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"TRY, TRY, AGAIN . . ." A PROPOSAL TO LIMIT THE SCOPE OF NEW TRIALS IN TEXAS

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A review of the Texas practice with regard to partial new trials shows a history of confusion, inconsistency and difficulty. The rule itself is simple: a cause of action is an entirety and retrial of any part requires retrial of the whole. The simplicity of the rule would suggest simplicity in its application, yet the Texas courts have experienced continuous difficulty in this regard.

Some of this difficulty can be attributed to confusion caused by terminology. For this reason, some of the terms which seem to have caused the confusion are expressly defined here so that a standard meaning is assigned for the purposes of this article. The term "issue" is here used to mean a fact question, one element of a cause of action, and is not, as it has been frequently used by the courts, synonymous with "cause of action." When a complete cause of action is discussed the term "cause of action" will be used. Furthermore, the word "severable" is not used as a technical term to mean separating one cause of action from another, but is used in its ordinary sense. Thus, no distinction is attributed to the meanings of "severable" and "separable" as some courts have done previously. Finally, the term "partial new trial" has been chosen over the term "partial remand" in order to make clear that the trial court on motion for new trial, and the appellate courts considering an appeal, should both have the power to limit new trials.

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The rule prohibiting partial new trials had its origin in the common law, based on the supposed indivisibility of a cause of action.[1] Texas courts embraced the rule at an early date, yet a strain of consistency in its use has emerged only recently. Various reasons have been advanced in its support including the conceptual indivisibility of causes of action, the requirement that there be only one final judgment, and a policy that causes of action are not to be tried piecemeal. In reliance upon earlier cases these reasons are often reasserted today, apparently without critical examination of their merit. When the foundation and rationale of the prohibiton against splitting a cause of action for partial new trial are examined, it can be seen that the present Texas practice retards efficient administration of justice.

This article will trace the history and development of the rule, including the present day practice. The precepts upon which the rule rests are tested for soundness in evaluating whether the rule serves or impairs its stated objectives. Finally, the partial new trial practice as it is employed in other jurisdictions is examined to aid in anticipating problems which will confront the Texas courts if the practice is changed.

THE EARLY TEXAS CASES

While no consistent rule or procedure was followed in the early Texas cases considering the problem of the scope of a new trial, a general conclusion can be drawn that the requirement that there be only one final judgment in any case is responsible for the adoption of the Texas practice. Although the first cases on the subject failed to specifically mention this prohibition against partial retrial, later cases established it as controlling.

The first recorded case with reference to the issue appears to be *Burleson v. Henderson*,[2] which involved a suit by the state against three defendants for nonpayment of a bond obligation. Citation was served on all three defendants, but none answered or appeared. The state obtained a default judgment, from which only one of the defendants appealed. The Texas Supreme Court invalidated the default judgment since the defendants were not served in accordance with the requirements of the law.[3] On rehearing the state argued that the supreme

1. *See* Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494 (1931); Simmons v. Fish, 97 N.E. 102 (Mass. 1912).
2. 4 Tex. 49 (1849).
3. *Id.* at 52-53.

court was without jurisdiction since two of the defendants were not parties to the appeal. Although the case dealt with severability of parties, and not of issues, it is instructive since it was the first time the court was confronted with the question of entirety of judgments. While indicating a reluctance for the reversal to inure to the benefit of parties who did not aid in obtaining it, the court also found strong policy considerations on the other side.

> But notwithstanding these consideration, it appears to be the more convenient rule that where a judgment is entire, where the judgments are not distinct and independent, or where the parties have not distinct and independent interests, . . . and where the judgment operates to the prejudice of all the defendants, a reversal as to one shall operate as a reversal as to the whole; and this may be regarded as the general rule, subject to such modifications as may meet the justice of a case under review . . . .[4]

Burleson is significant because the court formulated a rule without the guidance of precedent or statute. Although a statutory final judgment rule did exist at that time,[5] the court either implicitly found it inapplicable or was unaware of it. The rule announced was "commended to our sanction from its convenience, and not because it has the conclusive force of law."[6]

Even though the supreme court remanded *Burleson* in its entirety, it appears to have tolerated the practice of trial courts granting partial new trials. In *Smith v. Gans*,[7] Smith sued Mr. and Mrs. Gans alleging a violation of an agreement whereby Smith was to relinquish all interest in a partnership composed of himself and Gans, and Gans would collect all money still due the partnership as well as pay outstanding debts. Smith alleged that the debts were not being paid and sought an injunction. The case was submitted to the jury on issues inquiring whether Smith and Gans were partners, how much was due the partnership on the date of agreement, and whether Gans was collecting and paying off partnership debts. The jury found that they were partners and that Gans had not been paying the debts as provided in the agreement. The trial court set aside the jury finding as to this latter issue, and ordered a new trial on that issue only. At the retrial the court found

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4. *Id.* at 59-60.

5. Tex. Laws 1846, An Act To Regulate Proceedings in District Courts § 47, at 1681, 2 H. GAMMEL, LAWS OF TEXAS 1641 (1846). The former statute is now embodied, in identical language, within the terms of TEX. R. CIV. P. 301.

6. Burleson v. Henderson, 4 Tex. 49, 60 (1849).

7. 4 Tex. 72 (1849).

that Gans was paying the debts and Smith appealed. The supreme court discussed only the merits of the case without commenting on the partial new trial order although the court reporter's notes state that "*it seems* that a verdict which finds several distinct issues specially may be set aside as to some and sustained as to others."[8]

Boone v. Hulsey[9] discussed the question of severability of parties within the context of the one final judgment rule. The court held that reversing as to some defendants and affirming as to others was consistent with the requirement of only one final judgment since the plaintiff had a separate cause of action against each defendant, he could also have one final judgment against each.[10] This case did introduce "one final judgment" as an element within the issue of severability, but it did release the courts from an earlier, more restrictive holding in *Acklin v. Paschal*,[11] that a "judgment is an entirety; and if erroneous and reversed as to some of the defendants, *it must follow* that it be reversed as to all."[12] In *Acklin* the court had expressly noted that even though the plaintiff had separate causes of action against each of the defendants, he had limited himself to only one final judgment by not severing the actions in the trial court.[13] Comparison of this holding with that in *Boone* indicates that *Acklin* was tacitly overruled in *Boone*.

Having established the one final judgment requirement, the supreme court acted almost immediately to retain as much flexibility, consistent with the one final judgment requirement, as was possible. *Hamilton v. Prescott*[14] again considered whether reversal may be granted only as to some of the parties and not to the others. The court comprehensively reviewed previous cases which were hopelessly confused, recognizing the limitations which the one final judgment rule imposed, and released the appellate courts from those limitations. Without discussion or authority, the court proclaimed that the rule "is, however, applicable only to the trial courts, and consequently in this court no very uniform rule has been recognized."[15]

8. *Id.*
9. 71 Tex. 176, 9 S.W. 531 (1887).
10. *Id.* at 183, 9 S.W. at 534.
11. 48 Tex. 147 (1877).
12. *Id.* at 178 (emphasis added).
13. *Id.* at 178. Apparently *Boone* was the first case to decide that separate causes of action, which were jointly tried, can be separated for new trial. In the later case of Hamilton v. Prescott, 73 Tex. 565, 566, 11 S.W. 548, 549 (1889), it was said that *Boone* recognized an exception to the general rule that a reversal as to one party was a reversal as to all.
14. 73 Tex. 565, 11 S.W. 548 (1889).
15. *Id.* at 566, 11 S.W. at 549.

Thus *Hamilton* seemed to return to the original status of the rule. For 40 years after *Burleson*, the courts had followed conflicting practices—the one final judgment rule was injected, then removed as a consideration—but the supreme court had at least relaxed its position to the extent that a partial new trial was acceptable in certain instances.

> We think the conclusion to be deduced from these apparently conflicting cases is that this court when it finds error in the proceedings of the lower court as to any party to the judgment, and not as to another and that a proper discussion of the case as to one is not dependent upon the judgment as to the other, we will reverse in part and affirm in part. But where the rights of one party are dependent in any manner upon those of another it will *treat* the judgment as an entirety . . . .[16]

The court's language indicates that where the rights are not distinct and independent, but are interrelated, the *judgment* is deemed entire, presumably to parties *and* issues. The rule today, however, approaches the question from the opposite end: where the judgment is entire, the *parties and issues* are deemed interrelated. It seems that the approach taken in *Hamilton* is commended by stronger logic.

The disposition made in *Hamilton* apparently indorses partial remand by appellate courts. The one final judgment rule was not ignored, as it was in *Burleson,* but was simply decreed to be applicable only to trial courts; the holding was made without authority or explanation, seemingly indicating a reluctance to foreclose partial remand under proper circumstances.

The problem was again considered in detail in the case of *Hume v. Schintz.*[17] Plaintiff sued for false imprisonment and malicious prosecution. A verdict was given for the plaintiff on the false imprisonment issue and for the defendant on the malicious prosecution issue. The trial judge granted a new trial on the false imprisonment action and reinstated the entire case. The court of civil appeals affirmed, holding that the one final judgment statute dictated that a trial court's order for a new trial of the false imprisonment issue necessarily compelled a new trial of the malicious prosectution action as well.[18]

Hamilton established that the one final judgment rule was an obstacle to partial new trials only in the trial courts, and *Hume* set out the force and scope of that obstacle.

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16. *Id.* at 566-67, 11 S.W. at 549 (emphasis added).
17. 40 S.W. 1067 (Tex. Civ. App.), *writ ref'd*, 91 Tex. 204, 42 S.W. 543 (1897).
18. *Id.* at 1071.

> We note in this connection that the *Hulsey* Case relates to severance and judgment as to parties, and not to issues which may be more or less dependent or related. But we believe the true rule of practice in the district courts is that but one final judgment—there being no severance—can be rendered in any cause, and that a new trial as to one party or one issue is a new trial as to all parties and issues, or otherwise it would result that more than one final judgment could be had in the same cause. The attempt of a trial judge to hold up a verdict as to one branch of a case until return of a verdict that he would approve on another branch of the case is an anomaly unknown to our practice.[19]

It is clear that *Hume* was incorrectly decided: since *Boone v. Hulsey*,[20] there has been little doubt that one cause of action can be severed and remanded independent of another. *Hume*, however, became a leading case for denying partial new trials.[21]

The one final judgment statute was subsequently considered by the Austin Court of Civil Appeals in *Danner v. Walker-Smith Co.*[22] The court was critical of the one final judgment statute, because it "entails unnecessary delays and expense, but it is not for us to consider the wisdom or folly of a statute."[23] The case is significant in that it implicitly questions former holdings that the statute applied only to trial courts.

> It is well settled that, where the district court grants a new trial as to one party or one issue, this will operate as a new trial as to all parties and all issues. . . . If such is the effect of the voluntary action of the district court, why is it not the same when that court is required to take such action by the mandate of a superior court?[24]

Furthermore, the court noted that the question before the appellate court is merely what disposition the trial court should have made.[25]

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19. *Id.* at 1071.

20. 71 Tex. 176, 9 S.W. 531 (1887). *See* discussion p. 4 *supra.*

21. One possible reason is the detailed consideration of the problem given in *Hume.* The following hypothesis may also have been convincing:

> If the verdict could be carried over on one issue from time to time, and from judge to judge, until final judgment on all the issues, it would not only cause an inconvenient hiatus between the verdict and final judgment, but such a hiatus between the verdict and an appeal that appeal with a correct statement of facts could not be had.

Hume v. Schintz, 40 S.W. 1067, 1071 (Tex. Civ. App.), *writ ref'd*, 91 Tex. 204, 42 S.W. 543 (1897).

22. 154 S.W. 295 (Tex. Civ. App.—Austin 1912, writ dism'd).

23. *Id.* at 302.

24. *Id.* at 302.

25. *Id.* at 302. The court reviewed the several cases on partial reversal and came to the same conclusion that earlier cases reached: the cases showed the "unsettled condition" of the question. The court reconciled the earlier case of Burleson v. Henderson, 4 Tex. 49 (1849), and others which allowed partial reversal, on the grounds that the

Then, on October 30, 1912, the supreme court promulgated Rule 62a[26] in response to what the Texas Civil Judicial Council described as "a wide-spread demand to give the appellate courts more ample powers with the view of preventing new trials, either in whole or in part . . . ."[27] The rule contained a provision which permitted reversals for retrials of only a part of the matter in controversy when the issues are severable, but the main thrust of the rule was the adoption of the harmless error rule in place of the presumed harm practice. The rule operated to reduce the number of new trials,[28] but that part of the rule which invited a flexible new trial practice was generally ignored.

In *Texas & N.O.R. v. Weems*,[29] the plaintiff proved that he suffered the loss of his peach crop because of the carrier's failure to furnish refrigerator cars. Plaintiff's proof of his damages was defective, necessitating a remand. The court refused to remand the cause for a determination of the damages only, but remanded for retrial of both liability and damages.[30] In 1924, in *Farmers' Mill & Elevator Co. v. Hodges*,[31] the supreme court approved the holding of the commission of appeals that Rule 62a could not be read to authorize a new trial solely for the purpose of determining market value.[32]

The following year, however, in *Durham v. Scrivener*,[33] the commission of appeals ordered a new trial limited to the issue of damages for wrongful conveyance.[34]

> After a fair and impartial trial has been had in the trial court on the issue involving cancellation of the deeds, it would indeed be unfortunate if the rules of procedure governing appellate courts were such that, without any apparent reason therefor, the trial

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one final judgment statute was not enacted until 1879. As shown earlier, this is not true; the one final judgment statute was in existence at the time *Burleson* was decided. *See* Tex. Laws 1846, An Act To Regulate Proceedings in District Courts § 47, at 1681, 2 H. GAMMEL, LAWS OF TEXAS 1641 (1846). *Burleson* contains no indication as to whether it was unaware of the statute or simply found inapplicable.

26. *See* 149 S.W. x.
27. Eighth Annual Report, Texas Civil Judicial Council 50, 51 (1936).
28. Golden v. Odiorne, 112 Tex. 544, 547, 249 S.W. 822, 823 (1923).
29. 165 S.W. 1194 (Tex. Civ. App.—Texarkana 1914, no writ).
30. *Id.*
31. 260 S.W. 166 (Tex. Comm'n App. 1924, holding approved).
32. *Id.* at 167.
33. 270 S.W. 161 (Tex. Comm'n App. 1925, judgmt adopted).
34. The issue as to whether these deeds should be cancelled by reason of fraud practiced in securing their execution is clearly severable from the issue as to what relief should be awarded the defrauded parties for parts of the lands described in these deeds which have been wrongfully conveyed to innocent purchasers.

Id. at 163.

court should again be required to determine this issue.[35]

Besides stating this important policy, the case is significant in that it considered Rule 62a in conjunction with article 1997 which required that only one final judgment be rendered in any case.[36] The court stated that if Rule 62a in any way conflicted with the statute, it was invalid since "the Supreme Court is without authority to promulgate a rule which violates a provision of statutory law."[37] The rule and statute were then reconciled by renewing the holding that the one final judgment statute applied only to trial courts.[38]

The holding in *Farmers' Mill* is in direct conflict with the holding in *Durham*. Neither opinion was approved by the supreme court, however, so the problem continued.[39] This type of inconsistency is apparent throughout the early Texas practice. Rule 62a was promulgated in the midst of this confusion, yet it was initially interpreted to both prohibit and sanction severing issues for partial new trial, and no hint is given as to which practice was encouraged. The courts, however, soon began to adopt an approach which is still followed.

THE PRESENT TEXAS PRACTICE

There is a series of relatively recent supreme court cases involving the question of splitting a cause of action to allow partial new trial. Two significant features are common to each case. First, in each case the court of civil appeals had attempted to order a new trial on a single issue. The failure to analyze the practice and the lack of authority given indicate that the court of civil appeals in each instance was merely disposing of the case according to the court's own logic in interpretation of Rule 62a.[40] Second, the one final judgment rule disappeared as a consideration and was replaced by the now familiar maxim that "causes of action cannot be tried piecemeal." This is significant in that it represents a new adherence to policy rather than to statute, as had been emphasized in the early cases.

Phoenix Assurance Co. v. Stobaugh[41] seems to have firmly estab-

35. *Id.* at 163.
36. Article 1997 is now embodied in TEX. R. CIV. P. 301.
37. Durham v. Scrivener, 270 S.W. 161, 163 (Tex. Comm'n App. 1925, judgmt adopted).
38. *Id.* at 163.
39. *Farmers' Mill* was a holding approved decision, while *Durham* carries only a judgment adopted endorsement. The Texas Supreme Court now treats holding approved and judgment adopted cases as essentially the same.
40. TEX. R. CIV. P. 62a is now TEX. R. CIV. P. 434.
41. 127 Tex. 308, 94 S.W.2d 428 (1936).

lished the rule that causes of action cannot be tried piecemeal. There, plaintiff sued upon his fire insurance policy to recover for total loss of his house. On appeal, the court of civil appeals found that the trial court had submitted an improper issue to the jury to determine whether the loss was total.[42] Since this error did not affect the other issues in the case, including defensive pleas, the court of civil appeals reversed and remanded on the sole issue of whether there was a total loss of the building.[43] The supreme court reformed the court of civil appeals' judgment, holding that Rule 62a contemplated a circumstance where the issues were severable, and did not contemplate the piecemeal trial of an indivisible cause of action.[44]

In *Schumacher Co. v. Shooter*[45] the supreme court was again confronted with the question. In the trial court the plaintiff recovered for her personal injuries and also for the wrongful death of her two daughters. The court of civil appeals reversed and remanded as to the damages awarded plaintiff for the death of one of her daughters and affirmed as to the other issues. The reversal was grounded on failure of the plaintiff to join the daughter's minor child, who was a necessary party.[46] The supreme court declared that the case be remanded in its entirety, because the plaintiff had an interest in the remanded portion of the cause of action.[47] This is the only case in which the court has attempted to explain why a cause of action cannot be tried piecemeal. The court believed that a partial new trial would cause the defendant to suffer the consequences of having the plaintiff's cause of action tried piecemeal. Thus, the consideration of fairness was injected into the rationale. Why it is unfair to deny retrial as to issues that are distinct and have been fairly tried, determined, and are unaffected by error, was not explained.

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42. Phoenix Assurance Co. v. Stobaugh, 62 S.W.2d 678, 679 (Tex. Civ. App.—Austin 1933), *modified*, 127 Tex. 308, 94 S.W.2d 428 (1936).

43. *Id.* at 679.

44. Phoenix Assurance Co. v. Stobaugh, 127 Tex. 308, 311, 94 S.W.2d 428, 430 (1936).

45. 132 Tex. 560, 124 S.W.2d 857 (1936).

46. Schumacher Co. v. Shooter, 94 S.W.2d 484 (Tex. Civ. App.—Galveston), *rev'd*, 132 Tex. 560, 124 S.W.2d 857 (1936).

47. Schumacher Co. v. Shooter, 132 Tex. 560, 563-64, 124 S.W.2d 857, 858 (1936). *Schumacher* seems to contain a contradiction. The court condemned a practice which might result in the defendant having to "suffer the consequences of having Mrs. Shooter's cause of action against it, tried piecemeal." But this language immediately follows: "If the issues of negligence upon which *it* is grounded were severable . . . another question would be presented." *Id.* at 858 (emphasis added). The use of the word "it" means that the court was referring to a single cause of action, and still suggesting that if the issues were severable, a partial new trial may be proper.

That *Stobaugh* firmly established the practice of refusing to split a cause of action for partial new trial is clearly shown by *Texas Employers' Insurance Association v. Lightfoot.*[48] The court of civil appeals had reversed and ordered a new trial for the limited purpose of determining the amount of plaintiff's weekly wages in a workmen's compensation case.[49] The supreme court stated that Rule 434 carried forward the language of Rule 62a, and since this amounted to a reenactment, the previous interpretation formerly given by that court was still applicable. The court also quoted *Stobaugh*: "Rule 62a does not contemplate the trial of an indivisible cause of action by piecemeal."[50] No mention was made of policy considerations of fairness, nor was there any discussion of the limitations imposed by the one final judgment rule. *Lightfoot*, then, decided the issue solely on the basis of stare decisis, without reexamining the supporting rationale. *Lightfoot* only added force to *Stobaugh*, so that subsequent cases did little more than parrot these holdings.

The final judgment rule in connection with partial new trial practice surfaced again in *Luling Oil & Gas v. Humble Oil & Refining Co.*[51] The court of civil appeals, on motion for rehearing, had withdrawn its former judgment which remanded the case in its entirety and substituted an opinion which remanded for the limited purpose of trying defendant's pleas of limitations, with instructions "to hold the cause in abeyance" until the limited new trial was complete.[52] In a per curiam opinion the supreme court held that it was without jurisdiction because

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48. 139 Tex. 304, 162 S.W.2d 929 (1942).

49. Texas Employers' Ins. Ass'n v. Lightfoot, 158 S.W.2d 321, 325 (Tex. Civ. App. —San Antonio 1941), *modified*, 139 Tex. 304, 162 S.W.2d 929 (1942). It is interesting to note that the court of civil appeals was expressly applying TEX. R. CIV. P. 434.

> All other issues were found in favor of appellee upon sufficient evidence, and we have concluded that it is the duty of this Court, in observance of Rule 434 . . . to restrict the matters to be retried on a remand to those issues which are affected by the errors mentioned, they being severable from all other issues.

Id. at 325. The court's use of the word "severable" is a good example of the confusion engendered by the term. It was obviously used in its ordinary sense, and not as a technical term to mean separation of causes of action.

50. Texas Employers' Ins. Ass'n v. Lightfoot, 139 Tex. 304, 307, 162 S.W.2d 929, 930 (1942).

51. 143 Tex. 54, 182 S.W.2d 700 (1944).

52. Humble Oil & Ref. Co. v. Luling Oil & Gas Co., 192 S.W.2d 315, 320 (Tex. Civ. App.—Galveston), *writ dism'd w.o.j.*, 143 Tex. 54, 182 S.W.2d 700 (1944). After the supreme court dismissed the application for writ of error, Luling Oil moved for entry of final judgment, which the court of civil appeals granted. In its additional writing, however, the court again reversed and remanded only a portion of the case. The court found that Luling Oil had sued for eight separate causes of action, some of which were unaffected by error. *Id.* at 321.

no final judgment had been rendered.[53] Through dictum, however, the court referred to *Lightfoot* and reiterated that an indivisible cause of action cannot be tried piecemeal.[54]

In *Iley v. Hughes*[55] the supreme court declared that a trial court could not, after verdict, grant a mistrial only as to the damage issue and render an interloctuory judgment on the liability issues.[56] The case concerned the power of the trial court to order partial retrials under Rule 174(b),[57] and the supreme court felt bound by firmly established precedent which prohibited separate trials of liability and damage issues. In fact, the court explained its reason not to depart from precedent by quoting *Roosth & Genecov Production Co. v. White*:[58] "[t]o change it drastically by judicial decision would in our judgment cause undue confusion."[59] Such a far reaching change, thought the court, would more appropriately be accomplished by a change of the rules of civil procedure than by overruling so many decisions. The supreme court did in fact change the rule of *Roosth & Genecov* by rewriting Rule 277 in 1973. The court in *Iley* cannot be faulted for its adherence to precedent, but a close examination of that case with a view toward a rule change is overdue.

Iley had shot the plaintiff with a .22-calibre rifle while the plaintiff was in Iley's pecan grove without permission. The plaintiff sued Iley for compensatory and exemplary damages for injuries incurred as a result of the assault. In answer to several special issues, they jury found Iley had used more force than necessary to protect his pecans, and $3000 would be reasonable compensatory damages. The jury, however, was unable to agree on damages for diminished earning capacity and pain and suffering. The jury also failed to decide whether Iley acted with malice, and, if so, what exemplary damages should be awarded. Iley then made a motion for mistrial; the plaintiff made a motion for interlocutory judgment on the liability issue and a separate new trial on the damage issues. The trial court granted the plaintiff's motion and the supreme court granted leave to file a writ of mandamus

53. Luling Oil & Gas Co. v. Humble Oil & Ref. Co., 143 Tex. 54, 55, 182 S.W.2d 700 (1944).
54. *Id.* at 55, 182 S.W.2d at 700.
55. 158 Tex. 362, 311 S.W.2d 648 (1958).
56. *Id.* at 367, 311 S.W.2d at 651.
57. TEX. R. CIV. P. 174(b). This rule provides for separate trials of issues before any trial has been held.
58. 152 Tex. 619, 262 S.W.2d 99 (1953).
59. Iley v. Hughes, 158 Tex. 362, 367, 311 S.W.2d 648, 651 (1958).

and temporarily enjoined the trial court from proceeding to trial on the damages issue.[60]

Iley differs from the cases previously discussed since it involved a partial new trial ordered by the trial court rather than a partial remand ordered by an appellate court. Conceptually, however, the same considerations should apply. Nevertheless, the court regarded it as a question of first impression:

> In deciding it we attach no controlling significance to the fact that the order for a separate trial of the damage issue was entered after a verdict was had on the liability issues. Our conclusion would be the same if the separate trial had been ordered before trial of any issue had been undertaken.[61]

Whether an entire trial has been completed is of controlling significance from the standpoint of efficient judicial administration. The objections to trying a case by piecemeal have merit only where severance of issues is contemplated before a trial is begun. In such instances, two separate trials may be necessary where one would have been more effective. In the partial new trial or partial remand context, however, it is already determined that two trials are necessary. Since the first trial has been completed, and only one part of the trial is affected by error, the question is simply what the scope of the second trial should be.

Iley v. Hughes recognized and correctly stated the policy principle concerning efficient administration of justice, but the court felt bound by precedent to violate that principle. This is the overriding principle:

> Our courts have always frowned upon piecemeal trials, deeming the public interest, the interest of litigants and the administration of justice to be better served by rules of trial which avoid a multiplicity of suits.[62]

It is difficult to understand how the ends of efficient administration of justice are served by requiring retrial of issues already fairly determined. The question was undertaken for study by a group charged with making recommendations for enhancing efficiency in the administration of justice. In a report of the Committee on Trial Practice to the Section of Judicial Administration of the American Bar Association, the following conclusion was reached:

> It is the view of the committee that the power of the trial judge to grant a partial new trial should exist, but that it should be spar-

60. *Id.* at 364, 311 S.W.2d at 649.
61. *Id.* at 364, 311 S.W.2d at 650.
62. *Id.* at 366, 311 S.W.2d at 651.

> ingly exercised in actual practice, and then only where the issues are clearly and fairly separable.[63]

As to the interests of the litigants, they are entitled to but one fair trial of any question, unaffected by error. If this has been done, they are entitled to no more. In fact, many jurisdictions which allow partial new trials justify this practice by citing the unfairness to a successful party in retrying issues already determined.

> Upon all issues relating to liability, the defendants had their day in Court at the first trial, with full opportunity to submit their defenses. It would seem a grave injustice to a plaintiff, if, having submitted her claim to a jury and having obtained a verdict in her favor, she should be compelled to risk another trial with a possibility of an adverse verdict solely because the jury failed to agree upon how much her loss was.[64]

The United States Supreme Court has held that remanding to determine damages only is not proscribed by the seventh amendment's right to trial by jury. It seems, however, that retrial of a case in its entirety requires a higher degree of fairness than that guaranteed by the United States Constitution. In *Gasoline Products Co. v. Champlin Refining Co.*[65] the United States Supreme Court concluded that the Constitution does not "require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury."[66]

Finally, the objection of multiplicity of suits is invalid as it relates to the partial new trial practice. A finding of error by the trial or appellate court itself determines the need for another trial; it is simply a matter of what the scope of the new trial will be.

OTHER JURISDICTIONS

Texas is joined only by Montana in adhering to the wasteful practice

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63. REPORT OF THE COMMITTEE ON TRIAL PRACTICE TO THE SECTION OF JUDICIAL ADMINISTRATION OF THE AMERICAN BAR ASSOCIATION, 63 A.B.A. REP. 555 (1938).

64. Tompkins v. Pilots Ass'n, 32 F. Supp. 439, 441 (E.D. Pa. 1940).

> The only limitation of importance upon the Court's discretion is that partial retrial for the purpose of fixing the amount of damages ought not to be allowed where the issues of liabiblity and damages are so inextricably related that a proper verdict upon the one cannot be reached without taking into account the evidence relating to the other.

Id. at 441.

65. 283 U.S. 494 (1931).

66. *Id.* at 498. The Court, however, held that a limited new trial in this case was not proper. The question of damages was so interwoven with liability that to separate them would be denial of a fair trial. *Id.* at 500-501.

that prohibits partial retrials and partial remands.[67] The rule employed by all other jurisdictions is generally stated: a partial new trial may be granted by a trial or appellate court if it clearly appears that the matter involved in the particular issue is entirely distinct from matters involved in other issues, and that the new trial can be had without the danger of complication with other matters.[68] An examination of the experiences of other jurisdictions is helpful in showing the types of problems and questions which have confronted them and which Texas would also confront if it should adopt their practice.

Severability of Damages and Liability

The question of severability of issues for partial new trial most often arises in separating damages from liability. This area deserves special attention because the partial new trial question has arisen in most jurisdictions in this context and, therefore, the greatest number of cases available for study are in this area. Furthermore, the prevalence of this question in other jurisdictions would suggest that the Texas experience under a new rule would be similar. Finally, many of the same considerations involved in determining whether to limit a new trial to damages, or to liability, are also raised in determining whether to sever any issue from the remainder of a cause of action. First considered are the limitations, or conditions precedent, on use of the practice. Also concerned are the general procedural, or mechanical steps in im-

67. Seibel v. Byers, 344 P.2d 129 (Mont. 1959). The court expressly adhered to the common law concept that a cause of action is indivisible. *Id.* at 133. The Montana statute, R.C.M. 93-8005 (1947), authorized appeal from a judgment "or some specific part thereof." Justice Angstman filed a dissenting opinion in which he expressed confusion over the majority's interpretation of this statute, which held that it did not authorize partial new trials. *Id.* at 143.

68. The practice of allowing partial new trials is a matter of statute or rule of civil procedure in almost every jurisdiction. Nearly all are modeled closely after the federal rule, FED. R. CIV. P. 59(a) which reads, in pertinent part: "A new trial may be granted to all or any of the parties and on all or part of the issues . . . ." *See, e.g.*, IDAHO R. CIV. P. 59(a); MONT. R. CIV. P. 59(a); TENN. R. CIV. P. 59.04. A very small minority of jurisdictions have a rule separate from the general new trial rule, which specifically applies to partial new trials. *E.g.*, MD. R. CIV. P. 567(C).

One state has a specific partial new trial rule which appears to compel a limited new trial under proper circumstances:

> If several issues are presented by the pleadings and, on the trial of one or more of such issues, an error or ground for new trial intervenes which does not affect the legality of the trial or disposition of the other issue or issues, judgment *shall not* be arrested or reversed, nor a new trial granted, except so far as relates to the particular issue or issues in the trial of which such error or ground for a new trial intervened.

CONN. GEN. LAWS ANN. § 52-266 (rev. 1958) (emphasis added).

plementing the practice once it is determined to be suitable in a particular case.

There are generally three conditions precedent which can be derived from the case law and which must be fulfilled before a new trial can be limited to assessment of damages. First, it must clearly appear that the issues are severable and distinct, and that there is no danger that damages cannot be accurately assessed absent a full presentation of evidence on liability. Second, before damages can be separately determined, or rather redetermined, the issue of liability must have been clearly settled. Finally, the overriding consideration of fairness to the parties must be assured; or, stated in the negative, no prejudice must result to either party. It should be mentioned at the outset that although the three limitations can be isolated and identified, they are not entirely distinct. For example, if damages are not clearly separable from liability, or liability is not clearly established, it would be unfair to the defendant to order retrial only on the damages issue. Thus, the considerations are overlapping. The limitation requiring fairness, however, is separately identified because there may be cases where the first two limitations are fulfilled, yet it is still unfair to order a limited new trial because of other circumstances. The courts, then, should not stretch the concept in order to apply the conditions precedent individually, but rather should review the case as a whole.

Liability and Damages Must Be Distinct Issues

The first condition, that of determining that liability and damages are entirely distinct questions, is applied differently in various jurisdictions. Arizona, for example, represents one end of the spectrum as exemplified by the strong language in *L.C. James Motor Co. v. Wetmore*:[69]

> It is only when the reason for setting aside the verdict relates solely to damages disassociated from every other contributing, related or vitiating cause that 'the new trial shall be limited to the question of the amount of damages alone.'[70]

The District of Columbia is aligned with those jurisdictions which attach a strict interpretation of the requirement, and has indicated that damages will almost never be sufficiently distinct from liability issues in a tort case.[71]

69. 286 P. 180 (Ariz. 1930).
70. *Id.* at 182.
71. Munsey v. Safeway Stores, Inc., 65 A.2d 598, 601 (D.C. Mun. Ct. App. 1949). The language in the opinion, however, clearly indicates that where the issues are not interwoven, a partial new trial is proper. *Id.* at 601.

The practice in Ohio had originally required an entire new trial. The Ohio courts believed that their jurisdiction extended only to vacating a verdict and that a completely new trial was always necessary. This position was grounded on the policy that "liability and damage are so closely related that in absence of statutory authority the court should not undertake to separate them."[72] The necessary authority was provided in 1970 when Ohio's new trial rule was rewritten to trace the terms of the federal rule.[73] The staff note accompanying the rule, however, suggests that the federal practice of applying the rule not be followed:

> In effect, the rule provides for a partial new trial in a non-jury action so that the complete retaking of testimony can be avoided. Of course, the opening sentence of Rule 59(A) states that 'A new trial may be granted to all or any of the parties and on all or part of the issues . . . .' This language provides for a partial new trial even in a jury action. But in jury actions partial new trials are rarely granted because of the intertwining of the issues; if a new trial is granted, the new jury should be exposed to all of the issues.[74]

In many instances the issues of damages and liability cannot be fairly separated. For example, where punitive damages are sought, or where evidence relative to liability is necessary to mitigate damages liability and damages should not be separated. Because punitive damages are so inextricably related to the liability issues, it would seem clear that the issues should be retried together, and the federal courts have so held.[75] California, on the other hand, does allow a new trial limited solely to determining the amount of punitive damages.[76]

Limiting new trials to punitive damages accomplishes more than severing damages from liability; it severs one element of damages from the remaining elements. This practice may be beneficially employed where the separate elements of damages are clearly severable. In one case, for example, the finding on the value of a destroyed airplane was left undisturbed, and a new trial was ordered to assess the loss of use of the plane for the period reasonably required to replace it.[77] This is a logical, and recommended, extension of the rule.

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72. Edelstein v. Kidwell, 41 N.E.2d 564, 566 (Ohio 1942).
73. OHIO R. CIV. P. 59(a).
74. *Id.*
75. Atlantic Coast Line R.R. v. Bennett, 251 F.2d 934, 938 (4th Cir. 1958); Smyth Sales, Inc. v. Petroleum Heat & Power Co., 141 F.2d 41, 45 (3d Cir. 1944).
76. Brewer v. Second Baptist Church, 197 P.2d 713, 721 (Cal. 1948).
77. Reynolds v. Bank of America Nat'l Trust & Sav. Ass'n, 345 P.2d 926, 927 (Cal. 1959).

When a counterclaim is in issue, those jurisdictions which submit the case to the jury on a general verdict often order an entire new trial since it is impossible to tell whether the jury allowed the counterclaim and deducted it from the plaintiff's award.[78] Under the Texas special issue practice, however, where a counterclaim may be separately considered, this would not be a problem.

Another area where severability of damages and liability should receive particularly close scrutiny is in those cases where fault is apportioned and damages awarded accordingly. Even where the relative fault is separately found, there is danger that the jury may have wrongfully compromised the amount of damages awarded in apportioning the fault.[79]

Finally, the type of error committed in the trial court may have significant bearing on the question of whether liability and damages are distinct issues. Generally where the error is in the instructions given the jury as to the measure of damages, the error relates peculiarly to the damages question and retrial on that issue alone is sufficient.[80] Where, however, there is no error as to the proper measure of damages, but the verdict is grossly excessive or inadequate, it may be a reflection of passion or prejudice on the part of the jury which affects the liability issue as well.[81] Another type of case particularly suited to separating issues is where the trial court renders judgment for the defendant, but the appellate court holds that an instructed verdict for the plaintiff is necessary. The exclusive purpose of the new trial should then be to assess damages.[82]

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78. *See, e.g.*, Mahanna v. Westland Oil Co., 107 N.W.2d 353, 364 (N.D. 1960).

79. Canada's answer to this problem is interesting:

> The fact (if it is a fact) that some juries, in breach of their duty, may have seen fit to intermingle these two separate and distinct questions, in a desire to bring about a result that would not be produced by an honest answer to each question based upon the evidence relevant thereto, is no reason for this Court taking a course that would seem to be an invitation to a jury to depart from its duty in making a proper assessment of the damages sustained by the several parties to this action.

Bedford v. Cropper, 1949 Ont. Week N. 266, 3 D.L.R. 153 (1949).

80. *E.g.*, Brinson v. Howard, 71 So. 2d 172 (Fla. 1954). The Supreme Court of Florida in *Brinson* noted that, although it had always had the power to limit a new trial, the lower courts did not have such power. *Id.* at 173. A new statute, however, did give this power. FLA. STAT. ANN. § 25.47 (1951). The statute was probably the result of language in certain opinions by the Florida Supreme Court that it would not reverse the lower court for severing issues without statutory authority, but would ratify the action if the case was suited for partial new trial. *See* Remsberg v. Mosley, 58 So. 2d 432, 433 (Fla. 1952).

81. Mayo v. Ephrom, 325 P.2d 814, 817 (Ariz. 1958).

82. *See* Brown v. Bonesteele, 344 P.2d 928, 939 (Ore. 1959).

Liability Must Be Clearly Established

A second limitation on ordering a new trial as to damages alone is the requirement that liability be clearly established. The governing principle in this determination should be merely whether the verdict is supported by the evidence. Some jurisdictions, however, are more strict. In *L.C. James Motor Co. v. Wetmore*[83] the court refused to limit the necessary new trial to the question of damages because "liability was vigorously contested by defendant and much evidence tending to support its position was introduced, and some of the evidence to the contrary was not entirely satisfactory."[84]

The rule applied in Arizona and Kentucky, as well as in some other jurisdictions, allows the defendant a complete new trial if he has produced enough evidence to closely contest his liability. This would seem to misapprehend the theory. A basic premise underlying the partial new trial practice is that as to distinct issues, unaffected by error, the defendant has had his day in court and is entitled to no more. The jury determination, once fairly made, should be left undisturbed provided the other conditions have been satisfied.

Texas should follow the practice of the majority of jurisdictions in deciding if liability is established. In *Gentekos v. City & County of San Francisco*[85] the court merely stated that "on the issue of liability the evidence supports the implied findings of the jury."[86] This should be all that is required.

It should be emphasized that the point is that liability should not be retried with damages, where the error affects only damages, simply because liability was closely disputed. In many instances, however, an entire new trial is, and should be, ordered because a review of the case as a whole raises doubt as to whether liability was, in fact, fairly determined, although it was sufficiently supported by the evidence.[87]

The question of whether liability has been clearly established may be best determined by examining the case as a whole. In *Hallford v. Schumacher*,[88] the Oklahoma Supreme Court refused to remand only

83. 286 P.2d 180 (Ariz. 1930).
84. *Id.* at 182. *See also* Drury v. Franke, 57 S.W.2d 969, 986 (Ky. Ct. App. 1933).
85. 329 P.2d 943 (Cal. Dist. Ct. App. 1958).
86. *Id.* at 950.
87. For example, California, which makes liberal use of the partial new trial practice, has occasionally remanded an entire case where liability was supported in the evidence, but was a close question. *E.g.*, Hansen v. Bledsoe, 278 P.2d 514, 516 (Cal. Dist. Ct. App. 1955).
88. 323 P.2d 989 (Okla. 1958).

on the issue of damages where the jury had failed to award damages for pain and suffering and on trial such elements had been clearly proved, although it did award a recovery for the other elements of damages. The court's reason for refusing to limit the new trial was:

> A failure to award any damages for pain and suffering where clearly proved, under proper instructions is in effect a finding of no liability, whereas an award for medical and hospital expenses includes a finding that liability does exist. Therefore in the case before us, the proof of pain and suffering being clear and undisputed, it would appear that the jury was having its greatest difficulty with the question of liability.[89]

A grossly excessive or inadequate verdict is regarded as another indicator that liability was not clearly established at trial. An excessive verdict may indicate that the jury was motivated by passion or prejudice, thereby causing its liability determination also to be suspect.[90] A grossly inadequate verdict, on the other hand, may be the result of compromise by a jury who had a difficult time deciding whether the defendant was liable.[91] In such cases, most courts will order an entire new trial which is consistent with the principle that any doubt as to the wisdom of severing any issue should be resolved against severance.

The decision as to whether to order a partial or entire new trial, however, should always be based upon a review of a case as a whole, considering all surrounding circumstances. Upon this principle, the court in *McKay v. New England Dredging Co.*[92] found it more fair to limit the new trial to damages even though they were grossly excessive. The plaintiff had sued for damages due to wrongful death and received an award of $2000. The appellate court determined this amount to be grossly excessive, and ordered a remittitur of all damages over $750. The plaintiff refused to remit and a second trial was had as to both liability and damages. The second jury returned a verdict of $1990. The appellate court again considered the damages awarded to be grossly excessive, and the new trial was ordered to determine damages only. The following reason was advanced:

> We think this question [damages] must have been more or less obscured by the smoke of the battle over the question of liability which the defendant again raised, and that the jury thus lost sight of the rules governing the assessment of damages.

89. *Id.* at 990 (citation omitted).
90. *E.g.*, Mayo v. Ephrom, 325 P.2d 814, 817 (Ariz. 1958); Florida Power & Light Co. v. Watson, 50 So. 2d 543 (Fla. 1950).
91. *E.g.*, Hamasaki v. Flotho, 240 P.2d 298, 300 (Cal. 1952).
92. 44 A. 614 (Me. 1899).

> The verdict as to the question of liability must stand, and judgment be ventually rendered thereon for the plaintiff.[93]

The verdict of a jury may also be questioned both as to liability and damages where a witness, who testified on both issues, is discredited.[94] These are merely a few examples of indicators that liability has not been clearly determined. Although these are prevalent, there are many other examples. Each case must be reviewed as a whole, with a careful search to guarantee that no factors exist which would make a partial new trial unfair.

"Fairness"

The final condition or limitation is not as much a separate condition, as it is a requirement underlying the other conditions. This is the requirement that no prejudice result to the parties by ordering a partial new trial. It should control the final determination.[95] The conditions that damages and liability be clearly distinct, and that liability be clearly determined, are subsumed in the condition of fairness because if they are not satisfied, a partial new trial would be unfair.

Partial New Trials of Other Issues

Limited new trials to determine damages have been emphasized merely because that is the problem that arises more often than other kinds of issues and is more helpful in illustrating the rule and the limitations upon its use. It should be recognized, however, that the practice has utility in several other areas.

The partial new trial rule has been employed in other jurisdictions to limit a new trial to the issues of proximate cause,[96] negligence,[97] and contributory negligence.[98] Wisconsin has reached, under its comparative negligence practice, what must be the outer parameters of the practice. In Wisconsin it is permissible to restrict retrial of apportionment

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93. *Id.* at 615.
94. *See* Korbut v. Keystone Shipping Co., 380 F.2d 352, 354 (5th Cir. 1967).
95. Many courts have grounded denial of partial retrial, though the error affects only a severable issue, upon a general concern that it may be unfair to retry less than the whole case.
96. Burke v. Hodge, 97 N.E. 920 (Mass. 1912).
97. Snyder v. St. Louis Pub. Serv. Co., 329 S.W.2d 721 (Mo. 1959).
98. Woods v. Chinn, 224 S.W.2d 583 (Mo. Ct. App. 1949).

of negligence, apart from the issue of liability.[99] The trial court, however, is instructed to allow evidence on the issue of liability to be introduced to aid the jury.[100]

Numerous examples of potential application of the rule can be given:

(1) Whether one is uninsured could be severed from the question of whether he is negligent.

(2) The amount of average weekly wages could be severed from the question of extent of injury.

(3) Course and scope of employment could be severed from the question of whether an employee's act was negligent.

(4) Place of making a contract could be severed from interpretation of its terms.

It should be remembered that although certain types of issues will by nature be more readily severable than others, no inflexible rule can be applied. Each requires individual determination, subject to the circumstances surrounding each case.

It is noteworthy that the Texas courts are not completely unfamiliar with a partial new trial practice. Although the supreme court has reversed attempts by courts of civil appeals to limit a new trial, several cases have done so and survived supreme court review.[101] *City of Houston v. Howe & Wise*[102] is especially important because it was decided shortly after the supreme court's reaffirmation of the policy against piecemeal trials expressed in *Iley v. Hughes*.[103] In *City of Houston*, the appellees sued the city to recover fees for supervisory engineering services they were to perform in connection with the San Jacinto River Water Supply Project. The contract with the city provided that the appellees would receive 5 percent of the cost to the city to complete the project. They brought suit alleging that the city had prevented them from performing the contract, and recovered a judgment in the trial court.

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99. Caldwell v. Piggly Wiggly Madison Co., 145 N.W.2d 745, 752 (Wis. 1966).

100. *Id.* at 752.

101. City of Houston v. Howe & Wise, 323 S.W.2d 134, 151-52 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.); Neyland v. Brammer, 73 S.W.2d 884, 889 (Tex. Civ. App.—Galveston 1933, writ dism'd) (new trial limited to determining value of stock on date of conversion); Houston E. & W.T.R. v. Jones, 1 S.W.2d 743, 749 (Tex. Civ. App. —Beaumont 1927, writ ref'd) (new trial limited to issue of whether medical expenses were reasonable); Benjamin v. Gulf, C. & S.F. Ry., 108 S.W. 408, 412-13 (Tex. Civ. App. 1908, writ ref'd) (new trial limited to damages as to certain items).

102. 323 S.W.2d 134 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

103. 158 Tex. 362, 311 S.W.2d 648 (1958).

The court of civil appeals held that error had been committed as to some elements of the recovery, but not as to others.[104] Although the court realized that the case involved only one entire cause of action, it ordered a new trial only as to those elements affected by error.

> The claim incident to the railroad, though referable to the contract, involves issues not pertinent in any way to the other claims and not dependent thereon or affected thereby. Such claims may be tried independently of and without regard to the other claims.[105]

The court of civil appeals' disposition of this case, although clearly contrary to the established practice, was logical under the facts of the case, and perhaps for that reason, escaped reversal.

PROCEDURAL ASPECTS

A practice of allowing partial new trials would be readily adaptable to the general scheme of the Texas appellate process. This may be best illustrated by the following example:

> A sues B to recover for personal injuries incurred in an automobile accident, allegedly caused by B's negligence. During trial, A's witness is allowed to give hearsay evidence, over objection, of the details of the accident. The court also refuses B's proffered correct instruction as to the measure of damages for loss of future earnings, giving instead an incorrect instruction. The jury returns a verdit for A and assesses damages according to the measure detailed by the trial court, the amount being more than A is entitled to.

B's first step, of course, is to file a motion for new trial, assigning as error the admission of the hearsay evidence and the incorrect damages instruction. If the trial court grants the motion, but only because of its error on the damages charge, A should be allowed to request that the new trial be limited to damages. A small minority of jurisdictions have held that the power to order a partial new trial rests only in the appellate courts.[106] The more logical procedure would be to recognize the power of the trial court, in granting a new trial, to limit the new trial to one or more of the several issues in the case which are clearly and fairly separable. If the trial court does grant the limited new trial, the order would be interlocutory and not appealable.

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104. City of Houston v. Howe & Wise, 323 S.W.2d 134 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

105. *Id.* at 151-52.

106. *E.g.*, Porter v. Gordon, 46 So. 2d 19, 20 (Fla. 1950). This rule has now been changed.

If the trial court overrules B's motion for new trial, he can appeal both assigned errors to the court of civil appeals. If that court finds the hearsay evidence admissible as coming within an exception, yet agrees that the instruction as to the measure of damages is reversible error, A should be allowed to request a limited new trial. It should be sufficient if the party against whom the judgment is reversed first makes his request on motion for rehearing because it may not be until this time that a case may be evaluated as suitable for partial new trial. This would arise when points of error have been assigned to several issues, but the court of civil appeals has found merit only in those relating to one distinct issue.

If the court of civil appeals grants A's request to limit the new trial, B may appeal this disposition to the supreme court.[107] Similarly, if A's request is denied, he may file an application for writ of error. Because the decision to limit the new trial is discretionary, the complaining party will bear the heavy burden of showing abuse of discretion. This is the standard in every jurisdiction.[108]

A final question involves the procedure to be used in assigning error to the limiting or failure to limit a new trial. Some jurisdictions require that a party specifically request that a new trial be limited to the issue tainted with error.[109] For example, in one case the court refused to remand on one issue only, finding that passion and prejudice of the jury had vitiated the entire verdict. On rehearing, however, the court granted the plaintiff's motion for a limited new trial because the defendant had not opposed it.[110] Conversely, other jurisdictions hold that a court may limit a new trial on its own motion.[111]

The suggested procedure for Texas to follow would allow the court to limit a new trial on its own motion. If, however, it is required that a court's decision, refusing to limit a new trial, be complained of by point of error, the same requirement should not attach to the court's decision to limit the new trial. For example, if the court of civil appeals has improperly limited the new trial to one or more issues and the application for writ of error in the supreme court does not make this disposi-

107. *Cf.* Pruitt v. Republic Bankers Life Ins. Co., 491 S.W.2d 109, 112 (Tex. 1973).
108. Annot., 85 A.L.R.2d 1, 41 (1962).
109. *E.g.*, Cannon v. Krakowitch, 148 A.2d 213 (N.J. 1959). The court noted that the case was suited for partial new trial, and it "would undoubtedly expedite the matter" but the plaintiff's failure to request that the new trial be limited bound the court to order an entire new trial. *Id.* at 217.
110. Westover v. Chicago M.S.P. & P. Ry., 266 N.W. 741, 745 (Minn. 1936).
111. *See, e.g.*, Stith v. St. Louis Pub. Serv. Co., 251 S.W.2d 693, 695 (Mo. 1952).

tion one of the grounds of complaint, the supreme court should nevertheless remand the case entirely if it believes that the case is not suitable for partial new trial.

Some concern has been expressed that a partial new trial practice would contravene the requirement that only one final judgment be rendered in any case. That practice, however, would not infringe upon the rule. The portion of the case which is free of error is simply left undisturbed until a new trial is had over the portion which was affected by error. When this is completed, one final judgment is rendered. This would produce no more disharmony with the rule than the well accepted practice of granting a default judgment, later followed by a hearing on the amount of damages.[112] Additionally, courts are accustomed to granting a partial summary judgment, which is later incorporated into one final judgment.

A PROPOSED RULE

A partial new trial practice in Texas, applied with proper safeguards, would contribute to judicial efficiency and economy. The procedure by which we must "try, try again" does not achieve the purposes for which it was intended, nor does it guard against the evils it was to prevent. For this reason, we believe that Texas would benefit by adopting a new rule of civil procedure, designed to allow limited new trials under proper circumstances.[113]

It must be made clear that a new rule on limited new trials is not to be confused with, or have any relation to, Rule 174(b)[114] That rule allows a trial court to determine, before any trial has been held, whether to separate any issue of the case from the remainder, and try it separately. The considerations involved in that practice are entirely different from those that are the subject of this article.

It has been long recognized that Rule 174(b) grants a different power than that given in Rule 41, which allows a trial court to order

112. TEX. R. CIV. P. 243. *See also* Kansas Univ. Endowment Ass'n v. King, 162 Tex. 599, 350 S.W.2d 11 (1961). *See generally* Walker, *Amalgamation of Interlocutory Orders Into One Final Judgment*, 3 ST. MARY'S L.J. 207 (1971).

113. One proper circumstance has already been recognized, and is an apparent exception to the usual Texas practice. It has been a regular practice to remand a case solely to determine the proper amount of attorney fees. *See, e.g.*, Martin v. Neel, 379 S.W.2d 422, 424 (Tex. Civ. App.—Fort Worth 1964, writ ref'd).

114. TEX. R. CIV. P. 174(b) reads:

Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

separate trials of separate causes of action which have been jointly filed.[115] Rule 41 speaks of "actions which . . . may be severed," and the term "severance" was held to apply only to separating one cause of action from another.[116] Thus, the language in Rule 434, which refers to "issues [which] are severable" was construed to also refer to separating causes of action, and did not apply to separating issues.[117] Since Rule 41 deals with *severable "actions"* and Rule 434 deals with *severable "issues,"* an interpretation that Rule 434 allows retrial of certain issues would be supportable. The courts have, rather, seized upon the word "severable" as the basis upon which to build the distinction.[118] The interpretation of "severable" properly applied in Rule 41 was transposed to the same language in 434, and it became settled that Rule 434 concerned only separating one cause of action from another.[119]

Whatever the basis for the interpretation of Rule 434, it is clear that it is now firmly established. Rather than advocate a new construction of Rule 434 so as to allow for partial new trials of issues, less confusion may result by proposing and adopting a new rule of civil procedure designed to allow limited new trials. In *Waples-Platter Co. v. Commercial Standard Insurance Co.*,[120] Justice Walker, writing for the supreme court nearly 20 years ago, stated:

> Whether the administration of justice will best be served by permitting the appellate courts to order a new trial of only the issues affected by the errors requiring a reversal is a question which must be considered in determining whether to amend Rule 434.[121]

It is clear that the time has come to accept this invitation. The recent case of *United Services Automobile Association v. Ratterree*[122] may serve as illustration. The plaintiff was involved in an automobile accident with another driver, who was apparently uninsured. The plaintiff sued his own insurance company seeking to recover under the uninsured motorist provision of his policy. The jury found that the other driver was negligent, and was uninsured.

On appeal, the court of civil appeals held inadmissible several ele-

115. Kansas Univ. Endowment Ass'n v. King, 162 Tex. 599, 611, 350 S.W.2d 11, 19 (1961).
116. *Id.* at 611, 350 S.W.2d at 19.
117. TEX. R. CIV. P. 434.
118. Waples-Platter Co. v. Commercial Standard Ins. Co., 156 Tex. 234, 237, 294 S.W.2d 375, 377 (1956).
119. *Id.* at 237, 294 S.W.2d at 377.
120. *Id.* at 237, 294 S.W.2d at 377.
121. *Id.* at 237, 294 S.W.2d at 377.
122. 512 S.W.2d 30 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

ments of evidence which had established the negligent driver's uninsured status. After excluding the inadmissible evidence, the plaintiff had no evidence remaining which proved the negligent driver to be uninsured. Accordingly, the court of civil appeals reversed and remanded the case to the trial court in the interest of justice.[123]

The error in *Ratterree* was related only to the issue of the driver's uninsured status. This is only one element of a cause of action against an insurance company under an uninsured motorist provision, which also requires a showing of negligence, proximate cause, and damages. Although there was no error as to these latter elements, the court of civil appeals had no choice but to order an entire new trial. Thus, although a trial to determine negligence, proximate cause, and damages, lasting 4 days, had been fairly had without error, these issues had to be completely retried. Under the proposed new practice, the alternative would be to retry only the question of the driver's uninsured status, which could be accomplished in a few minutes by calling the driver as a witness to simply testify as to whether he was insured or not at the time of the accident.

The *Ratterree* case is only one of many examples where our procedure of "try, try again" leads to inefficiency in the administration of justice. We believe that a new rule of civil procedure could serve to eliminate this inefficiency. It should read as follows:

> Where it appears to the court that a new trial should be granted on a ground or grounds that affect only a part of the matters in controversy and that such part is clearly separable without unfairness to the parties, the court may grant a new trial as to that part only.

This rule could be incorporated into the terms of Rule 320 to give the power of granting partial new trials to the trial court.

In order that the appellate courts might have the same discretionary powers, Rules 434 and 503 could be amended to eliminate the following language:

> [A]nd if it appear to the court that the error affects only a part of the matter in controversy, and the issues are severable, the judgment shall be reversed and a new trial ordered only as to that part affected by such error.

And substitute in its place:

> [A]nd if it appear to the court that the error affects a part only of the matter in controversy, and that such part is clearly separable

123. *Id.* at 34.

> without unfairness to the parties, the judgment shall be reversed and a new trial ordered only as to that part affected by such error.

It is hoped that these rules, or similar ones granting the same powers, may be soon adopted and implemented in Texas.

CONCLUSION

The purpose of this article has been to both examine the foundations of the Texas prohibition against partial new trial of issues, and to examine the foundations of the opposite rule in other jurisdictions. Once the considerations supporting the partial new trial practice are identified, it becomes easier to determine where the balance falls. It seems clear that the stronger, more supportable position is that of allowing for partial new trials.

The concern of the Texas courts that fairness is accorded the parties to a case is, of course, a legitimate one. This is also a fundamental concern, however, in those states that provide limited new trials. It can be seen from their experience that it is possible to adequately protect the rights of the parties to fair treatment, while at the same time contributing to judicial efficiency.

The purpose of a limited new trial is to expedite the administration of justice by avoiding costly repetition. This purpose should be counterbalanced by considerations of whether repetition is necessary or even desirable in a particular context. This would not be a particularly difficult determination to make, under the guiding principle that reasonable doubt should be resolved in favor of an entire new trial. It is not, however, persuasive to deny partial new trials on the basis of indivisibility of causes of action. The only thing that makes many causes of action indivisible is the judicial holdings that so decree. Logic suggests otherwise. And to say that causes of action are not to be tried piecemeal, in the interest of administration of justice, is contradictory from the vantage point of either a trial or appellate judge reviewing an already completed trial.