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Appellant Need Not Evince Due Diligence in Securing a Statement of Facts When Court Reporter's Notes Are Unavailable.

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CIVIL PROCEDURE—Default Judgment—Appellant Need Not Evince Due Diligence in Securing a Statement of Facts When Court Reporter's Notes Are Unavailable

Morgan Express, Inc. v. Elizabeth-Perkins, Inc.,
525 S.W.2d 312 (Tex. Civ. App.—Dallas 1975, writ ref'd).

Elizabeth-Perkins, Inc. filed suit against Morgan Express, Inc. to recover the value of a shipment of goods lost by the defendant. Morgan Express was properly served with citation but failed to appear, therefore a default judgment was rendered against the defendant after a hearing on the unliquidated damages. The defendant's timely motion for a new trial was overruled and, by formal request, the defendant then sought to procure from the official court reporter a statement of facts in question and answer form. The court reporter certified that he was unable to comply with the request because he had been absent when the testimony was given, and no other court reporter had transcribed the testimony. On appeal, the defendant sought a reversal of the default judgment on the ground that there was no record of the testimony on which the judgment was based and, as a result, no statement of facts was available to review the sufficiency of the evidence. The plaintiff contended, however, under Rule 377 of the Texas Rules of Civil Procedure, that the defendant had not demonstrated due diligence in attempting to obtain a statement of facts, as there was no proof that a narrative statement of the evidence could not have been procured by agreement of the parties or by request of the trial judge. Held—*Reversed and remanded.* When the court reporter is absent during a trial, a defendant who is not present and not represented when the testimony is taken is not constrained to agree with his opponent concerning the substance of the testimony, nor is he required to rely on the unaided memory of the trial judge.[1]

Essentially, a statement of facts is a written record of the official court reporter's notes taken during the proceedings in a trial court.[2] It is comprised of the questions and answers of the witnesses and may include, in certain cases, exhibits and documentary evidence.[3] The Texas Rules of Civil Procedure provide that a statement of facts must include all the evidence

1. Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312, 315 (Tex. Civ. App.—Dallas 1975, writ ref'd).

2. TEX. REV. CIV. STAT. ANN. art. 2324 (1971).

3. *See* Houston Fire & Cas. Ins. Co. v. Walker, 152 Tex. 503, 509, 260 S.W.2d 600, 603 (1953); Insurance Co. of St. Louis v. Bellah, 373 S.W.2d 691, 693 (Tex. Civ. App.—Fort Worth 1963, no writ); Fenton v. Wade, 303 S.W.2d 816, 817 (Tex. Civ. App.—Fort Worth 1957, writ ref'd n.r.e.).

requisite to the appeal;[4] thus the appellant's statement, whether it be in narrative or question and answer form, necessarily must contain all the evidence material to the alleged point of error. It is generally recognized as the duty of the complaining party to procure a statement of facts by which the appellate court may review the findings of the trial court, and it is only in exceptional cases that an appellant is entitled to a reversal in the absence of a statement of facts.[5] This burden upon the appellant appears to be an extension of the mandate that the party who complains must sufficiently prove his case.

In the absence of a statement of facts the appellate court is required to assume that there was sufficient evidence adduced in the trial proceeding to support the findings of fact and the judgment rendered, and every reasonable presumption consistent with the record will be indulged to uphold the judgment.[6] The lack of a complete statement of facts will impede the appellate court in its endeavor to ascertain whether there was no evidence or insufficient evidence produced at the trial level. Furthermore, the court may not review an allegedly defective special issue in the absence of a factual statement.[7] Emerging as a judicial penalty of universal application in the Texas appellate courts, the supposition of the accuracy of the trial court's ruling is inapplicable on a direct review of a default judgment when no statement of facts is available for the appellant.[8]

4. TEX. R. CIV. P. 371; *see* Hassell v. New England Mut. Life Ins. Co., 506 S.W.2d 727 (Tex. Civ. App.—Waco 1974, writ ref'd); Weems v. Henry, 375 S.W.2d 791, 792 (Tex. Civ. App.—Fort Worth 1964, no writ); Shofner v. McKey, 345 S.W.2d 826, 829 (Tex. Civ. App.—San Antonio 1961, no writ).

5. Houston Fire & Cas. Ins. Co. v. Walker, 152 Tex. 503, 509, 260 S.W.2d 600, 603 (1953); Phillips v. Latham, 433 S.W.2d 775, 777 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.), *cert. denied*, 396 U.S. 830 (1969); First Nat'l Life Ins. Co. v. Herring, 318 S.W.2d 119, 122 (Tex. Civ. App.—Waco 1958, no writ); Gill v. Willis, 282 S.W.2d 88, 89 (Tex. Civ. App.—Eastland 1955, no writ).

6. Lane v. Fair Stores, Inc., 150 Tex. 566, 571, 243 S.W.2d 683, 685 (1951); Spring Branch Ind. School Dist. v. Lily White Church, 505 S.W.2d 620, 622 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ); Jackson v. Hendrix, 494 S.W.2d 652, 653 (Tex. Civ. App.—Fort Worth 1973, no writ). In the absence of a statement of facts, an appellate court must presume that the evidence was sufficient to justify the submission of the issues to the jury, and sufficient to uphold the jury's findings. Roberson Farm Equip. Co. v. Hill, 514 S.W.2d 796, 800 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.); McRae Oil Corp. v. Guy, 495 S.W.2d 31, 34 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.). When the complaint on appeal alleges that the evidence is legally or factually insufficient to support the judgment, the burden upon the complaining party will not be discharged in the absence of a complete statement of facts. Englander Co. v. Kennedy, 428 S.W.2d 806, 807 (Tex. 1968); James Edmond, Inc. v. Schilling, 501 S.W.2d 432, 434 (Tex. Civ. App.—Waco 1973, no writ).

7. Schrader v. Garcia, 516 S.W.2d 690, 691-92 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.); *see* Soobitsky v. Continental Trailways Tours, Inc., 502 S.W.2d 902, 903 (Tex. Civ. App.—El Paso 1973, no writ); Rey v. Yerby, 488 S.W.2d 553, 555 (Tex. Civ. App.—El Paso 1972, no writ).

8. McKanna v. Edgar, 388 S.W.2d 927, 929 (Tex. 1965); Dugie v. Dugie, 511 S.W.2d 623, 624 (Tex. Civ. App.—San Antonio 1974, no writ); Neal v. Roberts, 445 S.W.2d 58, 60 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ).

The matter of securing a statement of facts for appellate purposes in civil litigation is now governed by Rule 377 of the Texas Rules of Civil Procedure which provides two alternative methods of securing a statement of the evidence proffered in the trial court, independent of the official court reporter's notes.[9] A statement of facts may consist of either a narrative record to which the parties consented, or in the case of discord, a certified true statement drawn by the trial judge.[10]

In instances where a court has rendered a judgement by default it generally is accepted that an appealing party is entitled to a statement of facts in question and answer form. If, after the exercise of due diligence, through no fault of his own, he is unable to procure such a statement, his right to have the cause reviewed on appeal can be preserved to him in no other way than by a retrial of the case.[11] Accordingly, the Texas courts of civil appeals have employed this general principle as a predicate in deciding issues; however, divergent holdings have been generated from the determination as to what action or conduct of the appellant constituted due diligence.[12]

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9. TEX. R. CIV. P. 377; *see Rules of Practice and Procedure in Civil Actions*, 4 TEX. B.J. 546 (1941). Rule 377 is a derivation of FED. R. CIV. P. 75.

10. TEX. R. CIV. P. 377 states in pertinent part:

> (a) Testimony. The testimony of the witnesses need not be in narrative form but may be in question and answer form. A party may prepare and file with the clerk a condensed statement in narrative form . . . and deliver a true copy thereof to the opposing party . . . and such opposing party, if dissatisfied with the narrative statement, may require the testimony in question and answer form to be substituted . . . .
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> (c) Where a request is made of the official court reporter for the preparation of a transcript . . . of the evidence adduced on the trial of the case, or when . . . a statement of facts is filed or offered for filing by appellant, the appellant shall promptly deliver or mail to the appellee . . . and file with the clerk of the court a designation in writing of the portions of the evidence . . . desired in narrative form, if any, and the portions desired in question and answer form. . . . Within ten days thereafter any other party to the appeal may file a designation in writing of any additional portions of the evidence to be included, specifying the portions desired in narrative form, if any, and the portions desired in question and answer form, if any.
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> (d) Approval of Trial Court Unnecessary. It shall be unnecessary for the statement of facts to be approved by the trial court or judge thereof when agreed to by the parties. If any difference arises as to whether the record truly discloses what occurred in the trial court, or if the opposing party fails to agree . . . after being furnished with a copy of the proposed statement of facts, the matter shall be submitted to and settled by the trial court or judge thereof and the statement of facts be by him made to conform to the truth.

11. Mitchell v. Hunsaker Mfg., Inc., 520 S.W.2d 796, 797 (Tex. Civ. App.—Waco 1975, no writ) (judgment by default for breach of written contract); Harris v. Lebow, 363 S.W.2d 184, 185 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.) (default judgment against a contractor for damages in action for trespass). This commonly adopted principle has also been applied in cases where the appealing party was present and represented in the trial court. Victory v. Hamilton, 127 Tex. 203, 208, 91 S.W.2d 697, 699 (1936) (action in trespass to try title and for damages; appellant personally present and represented at the trial court); State v. Ripke, 426 S.W.2d 599, 603 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e) (appeal from adverse judgment in condemnation action; appealing party present in trial court).

12. Due diligence has been defined as the degree of diligence or care that an

Where strict compliance has been deemed necessary, the requisite test of due diligence has not been satisfied unless the appellant has shown that he employed both of the alternative methods prescribed by rule 377, and that neither has resulted in the acquisition of a complete statement of facts for his use on appeal.[13] Consonant with this view of strict compliance, evidently an appealing party has exercised due diligence by utilizing each of the methods afforded by rule 377 and each has proved futile.[14] In such instance, the appealing party will have been deprived of his fundamental

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ordinarily prudent and reasonable person would exercise under similar circumstances. It is a relative concept, the denotation of which must be determined by the factual setting of each case. Strickland v. Lake, 163 Tex. 445, 448, 357 S.W.2d 383, 384 (1962); *accord*, Missouri, K. & T. Ry. v. Gist, 73 S.W. 857, 858 (Tex. Civ. App. 1903, writ ref'd). In reference to an appellant's rights under rule 377, when the court reporter's notes of the testimony are unavailable, the appealing party exercises due diligence by seeking a statement of facts through agreement with his opponent on a proposed statement or by request of the trial judge. Unless this imperative effort is put forth, the requisite diligence has not been evidenced, and a fortiori the appealing party will be denied the right to a new trial. *See, e.g.*, Robinson v. Robinson, 487 S.W.2d 713, 715 (Tex. 1972); Victory v. Hamilton, 127 Tex. 203, 208, 91 S.W.2d 697, 699 (1936); Harris v. Lebow, 363 S.W.2d 184, 185 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.).

In Parker v. Sabine Valley Lumber Co., 485 S.W.2d 853 (Tex. Civ. App.—Fort Worth 1972, no writ) a default judgment was entered against the defendant in a suit to foreclose on a mechanic's lien even though the court reporter certified that he could not furnish a statement of facts because the testimony was not recorded by him. The court emphatically stated that a defaulting defendant is not entitled to a review of the lower court's judgment where he has not clearly evinced an attempt to obtain a statement of facts by means other than a mere request of the court reporter. *Id.* at 856. The court explicitly recited that independent of the official reporter's notes, effort must be made to acquire a statement of facts by agreement or by request of the trial judge. Thus, to sustain his procedural burden, the appellant exercises due diligence only by availing himself of the alternatives, authorized by rule 377, independent of the court reporter's record. In overt contravention to the *Parker* decision, the court in Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312, 315 (Tex. Civ. App.—Dallas 1975, writ ref'd) granted the defaulting defendant a reversal despite the fact that the defendant did not initially demonstrate his unsuccessful efforts to obtain the evidence proffered at the trial by the optional methods accorded by law.

13. In Brown v. Brown, 520 S.W.2d 571 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ), it was held that the appellant had not borne his procedural burden, imposed by rule 377, by merely preparing a narrative statement of the testimony, to which his opponent refused to concur. When the court reporter's notes are unavailable and the parties are in conflict, a request must then be made to the trial judge to prepare and cause to be filed a narrative statement of the testimony adduced upon the trial of the cause, acknowledged as true. *Id.* at 576. Should the complaining party fail to make such a request he would not be entitled to a new hearing on the merits because he would not be competent to show that through no fault of his own he was unable to procure a statement of facts. Thus, the complaining party would not be prejudiced by the unavailability of the official court reporter's notes in question and answer form because there was yet another alternative provided by rule 377.

14. *See* State v. Ripke, 426 S.W.2d 599, 604 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.); Spencer v. Texas Factors, Inc., 366 S.W.2d 699, 700 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.); Smith v. Jenkins Oil Corp., 90 S.W.2d 841 (Tex. Civ. App.—Dallas 1936, no writ).

right to review the sufficiency of the evidence in support of the adverse judgment, and will be granted a new trial.[15]

In *Morgan Express, Inc. v. Elizabeth-Perkins, Inc.*[16] the Dallas Court of Civil Appeals did not require the defaulting defendant to evidence due diligence as a precondition for the preservation of the right of review.[17] Instead, emphasis was placed upon the breach of duty by the official court reporter, as sanctioned by article 2324,[18] which requires the official court reporter to be present and to record the evidence proffered in every cause litigated.[19] As a general rule, a party may waive the presence of a court reporter or any errors in a reporter's notes by proceeding to trial and litigating the issues, or by failing to make a timely objection.[20] But when a defendant is neither present nor represented by counsel when the case is tried and later discovers that no record has been made, it cannot reasonably be said that the defendant's failure to object to the absence of the court reporter was a waiver.[21] In view of the binding obligation imposed upon a court reporter by law, the court reasoned that the defendant was prevented from procuring a statement of facts through no fault of his own.[22] In summation the court recited that if the official court reporter's failure to perform his positive duty deprives a

15. In Victory v. Hamilton, 127 Tex. 203, 91 S.W.2d 697 (1936), the appellant was granted a new trial when, after the court reporter's death and the parties' fruitless attempts to produce an agreed statement, the trial judge stated that he lacked the recollection to make a certified statement of facts that would do justice to the rights of the parties. Therefore, the prerequisite of due diligence had been satisfied in that the appellant had been precluded from securing a statement of the testimony for reasons other than his dereliction of duty.

16. 525 S.W.2d 312 (Tex. Civ. App.—Dallas 1975, writ ref'd).

17. *Id.* at 315. Essentially, the court held that where one appeals from a default judgment, the unavailability of the official court reporter's notes is a deprivation of the right to an adequate review, and the case should be remanded for a new trial.

18. TEX. REV. CIV. STAT. ANN. art. 2324 (1971). Couched in mandatory terms, article 2324 requires the official court reporter to attend all sessions of the court, and to take full shorthand notes of all the oral evidence offered in all causes tried in the court, including all objections by the parties, rulings and remarks of the court, and the closing arguments.

19. *Id.; see* McCoy v. State, 108 Tex. Crim. 583, 587, 2 S.W.2d 242, 244 (1927); Otto v. Wren, 184 S.W. 350, 352 (Tex. Civ. App.—Galveston 1916, no writ).

20. Brown v. Brown, 520 S.W.2d 571, 576 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); Wilkinson v. Evans, 515 S.W.2d 734, 737 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.); Whatley v. Whatley, 493 S.W.2d 299, 301 (Tex. Civ. App.—Dallas 1973, no writ). *Contra*, Strode v. Srygley, 342 S.W.2d 638, 641 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.). The court in *Strode* clearly represents the minority view as to a party's waiver of the right to have a court reporter present. Generally, when an appellant was present in the trial court and no exception was taken to the reporter's absence, the appellant's only recourse is to avail himself of the alternatives contemplated by TEX. R. CIV. P. 377 in order to obtain a statement of facts.

21. *See* Robinson v. Robinson, 487 S.W.2d 713, 714 (Tex. 1972); Dugie v. Dugie, 511 S.W.2d 623, 624 (Tex. Civ. App.—San Antonio 1974, no writ).

22. Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312, 315 (Tex. Civ. App.—Dallas 1975, writ ref'd).

party of his right to an adequate review, the error requires a reversal of the case for a complete retrial on the merits.[23]

In contrast to the rationale of *Morgan Express* are cases decided by those appellate courts which apply the due diligence criterion in reference to an appealing party's right to review the evidence underlying an adverse judgment.[24] When the reporter's official transcript is unobtainable, unless the defaulting defendant makes an effort to secure a statement of facts in narrative form by agreement, or from the trial court in the case of discord, the requisite compliance with rule 377 will not have been fulfilled and the party will be denied a new trial.[25]

The proposition that a failure of the court reporter to perform his obligatory function will entitle an appellant to a retrial, abrogates the duty imposed by several courts upon the appealing party to exercise efforts to procure a statement of facts by agreement or from the trial judge. Thus, the due diligence criterion is rendered impertinent. The propostion is predicated on the presumption that rule 377 contemplates the availability of the official court reporter's shorthand notes.[26] In *Waller v. O'Rear*,[27] the appellant was granted a new trial because he was deprived of a statement of facts in question and answer form as a result of the court reporter's negligence in misplacing the record transcribed in the trial court. In a protracted, but persuasive analysis, the *Waller* court posed two propositions upon which it based its final decision. Strictly construing rule 377(a), the court determined that a proposed narrative statement could not be converted into question and answer form without the court reporter's notes being available. Further, with respect to rule 377(c), it was reasoned that unless the reporter's transcription was accessible neither party to the appeal would have the option of designating which portions he may desire to have transcribed into question and answer form. From these premises it was deemed that unless a copy of the court reporter's transcription was presumed to be available, rule 377 would contain an inherent contradiction.[28] The equivocal effect of the rule would deprive

23. *Id.* at 315; Dugie v. Dugie, 511 S.W.2d 623, 624 (Tex. Civ. App.—San Antonio 1974, no writ).

24. Brown v. Brown, 520 S.W.2d 571, 576 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); Parker v. Sobine Valley Lumber Co., Inc., 485 S.W.2d 853, 856 (Tex. Civ. App.—Fort Worth 1972, no writ); Harris v. Lebow, 363 S.W.2d 184, 185 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.); Johnson v. Brown, 218 S.W.2d 317, 320 (Tex. Civ. App.—Beaumont 1948, writ ref'd n.r.e.).

25. *E.g.*, Parker v. Sobine Valley Lumber Co., Inc., 485 S.W.2d 853, 855 (Tex. Civ. App.—Fort Worth 1972, no writ).

26. *E.g.*, Mitchell v. Hunsaker Mfg., Inc., 520 S.W.2d 796, 797 (Tex. Civ. App.—Waco 1975, no writ). The court explicitly concluded that "[r]ule 377 presupposes that the court reporter's transcription of the testimony is available." *Id.* at 797; *see* Continental Trailways, Inc. v. McCandless, 450 S.W.2d 707, 712 (Tex. Civ. App.—Austin 1969, no writ).

27. 472 S.W.2d 789 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.).

28. *Id.* at 791, 792.

an appealing party of certain valuable rights which the rule literally accords.[29]

The court in *Waller* categorically controverts the view adopted by various other Texas courts of civil appeals; namely, that the two alternatives prescribed by rule 377—an agreed narrative statement of the testimony or one drawn by the trial court—exist independently and exclusively of the court reporter's notes and, therefore, are yet available in the event of a court reporter's breach of duty.[30] If there exists an intrinsic presumption within rule 377 of the availability of the court reporter's notes, where such record is lacking an appealing party will be entitled to a new trial because he has been deprived of a statement of facts through no fault or negligence of his own.[31] If the official reporter's notes are contemplated as a prerequisite to the other alternatives, the requirement of due diligence is not only rendered nonessential but also nugatory.

Several courts in misinterpreting rule 377, have undermined the fundamental purpose and intent of the Texas Supreme Court in its promulgation of that rule.[32] A number of decisions have concluded that a trial judge is without authority to prepare and file a statement of facts under rule 377.[33] Rather, where the parties to a suit are unable to agree on a proposed statement of facts, the trial judge is required to examine the proposed narrative, resolve the differences in the record, and certify that it conforms to the truth.[34] Therefore, the trial court's duty arises only when the parties are in disharmony, and a proposed statement of facts is presented to the court. By this interpretation the trial judge is not empowered to make a narrative statement of his own when the circumstances do not warrant such unilateral action. The rationale advanced is that an appealing party is entitled to a complete statement of facts in question and answer form, one which has not

29. *Id.* at 792.

30. *Id.* at 791. *Contra*, Harris v. Lebow, 363 S.W.2d 184, 185 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.); Johnson v. Brown, 218 S.W.2d 317, 320 (Tex. Civ. App.—Beaumont 1948, writ ref'd n.r.e.).

31. Waller v. O'Rear, 472 S.W.2d 789 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.); *accord*, Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312 (Tex. Civ. App.—Dallas 1975, writ ref'd).

32. The salutary purpose underpinning TEX. R. CIV. P. 377 was to afford one further method by which an appealing party could procure a statement of the evidence given at the trial. This purpose was fulfilled by rendering the trial judge competent to prepare a statement of facts in narrative form and certify that, to the best of his knowledge, it conforms with the truth. *See* Crawford v. Crawford, 181 S.W.2d 992, 995 (Tex. Civ. App.—San Antonio 1944, writ dism'd).

33. Goodin v. Geller, 521 S.W.2d 158, 160 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.); Waller v. O'Rear, 472 S.W.2d 789, 791 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.); Continental Trailways, Inc. v. McCandless, 450 S.W.2d 707, 712 (Tex. Civ. App.—Austin 1969, no writ).

34. Continental Trailways, Inc. v. McCandless, 450 S.W.2d 707, 712 (Tex. Civ. App.—Austin 1969, no writ).

been marred by human interpretation and partiality.[35] Further, to sanction a narrative statement made by the trial judge, who is vulnerable to the many weaknesses of the human intellect in reproducing from an unaided memory the testimony introduced at trial, would be to deprive the appellant of an unbiased and reliable statement of facts.[36] Although *Morgan Express* did not intimate a want of legal authorization on the part of the trial judge, the court did emphatically suggest that an appealing party should not have to rely on the unaided recollection of the trial judge where he is without the aid of the court reporter's notes, and has previously decided the cause adversely to the appealant's interest.[37]

In view of the mandatory duty imposed on the official court reporter to record all the testimony offered during each session of the court[38] and the interpretation that rule 377 contains the implicit presumption of the accessibility of the reporter's notes,[39] the defendant in *Morgan Express* was correctly granted a new trial from the default judgment. Although several courts have stated that a trial proceeding without the presence of the official court reporter is a grievous error on the part of the trial court, they have concluded that it does not constitute reversible error.[40] These courts, however, ignore the positive and obligatory language of the governing law.[41] An appellant should not be deprived of a statement of facts in question and answer form because of a breach of duty by the court reporter, or the error of the trial court in proceeding to trial without a court stenographer.[42] This deprivation, which prevents the appealing party from presenting to the appellate court questions he is entitled to raise, was patent in *Morgan Express* because the defendant was not present to offer an objection or exception in the trial court.[43]

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35. Goodin v. Geller, 521 S.W.2d 158, 160 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

36. *Id.* at 160.

37. Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312, 315 (Tex. Civ. App.—Dallas 1975, writ ref'd).

38. TEX. REV. CIV. STAT. ANN. art. 2324 (1971); *see* Dugie v. Dugie, 511 S.W.2d 623, 624 (Tex. Civ. App.—San Antonio 1974, no writ).

39. *See* Mitchell v. Hunsaker Mfg. Inc., 520 S.W.2d 796, 797 (Tex. Civ. App.—Waco 1975, no writ); Waller v. O'Rear, 472 S.W.2d 789, 791 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.).

40. *See* Wilkinson v. Evans, 515 S.W.2d 734, 737 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.); Whatley v. Whatley, 493 S.W.2d 299, 301 (Tex. Civ. App.—Dallas 1973, no writ).

41. TEX. REV. CIV. STAT. ANN. art. 2324 (1971).

42. *See* Morgan Express, Inc. v. Elizabeth-Perkins, Inc., 525 S.W.2d 312, 315 (Tex. Civ. App.—Dallas 1975, writ ref'd); Dugie v. Dugie, 511 S.W.2d 623, 624 (Tex. Civ. App.—San Antonio 1974, no writ).

43. *See* Mitchell v. Hunsaker Mfg. Inc., 520 S.W.2d 796, 797 (Tex. Civ. App.—Waco 1975, no writ); James Edmond, Inc. v. Schilling, 501 S.W.2d 432, 434 (Tex. Civ. App.—Waco 1973, no writ).

Although the due diligence criterion may seem an obviously just demand to place upon a party who has absented himself from the trial court after having been properly served with citation, it is a specious requirement. The courts which adhere to a view of strict compliance must take cognizance of the actual wording of rule 377 and the rights and duties it concretely delineates.[44] As indicated, there is cogent reason supporting the position that rule 377 presupposes the availability of the official court reporter's notes.[45] To assume that the court reporter's record is the basic means by which a party can avail himself of the other alternatives seems to be the sole expedient. It is implausible that in the majority of cases, a party wro did not hear the testimony upon which the trial court founded its judgment against him could successfully reach a fair compromise as to that testimony with his adversary. Equally improbable, in view of today's overcrowded dockets, is a situation where the trial judge could, unaided by a reporter's notes of the testimony, completely recollect the evidence proffered in order to prepare a truthful statement of facts.

Morgan Express does not change appellate procedure in Texas. Rather it affords an articulate, rational interpretation of rule 377. In its adoption of the *Morgan* opinion, the Texas Supreme Court has resolved this interpretative conflict in such a manner as to facilitate an unobstructed, adequate review of the allegations underlying an adverse judgment. This is particularly true where an appealing party was not present in the trial proceeding, and later discovers that there was no court record of the evidence transcribed. To have further imposed a burden of diligence upon a defaulting party who has a meritorius defense would have been ostensibly inimical to the ends of justice. The court should be commended for its decision. The divergence which once abounded from the Texas courts of civil appeals has been reconciled in such a way so as to liberate the appealing party from an ineffectual procedural burden. The decision of *Morgan Express* represents a realistic approach to the conflict of authority, and appears to have the sanction of equity.

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44. *See, e.g.*, Parker v. Sobine Valley Lumber Co., Inc., 485 S.W.2d 853, 856 (Tex. Civ. App.—Fort Worth 1972, no writ); Johnson v. Brown, 218 S.W.2d 317, 322 (Tex. Civ. App.—Beaumont 1948, writ ref'd n.r.e.).

45. Waller v. O'Rear, 472 S.W.2d 789, 791 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.).