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## JURISDICTIONAL AND PROCEDURAL ASPECTS OF SECURING JUDGMENTS AGAINST PARTIES SECONDARILY LIABLE—A PROPOSAL FOR REFORM

GERSHON D. COHEN\*

Frequently a creditor will seek the payment of a debt from parties other than the principal debtor. There are several reasons why the creditor would seek to recover from others, including the fact that the principal is judgment proof or is unavailable for service. Collection of the debt would then depend on the existence of a surety, guarantor, indorser, drawer of an accepted draft, or other party secondarily liable for the debt. In Texas, the procedural requirements for suing a party whose liability is of a secondary nature is governed by several rules of civil procedure and related statutes.<sup>1</sup>

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1. Rule 30 states:

Assignors, indorsers and other parties not primarily liable upon any instruments named in the title of the Revised Civil Statutes of Texas, 1925, dealing with Bills and Notes, may be jointly sued with their principal obligors, or may be sued alone in the cases provided for in Articles 1986 and 1987 of such statutes.

TEX. R. CIV. P. 30.

Rule 31 states:

No surety shall be sued unless his principal is joined with him, or unless a judgment has previously been rendered against his principal, except in cases otherwise provided for in the law and these rules.

*Id.* 31.

Rule 163 states:

When it will not prejudice the other defendants, the court may permit the plaintiff to discontinue his suit as to one or more of several defendants who were served with process, or who have answered, but no such discontinuance shall in any case, be allowed as to a principal obligor, except in cases provided for in Art. 2088 of the Revised Civil Statutes of Texas.

*Id.* 163.

Article 1986 states:

The acceptor of a bill of exchange, or a principal obligor in a contract, may be sued either alone or jointly with any other party who may be liable thereon; but no judgment shall be rendered against a party not primarily liable on such bill or other contract, unless judgment be also rendered against such acceptor or other principal obligor, except where the plaintiff may discontinue his suit against such principal obligor as hereinafter provided.

TEX. REV. CIV. STAT. ANN. art. 1986 (1964).

Article 1987 states:

The assignor, indorser, guarantor and surety upon a contract, and the drawer of a bill which has been accepted, may be sued without suing the maker, acceptor or other principal obligor, when the principal obligor resides beyond the limits of the State, or

The purpose of this article is to review the present status of this area of Texas law and submit a proposal for improving its operation.

In order to develop an understanding of this area, it is helpful to examine the relationship of the principal<sup>2</sup> to the suit against the secondarily liable party. Three situations generally arise: 1) the principal was not made a party to the suit, 2) the principal was made a party to the suit but was subsequently dismissed, and 3) the co-defendant principal was not dismissed from the suit. Another consideration in analyzing a question in this area is whether there has been an effective waiver of the requirement to proceed against a principal.

#### PRINCIPAL NOT SUED IN ORIGINAL PETITION

Simply stated, the general rule in suing a secondarily liable party is that the principal should be joined.<sup>3</sup> This rule is derived from the introductory language of rule 31 of the Texas Rules of Civil Procedure: "No surety shall be sued unless his principal is joined with him. . . ."<sup>4</sup> Rule 31 provides an exception to the general rule where "a judgment has previously been rendered against his principal . . . [and] in cases otherwise provided for in the law and these rules."<sup>5</sup>

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where he cannot be reached by the ordinary process of law, or when his residence is unknown and cannot be ascertained by the use of reasonable diligence, or when he is dead, or actually or notoriously insolvent.

*Id.* art. 1987.

Article 2088 states:

Where a suit is discontinued as to the principal obligor, no judgment can be rendered therein against an indorser, guarantor, surety or drawer of an accepted bill who is jointly sued, unless it is alleged and proved that such principal obligor resides beyond the limits of the state, or in such part of the same that he cannot be reached by the ordinary process of law, or that his residence is unknown and cannot be ascertained by the use of reasonable diligence, or that he is dead or actually or notoriously insolvent.

*Id.* art. 2088.

Section 34.01 of the Business and Commerce Code (1968) defines a surety to include an "endorser, guarantor, drawer of a draft which has been accepted, and every other form of suretyship. . . ." TEX. BUS. & COMM. CODE ANN. § 34.01 (1968). This statute has been interpreted to make guarantors the peers of sureties for purposes of Rule 31. See *Wood v. Canfield Paper Co.*, 117 Tex. 399, 405, 5 S.W.2d 748, 750 (Tex. 1928) (citing article 6336, which is now rule 31).

2. The word *principal* as used in this article is intended to mean *principal obligor* in a broad sense, unless otherwise qualified.

3. At common law, the practice was to require that the principal always be joined as a necessary party in a lawsuit for collection. *Republic Supply Co. v. Barrow*, 41 S.W.2d 475, 477 (Tex. Civ. App.—Fort Worth 1931, writ dismissed).

4. TEX. R. CIV. P. 31.

5. *Id.*

By implication, the rule 31 clause "cases otherwise provided for in the law," refers to articles 1986 and 1987 of the Texas Revised Civil Statutes,<sup>6</sup> which set forth mandatory requirements for suing secondarily liable parties.<sup>7</sup> Article 1987 requires that one of the following facts be shown in order to sue the secondarily liable party initially without the principal:<sup>8</sup>

- (1) That the principal resides beyond the limits of the state;<sup>9</sup>
- (2) That the principal cannot be reached by ordinary process of law;<sup>10</sup>
- (3) That the principal's residence is unknown and cannot be ascertained by the use of reasonable diligence;<sup>11</sup>
- (4) That the principal is deceased;<sup>12</sup>
- (5) That the principal is actually or notoriously insolvent.<sup>13</sup>

6. See *Yandell v. Tarrant State Bank*, 538 S.W.2d 684, 685 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.); *Cook v. Citizens Nat'l Bank*, 538 S.W.2d 460, 462 (Tex. Civ. App.—Beaumont 1976, no writ).

7. *Zimmerman v. Bond*, 392 S.W.2d 149, 151 (Tex. Civ. App.—Dallas 1965, no writ); *Republic Supply Co. v. Barrow*, 41 S.W.2d 475, 477 (Tex. Civ. App.—Fort Worth 1931, writ dism'd); *First Nat'l Bank v. Thurmond*, 159 S.W. 164, 165 (Tex. Civ. App.—Fort Worth 1913, no writ).

8. *Duree v. Aetna Ins. Co.*, 66 S.W.2d 764, 764 (Tex. Civ. App.—Amarillo 1933, no writ).

9. *Gill v. Universal C.I.T. Credit Corp.*, 282 S.W.2d 401, 409 (Tex. Civ. App.—Texarkana 1955, writ ref'd n.r.e.) (principals who executed "time price sales contracts" for purchases of cars, residents of Arkansas and Louisiana, not viewed as necessary parties if automobile dealer would be considered a guarantor of contract).

10. *R.P. Farnsworth & Co. v. Globe Marble & Granite Corp.*, 250 F.2d 636, 637 (5th Cir. 1958) (contractor may sue indemnitor-surety alone because supplier is non-resident and beyond reach of court's process).

11. *Moore v. Downie Bros. Circus*, 164 S.W.2d 420, 423 (Tex. Civ. App.—Fort Worth 1942, no writ) (principal had no fixed place of residence); *Bopp v. Hansford*, 45 S.W. 744, 745 (Tex. Civ. App. 1898, writ ref'd) (principal was a fugitive from justice).

12. *Holland v. Florey*, 151 S.W.2d 926, 927 (Tex. Civ. App.—Texarkana 1941, no writ) (death certificate not necessary to prove death); *Bacon v. Wright*, 52 S.W. 2d 1111, 1113 (Tex. Civ. App.—Dallas 1932, writ ref'd) (guardian may sue sureties on deceased guardian's bond without making administrator of deceased guardian's insolvent estate a party); *Marine Banking & Trust Co. v. Federal Trust Co.*, 64 S.W.2d 409, 410 (Tex. Civ. App.—Waco 1933, writ ref'd) (when principal is dead, obligee may sue surety and need not present claim to administrator of deceased principal).

13. *Smith v. Ojerholm*, 93 Tex. 35, 53 S.W. 341 (1899) (principal must be without any property liable to execution); *Brooks v. American Nat'l Bank*, 103 S.W.2d 246, 250 (Tex. Civ. App.—Beaumont 1937, writ dism'd) (insolvency for purposes of article 1987 presumed to exist if principal has been adjudicated a bankrupt). A contemporary application of the holding in *Smith v. Ojerholm*, 93 Tex. 35, 53 S.W. 341 (1899), is shown in the case of *Cook v. Citizens Nat'l Bank*, 538 S.W.2d 460 (Tex. Civ. App.—Beaumont 1976, no writ). Prior to the filing of the lawsuit in *Cook*, the principal debtor, a corporation, filed in federal court for an "arrangement" under Chapter XI of the Bankruptcy Act. 11 U.S.C. §§ 701-799 (1970). According to exhibits filed to obtain the Chapter XI status, the principal's financial data showed assets of \$4,600,147.13 and liabilities of \$2,029,400.69. Citing *Ojerholm* as precedent, the

An opinion which illustrates the operation of article 1987 is *Zimmerman v. Bond*,<sup>14</sup> written by the Dallas Court of Civil Appeals. In *Zimmerman*, an indorser on a promissory note was the sole defendant in a suit on the note which was signed by one maker and three indorsers. The original petition merely alleged nonpayment and demand on the indorsers prior to the filing of the lawsuit. In the indorser's amended original answer as well as in a plea in abatement, it was contended that "the maker of the note was a necessary party and that no action could be maintained against him, as [i]ndorser, in the absence of such party or proper pleading excusing the failure to sue the party primarily liable."<sup>15</sup> The trial court overruled the plea in abatement and rendered summary judgment in favor of the plaintiff.<sup>16</sup> On appeal, the trial court was held to have been in error for overruling the indorser's plea in abatement. After quoting directly from article 1987, the court stated that "[e]ither for bringing of the action, or alleging facts excusing failure to do so, is a condition precedent to an action against the [i]ndorser, secondarily liable."<sup>17</sup>

The article 1987 exceptions must not only be pled but must also be proved. The case of *Yandell v. Tarrant State Bank*<sup>18</sup> illustrates this requirement.<sup>19</sup> *Yandell* involved a suit against a guarantor of a note. As in *Zimmerman*, a plea in abatement was filed which asserted that the maker of the note was a necessary party under rule 31. In *Yandell*, however, there was an allegation in the original petition and in the motion for summary judgment that the maker

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court held that insolvency for purposes of article 1987 was not shown. *Cook v. Citizens Nat'l Bank*, 538 S.W.2d 460, 466 (Tex. Civ. App.—Beaumont 1976, no writ). Another interesting aspect of the *Cook* opinion was the court's treatment of the bankruptcy court's injunction against actions by creditors. See 11 U.S.C. § 714 (1970). The obstacle was overcome by the court's opinion that it was questionable if such an injunction would prevent an individual from being made a party to a lawsuit. *Cook v. Citizens Nat'l Bank*, 538 S.W.2d 460, 465 (Tex. Civ. App.—Beaumont 1976, no writ). If article 1987 is not satisfied and the principal is made a party to the lawsuit, this does not mean that a judgment must be rendered against the principal. *McGhee v. Wynnewood State Bank*, 297 S.W.2d 876, 883 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.). *But see* TEX. REV. CIV. STAT. ANN. art. 1986 (1964).

14. 392 S.W.2d 149 (Tex. Civ. App.—Dallas 1965, no writ).

15. *Id.* at 150.

16. *Id.* at 150.

17. *Id.* at 151; *accord*, *First State Bank & Trust Co. v. Colpaugh*, 489 S.W.2d 675, 680 (Tex. Civ. App.—San Antonio 1972, no writ); *Shotts v. Pardi*, 483 S.W.2d 879, 882-83 (Tex. Civ. App.—Corpus Christi 1972, writ dismissed).

18. 538 S.W.2d 684 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

19. *Id.* at 686-87; *accord*, *Republic Supply Co. v. Barrow*, 41 S.W.2d 475, 477 (Tex. Civ. App.—Fort Worth 1931, writ dismissed); *Welch v. Phelps & Bigelow Windmill Co.*, 37 S.W. 175 (Tex. Civ. App. 1896, no writ).

was insolvent. The proof offered to support this allegation was an affidavit by the president of the bank stating that notice had been received which reflected the maker's bankruptcy filing and a *belief* that the proceedings were still pending. This evidence constituted an attempt to comply with the proof requirement of article 1987 but was determined to be inadequate to establish the maker's insolvency because of the insufficiency of the evidence.<sup>20</sup>

#### CO-DEFENDANT PRINCIPAL DISMISSED FROM LAWSUIT

The procedural requirements for a suit in which the principal and the secondarily liable party are co-defendants in the original petition and the principal is subsequently dismissed from the suit are governed by rule 163<sup>21</sup> and its related statute, article 2088.<sup>22</sup> Rule 163 provides that "no such discontinuance shall in any case, be allowed as to a principal obligor, except in cases provided in Art. 2088. . . ."<sup>23</sup> Article 2088 requires that no judgment may be taken as to a secondarily liable party when a suit is discontinued as to the principal unless one of the facts similar to those listed in article 1987 is both alleged and proved.<sup>24</sup>

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20. *Yandell v. Tarrant State Bank*, 538 S.W.2d 684, 686-87 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.). The court's holding is questionable in light of *Smith v. Ojerholm*, 93 Tex. 35, 53 S.W. 341 (1899), where it was held that with an adjudication of bankruptcy, it will be presumed that the principal is insolvent for purposes of article 1987. The court, however, held that the guarantor could be sued without the maker because of an effective waiver of the right to have the maker joined. *Yandell v. Tarrant State Bank*, 538 S.W.2d 684, 688 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.). See text accompanying notes 56-59 *infra*.

21. TEX. R. CIV. P. 163.

22. TEX. REV. CIV. STAT. ANN. art. 2088 (1964).

23. TEX. R. CIV. P. 163.

24. TEX. REV. CIV. STAT. ANN. art. 2088 (1964). (1) Principal resides beyond the limits of the state: *Brown v. Standard Cigarette Serv., Inc.* 340 S.W.2d 121, 123 (Tex. Civ. App.—Amarillo 1960, no writ) (principal resided in Colorado). (2) Principal cannot be reached by ordinary process: *Johnson v. J.R. Watkins Co.*, 337 S.W.2d 477, 479 (Tex. Civ. App.—Austin 1960, no writ) (service attempted but not consummated). (3) Principal's residence is unknown and cannot be ascertained by the use of reasonable diligence: *Patterson v. Walker*, 135 S.W. 612, 613 (Tex. Civ. App. 1910, writ ref'd) (allegation should state that residence is unknown to plaintiff); *Chapman v. Brite*, 23 S.W. 514, 516 (Tex. Civ. App. 1893, no writ) (in action against administrator and sureties on his bond for misappropriating assets of estate, cause discontinued against administrator upon alleging and proving residence of administrator unknown). (4) Principal is deceased: *Muenster v. Tremont Nat'l Bank*, 92 Tex. 422, 425-26, 49 S.W. 362, 363-64 (1899). (5) Principal is actually or notoriously insolvent: *Daniel v. Brewton*, 136 S.W. 815, 816 (Tex. Civ. App. 1911, no writ) (dismissal as to maker upon proof of insolvency); *Chapman v. Brite*, 23 S.W. 514, 516 (Tex. Civ. App. 1893, no writ) (in action against administrator and sureties on his bond for misappropriating assets of estate, cause discontinued against administrator upon alleging and proving insolvency).

The case of *Johnson v. J.R. Watkins Co.*<sup>25</sup> shows the unexpected effect that article 2088 may have. It involved a suit on a sworn account against the principal and two guarantors. The principal was dismissed from the lawsuit because he had not been served with citation. A default judgment was rendered against the guarantors, holding them liable for the balance of the account. No attempt, however, was made in the lower court to plead and prove that any of the circumstances provided in article 2088 existed.<sup>26</sup> The court of civil appeals stated that "[i]n the absence of the pleading and proof expressly required by Art. 2088, and by implication by Art. 1987, the judgment against the guarantors should be reversed."<sup>27</sup> The opinion emphasizes the importance of amending pleadings to satisfy article 2088 if the principle is dismissed and a guarantor becomes the sole defendant. The original petition in such a suit will not support a judgment against a secondarily liable party if the allegations do not initially satisfy article 2088.<sup>28</sup>

The requirement that one of the five facts be both pled and proved is illustrated in *Brown v. Standard Cigarette Service*,<sup>29</sup> a suit against a principal and five sureties. The principal had been hired to sell merchandise furnished to him by the plaintiff, who alleged that the principal failed to account for \$1,897.94. The plaintiff originally sought to recover this sum against the principal as well as against the sureties. Since the principal was not served with process, however, a non-suit was taken as to him and judgment was rendered against the sureties.<sup>30</sup> On appeal, the sureties contended that the trial court erred in granting a judgment against them because the plaintiff took a non-suit as to the principal obligor "without discharging the legal requirements of pleading and proving" as required by article 2088.<sup>31</sup> The record indicated that there had been allegations in the lower court that the principal resided in Colorado; however, "there was no attempt whatsoever to introduce any evidence" to establish this contention.<sup>32</sup> The case was reversed and

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25. 337 S.W.2d 477 (Tex. Civ. App.—Austin 1960, no writ).

26. *Id.* at 477-78.

27. *Id.* at 479; *accord*, *First Nat'l Bank v. Thurmond*, 159 S.W. 164, 165 (Tex. Civ. App.—Ft. Worth 1913, no writ).

28. *See Daniel v. Brewton*, 136 S.W. 815 (Tex. Civ. App. 1911, no writ), where the plaintiff initially did not allege the unknown residency or insolvency of the maker of the note, but after filing the suit did so allege and safely dismissed as to the maker. *Id.* at 815.

29. 340 S.W.2d 121 (Tex. Civ. App.—Amarillo 1960, no writ).

30. *Id.* at 122.

31. *Id.* at 122.

32. *Id.* at 122-23.

remanded because the proof requirement of article 2088 was not satisfied.<sup>33</sup>

#### CO-DEFENDANT PRINCIPAL NOT DISMISSED FROM LAWSUIT

Suits in which the secondarily liable party and the principal are both co-defendants in the original petition and the principal is not dismissed would seem to be the category least susceptible to procedural errors. This situation is controlled by article 1986,<sup>34</sup> which provides that no judgment may be rendered against the secondarily liable party unless judgment is also rendered against the principal.<sup>35</sup>

The opinions in *Hart v. Foster*<sup>36</sup> and *Head v. Texas State Bank*<sup>37</sup> illustrate the operation of this rule. *Hart* involved a suit on a note against the maker and his sureties. Process had been validly served upon the maker and because of his failure to appear in court, a valid default judgment was taken. The sureties contended on appeal from a judgment holding them liable, that since the maker was a nonresident of the state, no valid judgment could be rendered against him

33. *Id.* at 123.

34. TEX. REV. CIV. STAT. ANN. art. 1986 (1964).

35. Article 1986 may be categorized into two sections separated by a semi-colon. The words in front of the semi-colon do not apply to secondarily liable parties: "The acceptor of a bill of exchange, or a principal obligor in a contract may be sued either alone or jointly with any other party who may be liable thereon. . . ."

The impact of this particular language in article 1986 was illustrated in the case of *Swinford v. Allied Finance Co.*, 424 S.W.2d 298 (Tex. Civ. App.—Dallas 1968, writ dismissed), cert. denied, 393 U.S. 923 (1968). This case involved a suit on a note which was brought originally against a husband and wife, the co-makers of a note. The husband was subsequently dismissed from the action, apparently because of the pending bankruptcy proceedings. On appeal from a judgment holding the wife liable for the total unpaid balance, it was maintained that the trial court erred in holding her liable. The wife's primary contention was that because there was a divorce between the two makers subsequent to the signing of the note, the property settlement directing the husband to pay all the community debts should be respected. It was therefore contended that the husband became the principal obligor upon the note, and because of article 2088 and rule 163, he could not be dismissed from the suit. After ruling that any divorce settlement is subject to the demands of creditors, the court cited article 1986 for the proposition that the wife could be sued either alone or jointly with the husband, the other principal obligor, "and it was not error for the court to dismiss one and allow recovery against the other. . . . [N]ot being the only principal obligor on the note, [the husband] was not an indispensable or necessary party to the action." *Swinford v. Allied Fin. Co.*, 424 S.W.2d 298, 301-02 (Tex. Civ. App.—Dallas 1968, writ dismissed); accord, *Palmer v. Federal Deposit Ins. Corp.*, 527 S.W.2d 788, 791 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ refused n.r.e.); *Milmo Nat'l Bank v. Cobbs*, 115 S.W. 345, 349 (Tex. Civ. App. 1908, no writ); *Webb v. Gregory*, 108 S.W. 478, 479 (Tex. Civ. App. 1908, no writ). See also, *Dorsaneo, Compulsory Joinder of Parties in Texas*, 14 Hous. L. Rev. 345, 354 n.42 (1977).

36. 109 S.W.2d 504 (Tex. Civ. App.—Fort Worth 1937, writ dismissed).

37. 16 S.W.2d 298 (Tex. Civ. App.—Eastland 1929, no writ).



or the sureties due to article 1987. The court held that a valid default judgment against the principal, "takes the case out of the provisions of article 1987 and brings it clearly within article 1986."<sup>38</sup> The *Head* case, on the other hand, supports the proposition that an erroneous judgment against the principal will not support a judgment against a secondarily liable party under article 1986. The case involved a suit on a note against the maker and four sureties, in which judgment was rendered against all the defendants for the unpaid balance of the note, accrued interest, and attorneys' fees. Default judgment was rendered against the maker, but there was no attempt in the lower court to satisfy the pleading and proof requirements of article 1987.<sup>39</sup> On appeal, the default judgment was reversed because the transcript did not show a citation and return, and thus a reversal as to the sureties was determined to be necessary. The Texas State Bank filed a motion for dismissal of the maker which was denied at the appellate level. This was an attempt to preserve the judgment against the sureties.<sup>40</sup> If there had been a valid judgment against the maker in *Head*, the *Hart* rule would have required a finding that article 1986 had been satisfied.<sup>41</sup> Since there was neither a valid judgment against the maker, nor pleadings and proof to satisfy article 1987, the court was forced to reverse the case on the basis of articles 1986 and 1987.<sup>42</sup>

#### WAIVER

Another important consideration when analyzing the procedural rights of a secondarily liable party is to determine the effectiveness

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38. *Hart v. Foster*, 109 S.W.2d 504, 506 (Tex. Civ. App.—Fort Worth 1937, writ dismissed). It is interesting to note that the sureties' contentions in *Hart* were facially incorrect. Assuming a principal is a nonresident of Texas, article 1987 would permit the principal's nonjoinder in the original petition with no effect on the note holder's ability to get a judgment against the secondarily liable party. See *McGhee v. Wynnewood State Bank*, 297 S.W.2d 876, 883 (Tex. Civ. App.—Dallas 1966, writ refused n.r.e.). If a secondarily liable party can plead and prove the nonliability of the principal, this is a sufficient basis for the release of the secondarily liable party. *Garrett v. Dodson*, 199 S.W. 675, 677 (Tex. Civ. App.—Amarillo 1917, writ refused). Nonresidency of the principal, however, should not be a basis for the nonliability to the secondarily liable party.

39. *Head v. Texas State Bank*, 16 S.W.2d 298, 299 (Tex. Civ. App.—Eastland 1929, no writ).

40. *Id.* at 299.

41. See *Hart v. Foster*, 109 S.W.2d 504, 506 (Tex. Civ. App.—Fort Worth 1937, writ dismissed).

42. *Head v. Texas State Bank*, 16 S.W.2d 298, 299 (Tex. Civ. App.—Eastland 1929, no writ); accord, *Elliott v. First State Bank*, 105 Tex. 547, 549, 152 S.W. 808, 809 (1913); *Snyder v. Slaughter*, 208 S.W. 974, 978 (Tex. Civ. App.—Amarillo 1919, no writ).

of a waiver which makes proceeding against the principal unnecessary. Waiver clauses of this nature are voluminous in many of the standard guaranty agreements in Texas. The contemporary cases which rule on the effectiveness of waiver by secondarily liable parties are in conflict and pose serious questions.<sup>43</sup> *Cook v. Citizens National Bank*<sup>44</sup> and *Yandell v. Tarrant State Bank*<sup>45</sup> are two such contemporary cases involving procedural rights of secondarily liable parties. These cases illustrate an interesting disagreement on the issue of whether such rights may be the subject of an effective waiver.<sup>46</sup>

The Beaumont Court of Civil Appeals in the *Cook* case held that whether a guarantor be of a conditional or absolute nature, rule 31 and its related statute apply.<sup>47</sup> Suit was brought by Citizens National Bank against a maker and two guarantors of a note. The maker filed a plea in abatement on the basis that it had filed for a Chapter XI Arrangement under the Federal Bankruptcy Act. On the bank's motion, the action against the maker was severed from that against the guarantors who objected to the trial court's proceeding without joinder of the maker. A summary judgment was rendered against the two guarantors for the balance on the note.

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43. This problem is further complicated by a recent Texas Supreme Court decision of *Universal Metals & Mach., Inc. v. Bohart*, 539 S.W.2d 874 (Tex. 1976) (first opinion, appearing in 19 Tex. Sup. Ct. J. 212 (March 13, 1976), was withdrawn) which has held that an apparent waiver of procedural rights in certain instances renders a guarantor primarily liable.

44. 538 S.W.2d 460 (Tex. Civ. App.—Beaumont 1976, no writ).

45. 538 S.W.2d 684 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

46. In the case of *Universal Metals & Mach., Inc. v. Bohart*, 539 S.W.2d 874 (Tex. 1976) (first opinion, appearing in 19 Tex. Sup. Ct. J. 212 (March 13, 1976), was withdrawn), the issue of waiver was upheld on the basis of section 3.416(a) of the Business and Commerce Code, TEX. BUS. & COMM. CODE ANN. § 3.416(a) (UCC 1968), and due to the particular language of the waiver. The holding of the supreme court seems questionable because no reference is made to rules 30, 31, and 163, or to articles 1986, 1987, and 2088. TEX. R. CIV. P. 30, 31, 163; TEX. REV. STAT. ANN. arts. 1986, 1987, 2088 (1964). *But see* *Hopkins v. First Nat'l Bank*, 551 S.W.2d 343 (Tex. 1977) (per curiam, refusing writ n.r.e.), wherein the supreme court recognizes the *Bohart* decision as being contra to *Cook*.

The Dallas Court of Civil Appeals treated the issue in 1965 in the case of *Zimmerman v. Bond*, 392 S.W.2d 149 (Tex. Civ. App.—Dallas 1965, no writ). In *Zimmerman*, the note contained a provision which stated that "[t]he makers, sureties, guarantors and endorsers of this note severally waive demand, presentment for payment, notice of dishonor, protest and notice of protest, diligence in collecting or in bringing suit against any party hereto. . . ." *Id.* at 151. This language was viewed as only waiving diligence in bringing a suit against the principal, "not the actual institution thereof." *Id.* at 151. *See also* *Musey v. Dickinson Social Club*, 466 S.W.2d 84, 87 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ).

47. *Cook v. Citizens Nat'l Bank*, 538 S.W.2d 460, 465 (Tex. Civ. App.—Beaumont 1976, no writ).

One of the guarantors appealed from the order of severance and the summary judgment, contending that rule 31 required joinder of the maker before a guarantor can be sued on a debt. The bank maintained that "rule 31 and related statutes do not apply when a guarantor has become primarily liable by contract on the debt."<sup>48</sup>

The court in *Cook* recognized but had no problem distinguishing several cases as weak precedent which served as authority for the rule "that a guarantor who unconditionally guarantees payment on a debt becomes a primary obligor and may be held liable without joinder of the original borrower."<sup>49</sup> The court relied on the Commission of Appeals case of *Wood v. Canfield Paper Co.*<sup>50</sup> as primary authority for its holding. In that case, the Canfield Paper Company instituted suit to collect a debt owed for goods sold to the Popular Finance Publishing Corporation. The only defendant was Wood, who had unconditionally guaranteed payment up to \$6,000 by Popular Finance on goods purchased from Canfield Paper. The lower court overruled Wood's demurrer to Canfield Paper's original petition because Popular Finance was not made a party to the suit. The issue certified to the Commission of Appeals involved a determination whether the procedural provisions for suing guarantors apply "generally without any distinction between absolute and conditional guarantors."<sup>51</sup> The *Wood* court held that there was no precedent which warranted denying the benefits provided by the applicable statutes to absolute guarantors.<sup>52</sup> In referring to article 6336, now embodied in rule 31, the court said:

The Legislature had the right thus to ignore distinctions in fact and to rest the procedural statute upon arbitrary selection. That situation renders unimportant, so far as the present case is concerned, most of the discussion to be found in text-books and opinions classifying guarantors into those who are "absolutely" and those who are such "conditionally."<sup>53</sup>

Another basis for the *Cook* holding was that a contrary ruling would encourage violations of the statutes involved.<sup>54</sup> Cases were

48. *Id.* at 461-62.

49. *Id.* at 463.

50. 117 Tex. 399, 5 S.W.2d 748 (Tex. 1928); see *Cook v. Citizens Nat'l Bank*, 538 S.W.2d 460, 463-65 (Tex. Civ. App.—Beaumont 1976, no writ).

51. *Wood v. Canfield Paper Co.*, 117 Tex. 399, 403, 5 S.W.2d 748, 749 (1928).

52. *Id.* at 411, 5 S.W.2d at 753.

53. *Id.* at 406, 5 S.W.2d at 750.

54. *Cook v. Citizens Nat'l Bank*, 538 S.W.2d 460, 465 (Tex. Civ. App.—Beaumont 1976, no writ).

cited which supported the proposition that contracts "may not impair the validity or force of any law. . . ." <sup>55</sup>

A different interpretation of a finely worded waiver provision in a guaranty agreement is illustrated in the case of *Yandell v. Tarrant State Bank*.<sup>56</sup> The court of civil appeals held that by virtue of the waiver clause, the guarantor waived the procedural rights provided for in rule 31 and its related statutes.<sup>57</sup> The court based its holding on the proposition that rights granted to individuals by a statute and the constitution may be waived if the rights flowing to another party have not been destroyed.<sup>58</sup>

The *Yandell* court distinguished *Cook* as involving the question of whether "rule 31 and its related statutes apply even if the guarantor is primarily liable," while *Yandell* holds that "the requirement of rule 31 and its related statutes . . . can be waived by the guarantor."<sup>59</sup>

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55. *Id.* at 465, citing *Woolsey v. Panhandle Refining Co.*, 131 Tex. 449, 455, 116 S.W.2d 675, 678 (1938) and *Morrison v. City of Wort Worth*, 138 Tex. 10, 14, 155 S.W.2d 908, 909 (1941).

56. 538 S.W.2d 684 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

57. *Id.* at 688.

58. *Id.* at 687, citing *United Benefit Fire Ins. Co. v. Metropolitan Plumbing Co.*, 363 S.W.2d 843 (Tex. Civ. App.—El Paso 1962, no writ); *Zurich Gen. Accident & Liab. Ins. Co. v. Fort Worth Laundry Co.*, 63 S.W.2d 236 (Tex. Civ. App.—Fort Worth 1933, no writ); *Young v. City of Colorado*, 174 S.W. 986 (Tex. Civ. App.—Fort Worth 1915, writ ref'd). These cases do not support the proposition that procedural rights regarding parties to a lawsuit may be waived. An argument can be made that the provisions relating to secondarily liable parties preserve a group of necessary, indispensable parties, despite the present rule 39 of the Texas Rules of Civil Procedure. See cases and materials cited note 62 *infra*. Under the traditional view, necessary and indispensable parties deal with the right and power of a court to proceed to judgment, its subject matter jurisdiction, not the statutory or constitutional rights of the parties to a lawsuit. See *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 202-03 (Tex. 1974), citing *Petroleum Anchor Equip., Inc. v. Tyra*, 406 S.W.2d 891, 892 (Tex. 1966). Thus it can be said that the real issue is subverted by the court in *Yandell* by relying on the cited precedent concerning waiver. Reference should be made to the precedent which supports the proposition that the subject matter jurisdiction of a court may not be obtained through the consent or waiver of parties. *Burke v. Satterfield*, 525 S.W.2d 950, 955 (Tex. 1975); *Trinity Life & Annuity Soc'y v. Love*, 116 S.W. 1139, 1139 (Tex. 1909).

59. *Yandell v. Tarrant State Bank*, 538 S.W.2d 684, 688 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.). This distinction does not seem valid. The guaranty agreement in *Cook* provided in part that "[i]t shall not be necessary for the bank . . . to first institute suit or exhaust its remedies against the Borrower. . . ." *Cook v. Citizens Nat'l Bank*, 538 S.W.2d 460, 462 (Tex. Civ. App.—Beaumont 1976, no writ). While the guaranty agreement in *Yandell* provided that

[i]n particular, and without in any way limiting the foregoing, Guarantor waives any right to have Customer joined with Guarantor in any suit brought against Guarantor on this guaranty, and further waives any right to require Bank to forthwith sue Customer to collect the Obligations as a prerequisite to Bank's taking action against Guarantor under the guaranty. . . .

## A PROPOSAL FOR REFORM

In considering the rules of civil procedure and statutes relating to suits against secondarily liable parties, it is important to realize that these provisions originate from an Act of the Session of the Fourth Congress of the Republic of Texas in 1840.<sup>60</sup> The law of

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*Yandell v. Tarrant State Bank*, 538 S.W.2d 684, 685 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

While the provision cited within *Cook* is not as explicit as the *Yandell* provision pertaining to remedies against the principal, they substantially provide for the same effect. The court in *Cook* apparently described the guaranty agreement being interpreted as one of an absolute nature, because, in essence, when there is no necessity to proceed against the principal, the guaranty agreement by implication develops into an absolute guaranty. An absolute guaranty is one on which the only condition for liability of the guarantor is default by the principal obligor. *McGhee v. Wynnewood State Bank*, 297 S.W.2d 876, 883 (Tex. Civ. App.—Dallas 1957, writ ref'd n.r.e.). A conditional guaranty is one in which liability is conditional upon the requirement of default by the principal, plus additional events, such as reasonable diligence in proceeding against the principal. See *Austin v. Guaranty State Bank*, 300 S.W. 129, 132 (Tex. Civ. App.—Waco 1927, no writ). It can be said, therefore, that where any waiver language within a guaranty makes it unnecessary to proceed against the principal after default, this makes the agreement an absolute guaranty. An argument can therefore be made that the *Yandell* court did have before it an absolute guaranty, and could have consistently followed the *Cook* opinion. See also *Universal Metals & Mach., Inc. v. Bohart*, 539 S.W.2d 874 (Tex. 1976), where the supreme court interpreted a guarantee agreement with a waiver as creating an "absolute guaranty." *Id.* at 877-78.

60. The language adopted by the 1840 legislative body states that:

[T]he assignor or endorser of any the [sic] beforementioned instruments may be sued without the necessity of previously suing the drawer, maker or obligor, when he may either reside beyond the limits of the Republic, or in such part of the same that he cannot be reached by the ordinary process of the law, or when he may be notoriously insolvent.

Tex. Laws 1840, An Act to Dispense with the Necessity of Protesting Negotiable Instruments for Dishonor, and of Giving Notice Thereof; and to Regulate Assignments of All Written Instruments § 6, at 146, 2 H. GAMMEL, LAWS OF TEXAS 320 (1898). The next version of the provisions being analyzed in this article was embraced in an act of the first legislature of the State of Texas in 1846, which provided:

That no person shall be sued as endorser, as guarantor, or as security, unless suit shall have been, or is simultaneously commenced against the principal, except in cases where the principal resides beyond the limits of the State, or in a county that is not organized, or where he is insolvent.

[T]his section shall not be so construed as to allow a plaintiff to discontinue, as to the principal, and take judgment against the endorser or surety [who is] jointly sued.

The principal and the endorser, or surety upon any instrument in writing, may be joined in the same suit, but no judgment in any such suit, shall be rendered against the endorser or surety, unless judgment is at the same time rendered against the principal, except where the plaintiff discontinues, as to the principal, because he resides beyond the limits of the State, or because he is insolvent, in which cases he may discontinue and take judgment.

Tex. Laws 1846, An Act to Regulate Proceedings in the District Court §§ 4, 45, 46, at 365, 374-75, 2 H. GAMMEL, LAWS OF TEXAS 1671, 1680-81 (1898). When the legislature began codifi-

necessary parties has radically changed since that year,<sup>61</sup> but the law relating to procedure in suing secondarily liable parties has remained virtually the same. It should therefore be changed to clearly reflect the modern approach of rule 39, relating to necessary parties.<sup>62</sup> There is also a need to reflect in such a new law the effect

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cation of statutes, the language of the statutory provisions being analyzed was essentially established. *See* Tex. Civ. Stat. arts. 1207, 1208, 1257 (1879); Tex. Civ. Stat. arts. 1203, 1204, 1257 (1895); Tex. Civ. Stat. arts. 1842, 1843, 1897 (1911). Since the 1925 codification of the statutes by the Texas Legislature, the numbering of the statutes being analyzed has remained the same.

61. *See generally* Dorsaneo, *Compulsory Joinder of Parties in Texas*, 14 HOUS. L. REV. 345 (1977).

62. TEX. R. CIV. P. 39. It can be argued that the provisions relating to secondarily liable parties preserve the antiquated concept of necessary, indispensable parties which the supreme court attempted to eliminate with the new rule 39, entitled, "Joinder of Persons Needed for Just Adjudication." The rule has virtually eliminated the concept of necessary parties as a jurisdictional requirement. *See* *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 203-04 (Tex. 1974). The argument would be based upon the premise that due to the provisions in question, unless the various requirements for suing a secondarily liable party without the principal are satisfied, the principal is an indispensable party as a matter of substantive law. *See* Dorsaneo, *Compulsory Joinder of Parties in Texas*, 14 HOUS. L. REV. 345, 365-69 (1977).

The concept of indispensable parties as a matter of substantive law is premised upon the holding in *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424, 425 (Tex. 1971), that a procedural rule established by the supreme court under Article V, § 25 of the Texas Constitution, must yield to a conflicting statutory enactment. Articles 1986, 1987, and 2088 create a facial, statutory conflict with rule 39. It can also be argued that rules 30, 31, and 163 should be interpreted as exclusive of rule 39 due to mandatory language.

The supreme court in *Clear Lake City Water Authority v. Clear Lake Utilities Co.*, 549 S.W.2d 385, 389 (Tex. 1977) overruled the holding in *Crickmer v. King*, 507 S.W.2d 314 (Tex. Civ. App.—Texarkana 1974, no writ), that there is a substantive inconsistency between TEX. REV. CIV. STAT. ANN. art. 2524-1, § 11 (1965) of the Declaratory Judgment Act and rule 39, and that unless article 2524-1, § 11 is satisfied by joining all interested parties, there is fundamental error. *Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385, 389-90 (Tex. 1977). In *Clear Lake*, article 2524-1, § 11 and rule 39 are reconciled by stating that both contain mandatory provisions relating to joinder as well as substantially similar language on considerations in determining when to proceed if there are absent persons. *Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385, 389-90 (Tex. 1977). It is important to realize that the holding in *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424, 425 (Tex. 1971) pertaining to statutory conflicts with rules of civil procedure was not overruled in *Clear Lake*.

Articles 1986, 1987, and 2088 cannot be reconciled with rule 39 as was done in *Clear Lake* for TEX. REV. CIV. STAT. ANN. art. 2524-1, § 11 (1965). The requirements of the statutes are clearly mandatory by virtue of nondiscretionary language and by the case law. *First State Bank & Trust Co. v. Colpaugh*, 489 S.W.2d 675, 680 (Tex. Civ. App.—San Antonio 1972, no writ); *Brown v. Standard Cigarette Serv., Inc.*, 340 S.W.2d 121, 123 (Tex. Civ. App.—Amarillo 1960, no writ); *First Nat'l Bank v. Thurmond*, 159 S.W. 164, 165 (Tex. Civ. App.—Fort Worth 1913, no writ). Also, there is no language within the provisions which lists considerations for review, when the principal is absent, which are analogous to article 2524-1, § 11 and rule 39(b). If the requirements for nonjoinder of the principal are not met, the

of contemporary law as pertaining to the pleading and proof requirements which must now be established to make joinder of the principal unnecessary.<sup>63</sup> The exception regarding principals who become deceased should be narrowed essentially to apply only to those deceased principals who leave little or no estate.<sup>64</sup>

The necessary reform could be accomplished by consolidating articles 1986, 1987, 2088, and rules 30, 31, and 163 within one rule of civil procedure to the extent they deal with secondarily liable parties. This would involve repealing the statutes and eliminating the rules of civil procedure in their present form.<sup>65</sup> The new rule of civil procedure also should be worded so as to make any pleading and proof requirements discretionary. This writer submits the following language:

No defendant, who is a secondarily liable party, shall be sued unless the principal obligor is joined with him, or unless a judgment has previously been rendered against the principal obligor, except in cases in which the principal obligor is not subject to service that will

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principal must be made a party to the lawsuit. *Zimmerman v. Bond*, 392 S.W.2d 149, 151 (Tex. Civ. App.—Dallas 1965, no writ).

In discussing the effect of rule 31 in *Trinity Universal Ins. Co. v. Plainview Hosp. & Clinic Foundation*, 385 S.W.2d 732 (Tex. Civ. App.—Amarillo 1964, no writ), the court stated that a principal is to be viewed as a necessary party defendant. If rule 31 is not satisfied, "the trial court [is] not authorized to enter any judgment and [the court cannot] render any judgment except to reverse and remand. . . ." *Id.* at 733. See also *First State Bank & Trust Co. v. Colpaugh*, 489 S.W.2d 675, 680 (Tex. Civ. App.—San Antonio 1972, no writ).

63. For example, the exceptions regarding nonresident principals, principals not reachable by "ordinary process," and principals with an unknown residence, deal with problems of in personam jurisdiction. This part of the law should be re-evaluated in light of TEX. REV. CIV. STAT. ANN. art. 2031b (1964) dealing with long-arm jurisdiction, the rules of civil procedure, and interpretive case law to the extent that they deal with service of citation other than "in person." See TEX. R. CIV. P. 106, 109. It is possible under article 2031b for a principal to reside beyond the limits of the state and be subject to the jurisdiction of a Texas court. However, under a strict construction of articles 1987 and 2088, a secondarily liable party could be deprived of the joinder of the principal.

64. Under present case law, if the principal dies a creditor may proceed against the guarantor alone under article 1987 and need not present a claim to the administrator of the deceased principal. It would seem that this is true regardless of the size of the estate. *Willis v. Chowning*, 90 Tex. 617, 621, 40 S.W. 395, 396 (1897); see *Marine Banking & Trust Co. v. Federal Trust Co.*, 64 S.W.2d 409, 410 (Tex. Civ. App.—Waco 1933, writ ref'd); *Planters' & Mechanics' Nat'l Bank v. Robertson*, 86 S.W. 643, 645 (Tex. Civ. App. 1905, no writ).

65. The language of article 1986 which should not be repealed is as follows: "The acceptor of a bill of exchange, or principal obligor in a contract, may be sued either alone or jointly with any other party who may be [primarily] liable thereon." The language of rule 163 which need not be affected is as follows: "When it will not prejudice the other defendants, the court may permit the plaintiff to discontinue his suit as to one or more of several defendants who were served with process, or who have answered."

support a judgment in personam by a court of this State, or is insolvent, or when the principal obligor is deceased and the estate will not satisfy in any respect the claim in which there is a secondarily liable party. Notwithstanding the above, a secondarily liable party may be a sole defendant in a lawsuit if proceeding or securing a judgment against the principal obligor or the estate thereof has been waived.

Secondarily liable party means a party to a contract who is either an assignor, indorser, guarantor, surety, drawer of an accepted draft, or any party to a contract whose liability is of a similar, secondary nature. Principal obligor means a party to a contract who has a primary liability; this definition includes a maker on a note, an acceptor of a draft, a principal who is bonded by a surety, or any party to a contract whose liability is of a similar, primary nature.

Under the language submitted, the general rule as derived from the common law is retained: a principal debtor is a necessary party in a suit on a debt.<sup>66</sup> Waiver provisions, as contained within the *Cook* and *Yandell* cases, however, clearly would be valid and enforceable. The basic approach behind articles 1986, 1987, and 2088 is retained; there are instances when making the principal a necessary party to a lawsuit is not practicable.<sup>67</sup>

#### CONCLUSION

The present laws regarding procedural aspects of securing judgments against parties secondarily liable originated in 1840. There have been numerous changes in related areas since that time, such as the development of long-arm jurisdiction, which make the procedural rules regarding secondarily liable parties seem outmoded. The law in this area will continue to be the subject of dispute until the legislature and supreme court work together in formulating a new law designed to be used in modern times.

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66. See *Republic Supply Co. v. Barrow*, 41 S.W.2d 475, 477 (Tex. Civ. App.—Fort Worth 1931, writ dismissed).

67. *Smith v. Ojerholm*, 93 Tex. 35, 53 S.W. 341 (1899). An early judicial interpretation of the provisions relating to procedural aspects of suing secondarily liable parties indicates a practical view of the law. See *Insall v. Robson*, 16 Tex. 114 (1856).