hazard to which the travelling public was subjected, but at that time Hester was en route to the place of employment to perform a service, special in nature, aside from and in addition to his regular daily task. The employer's order was clear and direct, for without the command Hester would not have gone to work that day. The order was a special or unusual one because it requested Hester to help move the employer's rig and was also at an unusual hour for him, since he was to report when he got home.[56] Thus, Hester was simply following his employer's order and in so doing conferred a special benefit on the employer in furtherance of his master's business at the time of the negligent act so as to bring the act "within the scope of employment."

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part of the regular duties, the employee's injuries are compensable from the commencement of the mission to its conclusion, or until he deviates from it for personal reasons.

[56] This is opposed to his regular daily duties as a derrick hand and his normal starting time of 7:00 A.M. Stapp Drilling Co. v. Roberts, 471 S.W.2d 131, 132, 133 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.).