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". . . IN THE INTEREST OF JUSTICE."

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One of the most frustrating experiences of a Texas supreme court justice is to be compelled to honor rules of procedure which lead in a particular case to a result deemed by the court to be unjust. The alternative, however, is to endow the court with unbridled discretion to set aside or change lower court judgments at will. The alternative would surely not be acceptable to lawyers, and it is doubtful that it would even be welcomed by the court's justices.

There is only one area in appealed cases in which our supreme court does have, and exercises, very broad discretion in the type of judgment which it will render. The area is marked out by Rule 505, Texas Rules of Civil Procedure, which provides:

> In each case, the Supreme Court shall either affirm the judgment, or reverse and render such judgment as the Court of Civil Appeals should have rendered, or reverse the judgment and remand the case to the lower court, if it shall appear that the justice of the case demands another trial, subject to the provisions of Rules 503 and 504 relating to reversals.

The first part of the rule directs the general course to be followed by the supreme court when it reverses a judgment of a court of civil appeals; it shall proceed to render such judgment or decree as the court below [court of civil appeals] should have rendered. Under this part of the rule, if, upon reversal of a trial court judgment, a court of civil appeals should have rendered judgment for the opposite party but failed to do so, it is the duty of the supreme court to do so. The second part of the rule contains an exception. By its express provision, the supreme court is authorized, upon reversal of a trial court judgment, to remand the case to the trial court "if it shall appear that the justice of the case demands another trial;" or, as the court usually puts it, "in the interest of justice." Certain aspects of the practice need discussion.

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Is remanding in the interest of justice a relatively recent practice? The answer is "no."

The rule is not new; it had its origin in the practice acts of 1892[1] and was adopted in 1941 from article 1771, Revised Civil Statutes of 1925. Its wording is virtually identical with its wording in the practice acts and in article 1771. As a matter of fact, even prior to adoption of the practice acts the supreme court had remanded "in the interest of justice" rather than render the judgment that the trial court should have rendered. In *Buzard v. First National Bank*,[2] the bank sued Buzard for the amount due on a note, executed only by Pennington, on the theory that Pennington and Buzard were partners and the note was given for a partnership debt. The trial court rendered judgment for the bank. The supreme court held that the evidence did not establish the partnership and that, therefore, the judgment must be reversed. The court then noted that the bank's petition did not seek to hold Buzard liable "on the ground that they were principal and agent," and, consequently, the court had "not considered the question of appellant's [Buzard's] liability by reason of the latter relation." The court's opinion concludes: "In order that appellee [bank] may take such further action in the case, by amendment or otherwise, as may be deemed proper, we reverse the judgment and remand the cause."[3]

It will be noted that *Buzard* was decided before the courts of civil appeals were created by constitutional amendment in 1891 and before enactment of the practice acts in 1892. Soon after those events, the supreme court expressed doubt in a rather clear dictum that it had jurisdiction to alter a court of civil appeals' judgment which because of the absence of evidence to support a verdict or judgment either reversed and rendered or reversed and remanded. In *Patrick v. Smith*,[4] the trial court rendered judgment for the plaintiff upon conflicting evidence. The court of civil appeals reversed and rendered judgment for defendant. The supreme court held that where evidence is conflicting a court of civil appeals may set aside a trial court judgment as being against the weight and preponderance of the evidence and remand, but that it may not reverse and render. In the course of the opinion, the court noticed the statute giving the supreme court power to remand in the interest of justice, and said:

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1 Tex. Laws 1892, ch. 14, § 1, at 22, 10 H. GAMMEL, LAWS OF TEXAS 386 (1898).
2 67 Tex. 83, 2 S.W. 54 (1886).
3 *Id.* at 93, 2 S.W. at 59.
4 90 Tex. 267, 38 S.W. 17 (1896).

> If there be no evidence to sustain a judgment upon an issue material to a recovery, the appellate court [Court of Civil Appeals] may, in its discretion, render judgment for the appellant, or remand the cause for a new trial. In such a case this court would probably have no more authority to revise their action than it would have to reverse a judgment of the District Court, merely because, in their opinion, the ends of justice would be promoted by a new trial.[5]

The dictum of *Patrick v. Smith* did not become, or at least remain, the rule of decision. Throughout the succeeding 75 years the supreme court has often exercised its power to remand in the interest of justice in situations in which a court of civil appeals has reversed and rendered as well as in cases in which the court of civil appeals has erroneously affirmed a trial court judgment. The power or propriety of the court's remanding in the interest of justice in the latter situation is beyond question; therefore, only cases in which the court has modified a court of civil appeals' judgment of reversal and rendition will be noticed in any detail.

First to be considered are cases in which the failure of a court of civil appeals to remand after reversal has been assigned as error in the supreme court, or where the record does not disclose whether error was so assigned.[6] These cases span a period of some 50 years. There are many, many other cases in which similar action has been taken. However, the number of cases in which such action has been taken is of no real significance; what is of significance is the rule or rules by which the court has been guided in deciding whether a remand should be ordered in the interest of justice. On this score, one need not discriminate between those cases in which the supreme court has modified courts of civil appeals' judgments and those in which the supreme court has reversed entire judgments of those courts, or even those in which courts of civil appeals' judgments of rendition have been affirmed.

The rule for deciding whether to remand.

Most of the cases in which the problem has arisen are "no evidence" cases; that is, cases which are reversed because there is no evidence to

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[5] *Id.* at 274, 38 S.W. at 21.

[6] *See* Praetorian Mut. Life Ins. Co. v. Sherman, 455 S.W.2d 201 (Tex. Sup. 1970); Benoit v. Wilson, 150 Tex. 273, 239 S.W.2d 792 (1951); Turner v. Texas Co., 138 Tex. 380, 159 S.W.2d 112 (Tex. Comm'n App. 1942, opinion adopted); Colbert v. Joint Stock Land Bank, 129 Tex. 235, 102 S.W.2d 1031 (1937); Smith v. Patton, 241 S.W. 109 (Tex. Comm'n App. 1922, opinion adopted); Waldo v. Galveston, H. & S.A. Ry., 50 S.W.2d 274 (Tex. Comm'n App. 1932, holding approved); Associated Oil Co. v. Hart, 277 S.W. 1043 (Tex. Comm'n App. 1925, jdgmt adopted).

support the jury's or trial court's finding on a vital fact issue. As early as 1911, the supreme court laid down the rule to be followed in such cases in *Paris & G.N.R.R. v. Robinson*,[7] in this language:

> [A]s long as there is a probability that a case has *for any reason* not been fully developed, this court will not render judgment on the insufficiency of the evidence. In other words, it must be apparent to the court that the case has been fully developed, and *that there is no probability* that any other evidence can be secured before it will render judgment.[8]

Associated Oil Co. v. Hart[9] has often been quoted as stating that:

> It is the rule, where a judgment has been reversed, to remand to the trial court rather than to render, where the ends of justice will be better subserved thereby. Such remanding has often been ordered to supply additional testimony, to amend the pleadings, and even to show jurisdiction.

The foregoing rule was quoted and applied in *Waldo v. Galveston H. & S.A. Ry.*,[10] in which an injured plaintiff pleaded two negligent omissions as a basis for recovery of damages from the railroad. Only the first was submitted to the jury, and judgment was rendered on the verdict for the plaintiff. The court of civil appeals reversed the trial court's judgment and rendered a take-nothing judgment on the ground that the answers to the submitted issues did not constitute a basis for liability. The commission of appeals reversed and remanded upon a holding that there was evidence supporting the second theory of liability and plaintiff was entitled to have it submitted to a jury.

In *Turner v. Texas Co.*,[11] a remand was ordered so that an injured plaintiff might seek the testimony of the defendant's automobile driver since ". . . plaintiff and his counsel may not have been at fault in failing to procure this testimony and . . . they may reasonably have expected that defendants would offer the driver of the automobile as a witness."[12] In *King v. Hill*,[13] a remand instead of rendition was ordered because "[t]he case was tried on a theory different to that made applicable by the verdict . . . ."[14] In *Hall v. O.C. Whitaker Co.*,[15] a remand rather than rendition was ordered, the court stating:

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7 104 Tex. 482, 140 S.W. 434 (1911).
8 *Id.* at 492, 140 S.W. at 439 (emphasis added).
9 277 S.W. 1043, 1045 (Tex. Comm'n App. 1925, holding approved).
10 50 S.W.2d 274 (Tex. Comm'n App. 1932, holding approved).
11 138 Tex. 380, 159 S.W.2d 112 (1942).
12 *Id.* at 388, 159 S.W.2d at 117.
13 141 Tex. 294, 172 S.W.2d 298 (1943).
14 *Id.* at 299, 172 S.W.2d at 301.
15 143 Tex. 397, 185 S.W.2d 720 (1945).

> When it does not appear that the facts have been fully developed, the Supreme Court when reversing the judgment of the Court of Civil Appeals will remand and not render the case.[16]

Chief Justice Alexander protested in that case that a remand should not be ordered "merely to see if plaintiff can do better upon another trial." He added: "At least he should not be given that opportunity in the absence of reasonable assurance that he can produce other evidence upon another trial, and the showing of a reasonable excuse for having failed to produce same upon the former trial."[17]

In *United Gas Corp. v. Shepherd Laundries Co.*,[18] the court said:

> From what has been said it follows that the respondent has failed to allege or prove a cause of action either for overcharge or discrimination. However, since the cause has been tried upon an erroneous theory we think justice will best be subserved by remanding the cause rather than rendering judgment for petitioner.

In *Morrison v. Farmer*,[19] remand was ordered to permit a plaintiff who was losing a suit for title to property to sue for the value of improvements placed on the lot. In remanding *Benoit v. Wilson*, the court stated that "[r]endition of judgment, where a case has been tried upon the wrong theory, *should only occur* where the record discloses that the complaining party would not have been able to recover had the case been tried on the right theory."[20] In *Hicks v. Matthews*,[21] the plaintiff had two theories of recovery and went to the jury on only one of them. The court held that the judgment could not stand on the submitted theory, but remanded for trial on the other theory, saying:

> *This court exercises a wide discretion in determining whether it should render final judgment here or remand the case for another trial.* The fact that a peremptory instruction would have been justified does not necessarily mean that the cause should not be remanded to the trial court.[22]

In *City of San Antonio v. Pigeonhole Parking, Inc.*,[23] respondent presented no evidence that an ordinance was arbitrary or unreasonable as to it because it did not think it had that burden. The court remanded instead of rendering because respondent "*proceeded under a mistake of*

16 *Id.* at 405, 185 S.W.2d at 724
17 *Id.* at 406, 185 S.W.2d at 724 (dissenting opinion).
18 144 Tex. 164, 179, 189 S.W.2d 485, 492 (1945).
19 147 Tex. 122, 213 S.W.2d 813 (1948).
20 150 Tex. 273, 284, 239 S.W.2d 792, 799 (1951) (emphasis added).
21 153 Tex. 177, 266 S.W.2d 846 (1954).
22 *Id.* at 183, 266 S.W.2d at 849 (emphasis added).
23 158 Tex. 318, 311 S.W.2d 218 (1958).

law in presenting his case,"[24] and a remand was in the interest of "fairness and justice." In *Davis v. Gale*, a remand was ordered with the declaration that "*it is the rule to remand to the trial court for a new trial rather than to render*, where the ends of justice will be better subserved thereby."[25] In *American Title Insurance Co. v. Byrd*,[26] the court let an experienced attorney go back for another "bite at the apple" after holding that he had no right of action under article 4004 against a title guaranty company, but that he might have a right of action on another theory. In *C. & R. Transport, Inc. v. Campbell*,[27] a case was remanded in the interest of justice because it appeared that the jury may have misunderstood the court's charge. In *Houston Fire & Casualty Insurance Co. v. Nichols*,[28] the court remanded because "[t]o deny Nichols another opportunity to develop his evidence fully would be unjust."

The foregoing cases should illustrate that *the rule* is to remand wherever and whenever it appears that a party with a meritorious claim or defense will lose his case without another opportunity to present it in the trial court. There are a few cases in which the supreme court has refused to remand, and, indeed, some in which it has reversed a court of civil appeals' judgment of remand, but those cases are the exception rather than the rule, and judgment has usually been rendered only after a searching examination of the record.[29]

Cases in which the trial court has rendered judgment *non obstante veredicto* fall into a special category. In this category are *LeMaster v. Fort Worth Transit Co.*,[30] *Scott v. Liebman*,[31] and *Jackson v. Ewton*.[32] In these cases *the rule* is that, following reversal, judgment should be rendered on the verdict unless good and sufficient reason for remanding is "reflected by the record."[33] But even here, remand rather than rendition can be ordered.[34]

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24 *Id.* at 327, 311 S.W.2d at 223 (emphasis added).
25 160 Tex. 309, 313, 330 S.W.2d 610, 613 (1960) (emphasis added).
26 384 S.W.2d 683 (Tex. Sup. 1964).
27 406 S.W.2d 191 (Tex. Sup. 1966).
28 435 S.W.2d 140, 143 (Tex. Sup. 1968).
29 *See* City of Fort Worth v. Pippen, 439 S.W.2d 660 (Tex. Sup. 1969); Missouri Pac. R.R. v. Whittenburg & Alston, 424 S.W.2d 427 (Tex. Sup. 1968); London Terrace, Inc. v. McAlister, 142 Tex. 608, 180 S.W.2d 619 (1944); Great Atl. & Pac. Tea Co. v. Evans, 142 Tex. 1, 175 S.W.2d 249 (1943); Yarbrough v. Booher, 141 Tex. 420, 174 S.W.2d 47 (1943); McMahan v. Texas & N.O.R.R., 138 Tex. 626, 161 S.W.2d 70 (1942); Great Plains Oil & Gas Co. v. Foundation Oil Co., 137 Tex. 324, 153 S.W.2d 452 (1941).
30 138 Tex. 512, 160 S.W.2d 224 (1942).
31 404 S.W.2d 288 (Tex. Sup. 1966).
32 411 S.W.2d 715 (Tex. Sup. 1967).
33 *Id.* at 718.
34 Scott v. Liebman, 404 S.W.2d 288 (Tex. Sup. 1966).

Is a remand in the interest of justice authorized to correct injustice resulting from trial tactics? The answer is "yes."

The first problem in answering this question is in recognizing when an unjust judgment may result from trial tactics and when it may result from the negligence of counsel or the trial judge. Look, for example, at many of the cases previously analyzed.

In *Buzard,* was the bank's reliance on partnership and its failure to plead and prove a case of principal and agent trial tactics or negligence? In *Waldo,* was submission of only one of the plaintiff's two negligence theories the result of trial tactics, or counsel negligence, or the trial court's ruling? In *Turner,* was the failure of plaintiff's counsel to call the defendant's driver as a witness or take his deposition trial tactics or counsel negligence? And, how about *King v. Hill*? In *Morrison,* was it trial tactics that plaintiff sought to recover title to the house and lot rather than the value of the improvements? In *Hicks,* was it trial tactics, or negligence, or the trial court's mistake that prompted plaintiff's counsel to go to the jury on the one of his two theories of liability on which he could not recover? In *Byrd,* was it trial tactics that prompted Byrd to sue under article 4004[35] which, if applicable, would have given him a much greater award of damages than a mere breach of contract action?

Even if the court always has the ken to know when a case has been lost by trial tactics rather than negligence or ignorance, it would not be just to adopt a rule of rendering judgment instead of remanding in the interest of justice *merely* because a litigant's lawyer made the wrong chess move.

Has the supreme court, upon agreeing with a court of civil appeals' judgment of reversal, modified the court of civil appeals' judgment of rendition and ordered a remand instead without a point of error seeking such action? The answer is "yes."

In support of a "yes" answer, see *Dahlberg v. Holden,*[36] *Kennedy v. American National Insurance Co.,*[37] *Taylor v. United States Fidelity & Guaranty Co.,*[38] *Maupin v. Chaney,*[39] *Southampton Civic Club v.*

35 TEX. REV. CIV. STAT. ANN. art. 4004 (1966).
36 150 Tex. 179, 238 S.W.2d 699 (1951).
37 130 Tex. 155, 107 S.W.2d 364 (1937).
38 283 S.W. 161 (Tex. Comm'n App. 1926, holding approved).
39 139 Tex. 426, 163 S.W.2d 380 (1942).

Couch,[40] and *Scott v. Liebman*.[41] There may well be other cases in which the court has followed the practice but they are not easily found by simply reading opinions.

Two of the cited cases need explanation, but *Kennedy*, *Taylor*, *Maupin*, and *Couch* do not; these four are cases, pure and simple, in which a court of civil appeals reversed and rendered, and the supreme court, without a point of error seeking such action, ordered a remand instead of rendition.

Now to *Dahlberg v. Holden*. The record in the case shows conclusively that defendant was given a second bite at the apple to remedy counsel's misfired trial tactics. The facts in the case are too complicated to go into them in detail. Suit was in trespass to try title. The trial court awarded plaintiffs full title as against defendant, Dahlberg, who claimed only a mineral interest, but ordered that they take nothing as against defendant, Paul, who had purchased the surface from Dahlberg.[42] The court of civil appeals reversed the judgment and awarded plaintiffs full title as against both defendants.[43] Neither of the defendants had a point of error before the supreme court complaining that the court of civil appeals erred in failing to remand in the interest of justice. The supreme court affirmed.[44] On rehearing, Dahlberg asserted, alternatively, for the first time, that in any event the court should remand in the interest of justice to permit him to make proof of title to a two-thirds interest. In this connection, he said in his motion for rehearing:

> [A]lthough the record does not reflect it, the Petitioner Dahlberg states to the court that there is a chain of conveyances into him and the Petitioner Paul with respect to the remaining two-thirds interest, *which conveyances were not offered in evidence in the trial court.*

In spite of this open admission that his proof had been deficient because of trial tactics, the court heard Dahlberg's cry for justice, set aside its earlier judgment as to the two-thirds interest, and remanded.[45]

In *Southampton Civic Club v. Couch*,[46] the court set aside its first judgment and reversed and remanded on rehearing *without anyone*

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40 159 Tex. 464, 322 S.W.2d 516 (1959).
41 404 S.W.2d 288 (Tex. Sup. 1966).
42 Dahlberg v. Holden, 150 Tex. 179, 182, 238 S.W.2d 699, 700 (1951).
43 *Id.* at 183, 238 S.W.2d at 701.
44 *Id.* at 186, 238 S.W.2d at 703.
45 *Id.* at 187, 238 S.W.2d at 704.
46 159 Tex. 464, 322 S.W.2d 516 (1959).

asking that it do so by point of error in either the original applications or the motion for rehearing.

In *Scott v. Liebman*,[47] the court remanded in the interest of justice after reversing the court of civil appeals' judgment, without a point of error invoking the power given by Rule 505.[48] Petitioner did have points of error complaining of the fact that the court of civil appeals' judgment of rendition against him had the effect of denying him a jury trial and thus was lacking in fundamental fairness.[49] However, that the court *thought* it was remanding in the interest of justice without a point of error so requesting seems evident from citation of *Dahlberg* and *Southampton Civic Club* and its summary of the *Dahlberg* holding, as follows:

> However, both the Court of Civil Appeals and this Court, having found error in the judgment of the trial court, are authorized in a proper case to remand in the interest of justice. Both courts have discretion in this matter. *Rule 505 specifically authorizes this Court to do so.*[50]

Should the supreme court as a policy matter retain and exercise the right to pursue the course of action of remanding in the interest of justice?
The answer is "yes."

The supreme court is constantly striving and straining, and bending rules of procedure, to try to achieve a result deemed by it to be just and equitable. Now, here is the one and only rule which expressly confers the power upon the court to render a judgment purely for the purpose of achieving justice, and it would seem that the court had better keep its hand firmly on the tiller lest one day it have before it a case in which a court of civil appeals has entered a terribly unjust judgment of rendition and the petitioner has failed to present a point of error complaining of the court's failure to remand in the interest of justice.

Some may think that to adopt the practice suggested violates the rule against reversing on a ground not assigned as error in a point of error, and that it will lead eventually to reversals in all situations without a point of error. Experience does not so indicate. In the first place, the practice has already been adopted, as shown by the cases cited above, and it has not led to wholesale reversals. Moreover, the practice does

47 404 S.W.2d 288 (Tex. Sup. 1966).
48 TEX. R. CIV. P. 505.
49 Scott v. Liebman, 404 S.W.2d 288, 294 (Tex. Sup. 1966)
50 *Id.* at 294 (emphasis added) (citations omitted).

not violate the rule against reversal on a ground not assigned in a point of error. As pointed out in *Scott v. Liebman*[51] and *Dahlberg v. Holden*,[52] Rule 505 and courts of civil appeals' Rule 434 confer coequal and independent powers of discretion upon the supreme court and courts of civil appeals, with no suggestion in Rule 505 that the supreme court's discretion can be exercised only if invoked by point of error. The courts do not require as a predicate for court of civil appeals' action that exercise of its discretion to remand be invoked by request of the appellee, and there would seem to be no more reason for requiring a point of error to invoke supreme court discretion. Finally, by the express wording of Rule 505, the injunction laid upon the supreme court to remand is mandatory if the court concludes that "the justice of the case demands another trial."

CONCLUSION

While the foregoing is primarily intended to demonstrate, through both history and precedent, that there is one area in appealed cases in which the supreme court has almost unbridled discretion of action in its yearning to achieve justice in particular cases, it should also point up certain procedural courses of action which a careful appellate lawyer should not overlook. An appellee in a court of civil appeals which is being urged to reverse the trial court's judgment and render judgment for the appellant, should always urge, alternatively, that a remand be ordered in the interest of justice under Rule 434, Texas Rules of Civil Procedure, if reversal occurs. Although the wording of Rule 434 differs from that of Rule 505, they have substantially the same meaning.[53] If a court of civil appeals fails to hear the plea and renders judgment for the appellant, the appellee, as petitioner in the supreme court, should assert error on the part of the court of civil appeals in failing to remand. That this course of action is not absolutely essential to a judgment of remand "in the interest of justice" is clearly held by the supreme court in the very recent case of *Morrow v. Shotwell*,[54] but why risk the chance that the appellate courts may fail to see and appreciate that the justice of the case requires a remand?

One further admonition is justified. Attorneys frequently interpret Rule 505 and the cases cited herein as authorizing the supreme court

51 *Id.* at 294.
52 Dahlberg v. Holden, 150 Tex. 179, 187, 238 S.W.2d 699, 704 (1951).
53 *See* London Terrace, Inc. v. McAlister, 142 Tex. 608, 180 S.W.2d 619 (1944).
54 477 S.W.2d 538 (Tex. Sup. 1972).

to *reverse* trial court judgments in the interest of justice. Not so. Neither Rule 505 nor Rule 434 authorizes reversal of an errorless judgment.[55] The rules merely authorize remand for retrial rather than rendition of judgment once the appellate court has held that the trial court's judgment must be reversed because it is erroneous.

[55] City of Houston v. Blackbird, 394 S.W.2d 159 (Tex. Sup. 1965); Davis v. Davis, 141 Tex. 613, 175 S.W.2d 226 (1943); National Life Co. v. McKelvey, 131 Tex. 81, 113 S.W.2d 160 (1938).