St. Mary's Law Journal

Volume 8 | Number 3 Article 8

9-1-1976

Appeal Will Not Be Dismissed for Failure to Timely File Record Where Reasonable Explanation for Such Failure Is Shown.

David E. Chamberlain

Pennzoil v. FPC[56] is significant in that is recognizes the right of a private interest to restrict public access to governmental information. Criteria for review of a governmental agency's exercise of its discretionary power to disclose FOIA-exempt information have been delineated for the first time. While the present controversy arose under the trade secret and geological data exceptions to the FOIA, other exceptions cover matters of vital concern to the public.[57] No statute forbids disclosure of such information;[58] therefore, all citizens have an interest in knowing what rules govern public disclosure of government data.

Theodore C. Hake

APPELLATE PROCEDURE—Dismissal—Appeal Will Not Be Dismissed for Failure to Timely File Record Where Reasonable Explanation for Such Failure Is Shown

Stieler v. Stieler,

537 S.W.2d 954 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.).

Gus Stieler conveyed approximately 527 acres of land to two of his sons. Upon Stieler's death the brothers and sisters of the grantees brought suit to cancel the deed and received a judgment on September 20, 1974. On September 26, 1974, a motion for new trial was filed and was overruled by operation of law on November 10, 1974. The grantees appealed and made a timely request for the compilation of the transcript and statement of facts. Appellants' first motion for extension of time to file the record was granted, and time was extended until March 4, 1975, based on the court reporter's inability to prepare the statement of facts within the prescribed time because of the "press of official business." Before March 4 appellants made a second motion for extension on the grounds that the official reporter had died. The

56. 534 F.2d 627 (5th Cir. 1976).

57. *See* 5 U.S.C. § 552(b)(6), (7) (Supp. IV 1974), *amending* 5 U.S.C. § 552(b)(7) (1970), which exempt from FOIA disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" and law enforcement investigatory files.

58. *See* Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 766 (1967).

Austin Court of Civil Appeals extended the time for filing the transcript and statement of facts to May 5, 1975. One day after the date when the record was to have been filed, appellants filed their third motion for extension. In support of this motion, appellants alleged that the completed statement of facts contained numerous errors, which would require "extensive time" on the part of the three attorneys for appellants to reconcile and that one of appellants' attorneys who participated in the trial had undergone emergency surgery on April 21, 1975 and could not complete his examination of the statement of facts until May 6, 1975. In appellees' sworn response opposing the third motion for extension, it was alleged that the completed statement of facts had been given to the appellants' attorneys thirty-eight days prior to the time designated for filing and twenty-eight days preceding the attorney's surgery. Held—*Motion granted.* Under rule 21c of the Texas Rules of Civil Procedure,[1] an appeal will not be dismissed for failure to make a timely filing of the record where a "reasonable explanation" for such failure is shown.[2]

Rule 371 of the Texas Rules of Civil Procedure provides that "[t]he record on appeal shall consist of a transcript and, where necessary to the appeal, a statement of facts."[3] The appellant must promptly request that the record be prepared[4] and is responsible for its timely filing with the clerk of the court of civil appeals.[5] The filing of the record is mandatory and jurisdictional, so without the record or a motion to extend filed within the speci-

1. TEX. R. CIV. P. 21c states:

The failure of a party to timely file a transcript, statement of facts, motion of rehearing in the court of civil appeals or application for writ of error, will not authorize a dismissal or loss of the appeal if the defaulting party files a motion reasonably explaining such failure in the court whose jurisdiction to make the next ruling in the case would be affected by such failure. Said motion must be filed within fifteen (15) days of the last date for timely filing provided in the applicable rule or rules sought to be avoided, although it may be acted upon by the court at a date thereafter.

2. Stieler v. Stieler, 537 S.W.2d 954, 957 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.).

3. TEX. R. CIV. P. 371. It is the duty of appellant to procure the statement of facts by which appellate court may review findings of 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. *See* 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).

4. TEX. R. CIV. P. 376.

5. TEX. R. CIV. P. 385 (when appealing from interlocutory order, transcript must be filed within 20 days after rendition of order being appealed); Tex. R. Civ. P. 386 (1967) (record must be filed with clerk within 60 days from rendition of final judgment or order overruling motion for new trial, or perfection of writ of error).

It is the duty of the clerk of the appellate court upon receipt of the appellate record to endorse the record with the date and file it promptly. If the record is late or not properly endorsed, the clerk must make a memorandum of the date of its receipt and keep it subject to the order of the person who sent it or by deposition by the court. TEX. R. CIV. P. 389.

fied time, the appellate court is without power to determine the appeal.[6] Since timely filing is jurisdictional, it cannot be waived by the parties,[7] nor can it be abridged by any action of the court.[8] Where the appellant is unable to have the record filed before the expiration of the sixty-day period, he may move for an extension of time in order to preserve his appeal.[9] When this motion is properly made and timely filed, the appellate court may, within certain requirements, extend the time within which to file.[10]

Before January 1, 1976, rule 386 required a showing of *good cause* why the appellant could not file the record on time before an extension could be secured.[11] What constituted good cause was a question of fact,[12] and the appellate court had very little discretion in granting the extension of time.[13] The crucial point of former rule 386 was that the appellant had to show why the record *could not* be filed and not why the record *was not* filed.[14] While

---

6. *E.g.*, Walker v. Cleere, 141 Tex. 550, 552, 174 S.W.2d 956, 957 (1943); Cousins v. Brown, 539 S.W.2d 233, 234 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (appellate court without power to grant extension when neither record nor motion to extend time had been timely filed); Horn v. Builders Supply Co., 401 S.W.2d 143, 147 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.); Tydlacka v. Tydlacka, 277 S.W.2d 159, 160 (Tex. Civ. App.—San Antonio 1955, no writ).

7. Walker v. Cleere, 141 Tex. 550, 552, 174 S.W.2d 956, 957 (1943); Consolidated Cas. Ins. Co. v. Wade, 373 S.W.2d 841, 843 (Tex. Civ. App.—Corpus Christi 1963, writ dism'd); Ortiz v. Associated Employers Lloyds, 294 S.W.2d 880, 881 (Tex. Civ. App.—Austin 1956, no writ).

8. Ramey v. Phillips, 253 S.W. 323, 324-25 (Tex. Civ. App.—Amarillo 1923, no writ) (dictum) (appellee's motion to affirm on certificate before expiration of statutory period would be denied); Crary v. Port Arthur Channel & Dock Co., 45 S.W. 842, 844 (Tex. Civ. App.—1898, writ dism'd) (appellee has no right to hearing before expiration of time).

9. TEX. R. CIV. P. 21c; Tex. R. Civ. P. 386 (1967).

10. Previously rule 386 required a showing of "good cause." Presently, under rule 21c, only a "reasonable explanation" is required. *Compare* TEX. R. CIV. P. 21c *with* Tex. R. Civ. P. 386 (1967). In Matlock v. Matlock, 151 Tex. 308, 313, 249 S.W.2d 587, 590 (1952), the Texas Supreme Court ruled that the civil appeals courts must strictly comply with the "good cause" requirement of rule 386. *Accord*, Homestead Lumber Co. v. Harris, 178 S.W.2d 161, 162 (Tex. Civ. App.—Waco 1944, no writ); *see* O. WALKER & J. HEBDON, APPELLATE PROCEDURE IN TEXAS § 11.5 (1964).

11. Tex. R. Civ. P. 386 (1967) stated:

> In appeal or writ of error the appellant shall file the transcript and statement of facts with the clerk of the Court of Civil Appeals within sixty days from the rendition of the final judgment or order overruling motion for new trial, or perfection of writ of error; provided, by motion filed before, at, or within a reasonable time, not exceeding fifteen days after the expiration of such sixty day period, showing good cause to have existed within such sixty day period why said transcript and statement of facts could not be so filed, the Court of Civil Appeals may permit the same to be thereafter filed upon such terms as it shall prescribe.

12. Williams v. Williams, 392 S.W.2d 539, 541 (Tex. Civ. App.—Tyler 1965, no writ); Harrison v. Benavides, 327 S.W.2d 610, 612 (Tex. Civ. App.—San Antonio 1959, no writ).

13. Matlock v. Matlock, 151 Tex. 308, 313, 249 S.W.2d 587, 590 (1952); Williams v. Williams, 392 S.W.2d 539, 542 (Tex. Civ. App.—Tyler 1965, no writ); State v. Camper, 261 S.W.2d 465, 466 (Tex. Civ. App.—Dallas 1953, writ ref'd).

14. Matlock v. Matlock, 151 Tex. 308, 312, 249 S.W.2d 587, 589 (1952); Reynolds,

neither the courts nor the rules required the appellant to show utter impossibility,[15] he was required to show, in light of all attendant circumstances, that due diligence had been exercised and that the failure to file was not due to his own negligence.[16] Where the lack of diligence[17] or any delay traceable to some circumstances under the control of or mixed with any significant fault on the part of the applicant resulted in a failure to file on time, the motion was denied.[18] The harshness[19] of the rule was augmented in that a dismissal could only be reversed on appeal by a showing that such dismissal was arbitrary or an abuse of discretion.[20] In a leading case, *Matlock v. Matlock*,[21] the Texas Supreme Court recognized that rule 386 and the legislative policy surrounding it dictated that civil litigation should be resolved promptly.[22]

On January 1, 1976, rule 21c[23] became effective by order of the Texas Supreme Court. The new rule provides that the failure to make a timely filing of the record on appeal does not authorize a dismissal or loss of appeal if the defaulting party files a motion *reasonably explaining* such failure.[24] Consistent with this, the court also amended rule 386, repealing that part which required appellant to show good cause why the record could not be timely filed.[25] The net effect of these changes is to require appellant to

---

Texas Rules of Civil Procedure 385 & 386: Whether to Extend the Definitive Time for Filing the Appellate Record, 4 TEX. TECH. L. REV. 1, 10 (1972).

15. Harrison v. Benavides, 327 S.W.2d 610, 613 (Tex. Civ. App.—San Antonio 1959, no writ) (court could find no authority for such a drastic requirement).

16. *E.g.*, Williams v. Williams, 392 S.W.2d 539, 542 (Tex. Civ. App.—Tyler 1965, no writ); Figueroa v. Treece, 331 S.W.2d 250 (Tex. Civ App.—San Antonio 1960, no writ); Rigdon v. Panhandle Publishing Co., 233 S.W.2d 230, 232 (Tex. Civ. App.—Amarillo 1950, no writ).

17. Cases cited note 16 *supra*.

18. *E.g.*, Consolidated Cas. Ins. Co. v. Wade, 373 S.W.2d 841, 843 (Tex. Civ. App. —Corpus Christi 1963, writ dism'd) (inadvertent failure of appellants' attorney to see that appellees' counsel had read and signed statement of facts prior to expiration of 60-day period); Barron v. Barron, 365 S.W.2d 425, 427 (Tex. Civ. App.—Eastland 1962, no writ) (failure of appellant to realize necessity of complying with rule); Douglas v. Wheeler, 306 S.W.2d 956, 959 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.) (appellant delayed 30 days before ordering statement of facts to be prepared); *see* Reynolds, *Texas Rules of Civil Procedure 385 & 386: Whether to Extend the Definitive Time for Filing the Appellate Record*, 4 TEX. TECH L. REV. 1, 11 (1972).

19. Thompson v. Carter, Jones, Magee, Rudberg, Moss & Mayes, 514 S.W.2d 131, 132 (Tex. Civ. App.—Dallas 1974, no writ) (court suggested rule 386 be amended).

20. Patterson v. Hall, 430 S.W.2d 483, 486 (Tex. 1968); Wigley v. Taylor, 393 S.W.2d 170, 171 (Tex. 1965).

21. 151 Tex. 308, 249 S.W.2d 587 (1952).

22. *Id.* at 313, 249 S.W.2d at 590.

23. TEX. R. CIV. P. 21c.

24. *Id.* Rule 385 still requires that appellant show good cause for failure to file record on time when appealing from an interlocutory order. TEX. R. CIV. P. 385. In Trial v. McCoy, 535 S.W.2d 681, 682 (Tex. Civ. App.—El Paso, no writ), the court stated that due to the urgency of appeals from interlocutory orders, a showing of good cause was required and not the reasonable explanation standard of rule 21c.

25. TEX. R. CIV. P. 386 states: "In appeal or writ of error the appellant shall file the transcript and statement of facts with the clerk of the Court of Civil Appeals

reasonably explain such failure rather than require him to show good cause why the record could not be filed.[26]

Following the adoption of rule 21c, divergent interpretations of "reasonable explanation" have emerged from the courts of civil appeals.[27] One interpretation equates "reasonable explanation" with "reasonable diligence" and requires the appellant to show some degree of diligence throughout the entire statutory period.[28] Another explanation requires that the failure to file must be the result of inadvertence, mistake, or mischance in order to be excused.[29]

When the Austin Court of Civil Appeals in *Stieler v. Stieler*[30] was presented with a motion to extend time for filing the record, it admitted that the result would depend on whether former rule 386 or rule 21c was applied.[31] The uncontroverted fact that appellants' counsel had possession of the record for thirty-eight days before the time for filing negated any possible showing of good cause for failure to file on time.[32] Upon rehearing the court applied rule 21c and found that the movant had "reasonably explained" his failure to file the record within the required time.[33]

---

within sixty days from the rendition of the final judgment or order overruling motion for new trial, or perfection of writ of error."

26. *Compare* TEX. R. CIV. P. 21c, *with* TEX. R. CIV. P. 386, *and* Tex. R. Civ. P. 386 (1967).

27. In Gallegos v. Truck Ins. Exch., 539 S.W.2d 353, 354 (Tex. Civ. App.—San Antonio 1976, no writ), the court on rehearing required appellant to show that his failure to timely file was not deliberate or intentional, but was the result of mistake, mischance, or inadvertence in order to be excused. *Accord*, Mulloy v. Mulloy, 538 S.W.2d 818, 819 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).

In Sloan v. Passman, 536 S.W.2d 575, 576 (Tex. Civ. App.—Dallas 1976, no writ), a majority of the court required that appellant show "reasonable diligence" during the 60-day period in order to be excused.

In Russell v. Truitt, Docket No. 17,830 (Tex. Civ. App.—Fort Worth, October 8, 1976) (not yet reported), the court by per curiam opinion applied, without explanation, the "good cause" standard and not the "reasonable explanation" standard. The decision was rendered 10 months after rule 21c became effective and the "good cause" requirement had been deleted from rule 386.

28. Sloan v. Passman, 536 S.W.2d 575, 576 (Tex. Civ. App.—Dallas 1976, no writ) (motion denied because attorney's illness and secretary's negligence were not reasonable explanations).

29. Gallegos v. Truck Ins. Exch., 539 S.W.2d 353, 354 (Tex. Civ. App.—San Antonio 1976, no writ) (motion granted on rehearing, when record was lost); Mulloy v. Mulloy, 538 S.W.2d 818, 819 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ) (motion denied when no explanation was offered for failure to file in 60-day period); Sloan v. Passman, 538 S.W.2d 1 (Tex. Civ. App.—Dallas 1976, no writ) (dissenting opinion) (dissent would have granted motion upon attorney's illness and secretary's inadvertent failure to file record).

30. 537 S.W.2d 954 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.).

31. *Id.* at 956.

32. *Id.* at 956.

33. Although the appellants' third motion for extension was filed, submitted, and argued in 1975, the court was able to apply the 1976 rule 21c under rule 814 which provides that new rules may affect pending actions if it does not work injustice. *Id.* at 956-57.

In granting appellants' third motion, the court adopted the position taken in the dissenting opinion in *Sloan v. Passman*,[34] which defined "reasonable explanation" as any plausible statement indicating that the failure was not deliberate or intentional but, rather, was the result of inadvertence, mistake, or mischance.[35] The *Stieler* court stated that while extensive errors in the statement of facts and illness of one of the appellants' attorneys did not constitute good cause, they nevertheless provided a "reasonable explanation" for failure to file the record within the required time.[36]

Since this was a problem of first impression for the Austin Court of Civil Appeals, the court was faced with the question of what interpretation to place on the phrase "reasonable explanation." By its decision the Austin court differed sharply from the majority opinion of the Dallas Court of Civil Appeals in *Sloan v. Passman*.[37] In *Sloan* the appellant delayed forty-two days before requesting the clerk to prepare a transcript, but received it five days before the last date of the statutory period.[38] The appellants' attorney contended that his "reasonable explanation" for failure to file on time was that his secretary had failed to follow his instructions as a result of her preoccupation with her impending marriage and his own illness during two out of the last five days.[39] A majority of the court denied the motion and stated that the substitution of a "reasonable explanation" for the "good cause" test did not eliminate the requirement of diligence during the sixty days.[40] The Dallas Court of Civil Appeals felt it was implicit in rule 21c that an appellant be required to reasonably explain his activity during the statutory period, including a reasonable explanation for an "extraordinary delay" in directing the clerk to prepare the transcript.[41]

---

34. 538 S.W.2d 1 (Tex. Civ. App.—Dallas 1976, no writ) (dissenting opinion).

35. *Id.*

36. Stieler v. Stieler, 537 S.W.2d 954, 957 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.).

37. 536 S.W.2d 575 (Tex. Civ. App.—Dallas 1976, no writ).

38. *Id.* at 576-77.

39. *Id.* at 577.

40. *Id.* at 576. Although involving different facts and legal questions, the Texas Supreme Court in Strickland v. Lake, 163 Tex. 445, 448, 357 S.W.2d 383, 384 (1962), defined diligence as the degree of care that a prudent and reasonable person would exercise under similar circumstances. It is a subjective concept which must be determined by the factual setting of each case. *Accord*, Missouri, K. & T. Ry. v. Gist, 73 S.W. 857, 858 (Tex. Civ. App. 1903, writ ref'd).

41. Sloan v. Passman, 536 S.W.2d 575, 577 (Tex. Civ. App.—Dallas 1976, no writ) (rule 376 still requires appellant to promptly file copy of written direction to prepare transcript with clerk). The *Sloan* transcript was 158 pages long and took the Clerk 8 hours and 40 minutes to prepare. Interview with Bill Shaw, Dallas County District Clerk, in Dallas, Texas, Nov. 23, 1976. While there was no statement of facts involved in *Sloan*, it normally takes 10 days to prepare a 200-page statement of facts. Interview with Ronald A. Worth, Court Reporter, 144th District Court, in Dallas, Texas, Nov. 23, 1976. Thus, it is apparent that a dilatory appellant could still file within the 60-day period.

The holding in *Sloan* indicated that any other reading of rule 21c would permit an appellant to "unreasonably delay in requesting the preparation of transcripts and thus abuse the orderly and timely disposition of appeals."[42] This statement is strongly reminiscent of the Texas Supreme Court's position in *Matlock* favoring the prompt disposition of civil litigation.[43] In a 1974 case a majority of the Dallas Court of Civil Appeals pointed out that the *Matlock* explanation of the restrictiveness of rule 386 was predicated on a declaration by the 1931 Texas Legislature that the rule was adopted "to expedite and simplify the business of the courts."[44] The court noted that since the Texas Supreme Court now had authority over civil procedure, the restrictiveness of rule 386 should be reassessed and an amendment considered which would give the courts of civil appeals discretion to grant extensions.[45] Apparently in answer to this plea, rule 386 was amended and rule 21c was added to the rules.[46]

The dissenting opinion in *Sloan* stated that a failure to file on time required a "reasonable explanation" and not a showing of "reasonable diligence" as the majority had ruled was implicit in rule 21c.[47] Justice Guittard thought that:

> any plausible statement of circumstances indicating that failure to file within the sixty-day period was not deliberate or intentional, but was the result of inadvertence, mistake, or mischance might be accepted as a reasonable explanation, even though counsel or his secretary had been lacking in that degree of diligence which careful practitioners normally exercise.[48]

The dissent indicated that the standard required careful judicial scrutiny of appellant's explanation only if the delay in requesting an extension of time had become unduly long.[49] Thus, a short and conscionable delay could be treated with considerable leniency.[50]

Rule 1 of the Texas Rules of Civil Procedure states that the objective of the rules is to "obtain a just, fair, equitable, and impartial adjudication of

42. Sloan v. Passman, 536 S.W.2d 575, 577 (Tex. Civ. App.—Dallas 1976, no writ).

43. Matlock v. Matlock, 151 Tex. 308, 313, 249 S.W.2d 587, 590 (1952).

44. Thompson v. Carter, Jones, Magee, Rudberg, Moss & Mayes, 514 S.W.2d 131, 132 (Tex. Civ. App.—Dallas 1974, no writ) (on motion for rehearing).

45. *Id.* at 132 (extensions could be granted in case of inadvertent failure to meet the deadline).

46. This opinion was rendered in 1974 and the "good cause" requirement was deleted the next year by order of the Texas Supreme Court. *Compare* TEX. R. CIV. P. 21c, *with* TEX. R. CIV. P. 396, *and* Tex. R. Civ. P. 386 (1967).

47. Sloan v. Passman, 538 S.W.2d 1 (Tex. Civ. App.—Dallas 1976, no writ) (dissenting opinion).

48. *Id. But see* Gallegos v. Truck Ins. Exch., 539 S.W.2d 353, 354 (Tex. Civ. App.—San Antonio 1976, no writ) (court on rehearing expressed some doubt whether negligent failure to file record on time would constitute reasonable explanation).

49. Sloan v. Passman, 538 S.W.2d 1 (Tex. Civ. App.—Dallas 1976, no writ) (dissenting opinion).

50. *Id.*

the rights of the litigants under established principles of substantive law."[51] Moreover, a liberal construction of the rules is in order if it is judicially efficient and does not operate to the detriment of the litigants or the state.[52] With this in mind, it is edifying to compare the duties incumbent upon a defaulting party in a motion for new trial with the duties of a tardy appellant in a motion for extension of time to file the record. Before a default judgment becomes final, the defendant is entitled to have it set aside if his failure to appear was not intentional or the result of conscious indifference but, rather, was due to mistake or accident.[53] In addition, he must show that he has a meritorious defense and that the delay will not cause injury to the opposing party.[54] It has been stated that the controlling fact is the absence of an intentional failure to answer rather than a real excuse for not answering.[55] The dissenting opinion in *Sloan* states that the requirement of "reasonable explanation" requires *no stricter standard* than is applicable to a default judgment.[56] Thus the objective of the rules would be satisfied if the tardy appellant reasonably explained his failure to timely file and there is no substantial injury or expense to the state or the appellee.[57] As the *Sloan* dissent noted, the standard should be considered "in the context of the length of the delay."[58]

The policy considerations underlying the promulgation of rule 21c are unclear. Although considering a different rule, one court has stated that the 1976 amendments to the rules of procedure were clearly intended to facilitate appeals by eliminating requirements which had become, in effect, "traps for the unwary and resulted in numerous dismissals . . . without reference to the merits."[59] Moreover, it has been proposed that the purpose of adopting rule 21c was to avoid the inequities associated with a procedural loss of appeal by substituting a "reasonable explanation" requirement for the "good cause" requirement.[60] These observations seem fair in light of the announ-

51. TEX. R. CIV. P. 1.
52. *Id.*
53. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 391, 133 S.W.2d 124, 126 (1939) ("some excuse," not necessarily a "good excuse," is required); Houston & T.C. R.R. v. Burke, 55 Tex. 323, 331 (1881); Dowell v. Winters, 20 Tex. 794, 797 (1858).
54. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 392, 133 S.W.2d 124, 126 (1939); Houston & T.C.R.R. v. Burke, 55 Tex. 323, 331 (1881); Dowell v. Winters, 20 Tex. 794, 798 (1858).
55. Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 389, 133 S.W.2d 124, 125 (1939).
56. Sloan v. Passman, 538 S.W.2d 1 (Tex. Civ. App.—Dallas 1976, no writ) (dissenting opinion).
57. *Compare* TEX. R. CIV. P. 21c, *with* TEX. R. CIV. P. 1.
58. Sloan v. Passman, 538 S.W.2d 1 (Tex. Civ. App.—Dallas 1976, no writ) (dissenting opinion).
59. Graves v. Dullnig & Co., 538 S.W.2d 149 (Tex. Civ. App.—San Antonio 1976, no writ) (per curiam).
60. Sloan v. Passman, 538 S.W.2d 1 (Tex. Civ. App.—Dallas 1976, no writ) (dissenting opinion).