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Texas Civil Procedure

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M AJOR developments in the field of civil procedure during the survey period include both judicial decisions and recent amendments to the Texas Rules of Civil Procedure. This Survey will examine these developments and consider their impact on existing Texas procedure.

I. JURISDICTION OVER THE PERSON

Several decisions during the survey period considered the propriety of out-of-state service under article 2031b, the Texas long-arm statute. Section 3 of article 2031b authorizes the exercise of jurisdiction over a nonresident when he is "doing business" in Texas. "Doing business," as defined by section 4, includes entering into a contract by mail or otherwise with "a resident of Texas" to be performed by either party in whole or in part in this state. The reference to "a resident of Texas" has posed a perplexing problem for the foreign corporation licensed to transact business in Texas that is seeking to effect service upon a nonresident under article 2031b. Does the residency requirement exclude from the definition of "doing business" the nonresident defendant's contractual relations with the foreign corporation even though the contract is to be performed in Texas? Or, is the licensed foreign corporation accorded the status of a Texas resident for purposes of article 2031b?

In a case of first impression, the court of civil appeals in National Truckers Service, Inc. v. Aero Systems, Inc. concluded that a foreign corporation licensed to transact business in Texas enjoyed the same rights and privileges as a domestic corporation, and was, therefore, "a resident of Texas" as that term is used in article 2031b.

Article 2031b also authorizes service over former residents of Texas in suits arising from their activities while domiciled in the state. Specifically, section 6 provides that a person who becomes a nonresident of Texas after a cause of action arises in this state and who "is not required to appoint a service agent in this State" may be served through the secretary of state. Deviating slightly from the rule that a plaintiff must allege facts showing that he is entitled to resort to the provisions for service under article 2031b, the court in Parnass v. L & I Realty Corp. held that the plaintiff's petition

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1 As a result of the amendments, 28 Texas Rules of Civil Procedure were modified and 3 new rules were added. These changes became effective Feb. 1, 1973. See Civil Procedure Rules Amended, 35 TEX. B.J. 1037 (1972).

2 TEX. REV. CIV. STAT. ANN. art. 2031b (1964).

3 Id. § 3.

4 Id. § 4.

5 480 S.W.2d 455 (Tex. Civ. App.—Fort Worth 1972), error ref. n.r.e.

6 Id. at 458; see TEX. BUS. CORP. ACT ANN. art. 8.02 (1956).

7 480 S.W.2d at 458.

8 TEX. REV. CIV. STAT. ANN. art. 2031b, § 6 (1964).

9 See McKanna v. Edgar, 388 S.W.2d 927 (Tex. 1965).

10 482 S.W.2d 944 (Tex. Civ. App.—Dallas 1972), error granted.
need not allege that the defendant "is not required to appoint a service agent in this State" to invoke section 6 of article 2031b. It is sufficient, reasoned the court, if the plaintiff alleges that the defendant "has not appointed an agent in state upon whom service may be made."11

Parnas is also significant in two other respects. The defendant, seeking to set aside a default judgment where service was made under article 2031b, contended that jurisdictional allegations must be supported by evidence when a defendant fails to appear and answer. Overruling this argument, the court of civil appeals concluded that "proof is no more necessary to support jurisdiction allegations under article 2031b than to support allegations of the authority of any other service agent before default judgment is rendered."18

The defendant also maintained that where service is effected under article 2031b and no appearance is made, the record must show that the secretary of state mailed process to the defendant. Relying upon the statutory duty of the secretary of state to forward process to the defendant, the court held that "[a]lthough the trial judge has discretion to require a certificate of mailing, his failure to do so does not affect the validity of the judgment."14

While earlier federal cases have opened the door to a broadened use of article 2031b,16 the recent decision of a federal district court in Bland v. Kentucky Fried Chicken Corp.18 seems to have torn the door from its hinges. The plaintiff brought suit against two corporate defendants, one a subsidiary of the other, on a claim arising out of the alleged breach of a Texas contract entered into between the plaintiff and the subsidiary corporation. The subsidiary was served with process through its registered agent in Texas, but service on the parent corporation, which was neither incorporated nor licensed to do business in Texas, was effected under article 2031b. The parent corporation filed a motion to dismiss for lack of personal jurisdiction, and the plaintiff responded with the contention that the subsidiary "was a mere shell" and that "the real party to the contract" was the parent.17 Although the parent corporation owned ninety-five percent of the common stock of the subsidiary, named three of the five directors of the subsidiary, and exercised influence and control over the business decisions of the subsidiary, the evidence reflected that the defendants had gone to special lengths to preserve their separate identities. Nevertheless, seizing upon the power of the parent corporation to exercise control over its subsidiary, the federal district court concluded that the activities of the subsidiary should be imputed to its parent for jurisdictional purposes. Consequently, service on the parent under article 2031b was sustained.18

11 Id. at 946.
12 Id.
13 Id. at 948.
14 Id. at 949.
15 See, e.g., Eyerly Aircraft Co. v. Killian, 414 F.2d 951 (5th Cir. 1969); Coulter v. Sears, Roebuck & Co., 411 F.2d 1189 (5th Cir. 1969).
17 Id. at 875.
18 The district court apparently harbored some reservations about its holding, as it certified the matter for interlocutory appeal, acknowledging that this "is a decision . . . as to which there is substantial ground for difference of opinion." Id. at 877.
II. Venue

The rule has long prevailed in Texas that a contract which restricts the situs of a suit to a particular county contravenes the statutory scheme for fixing venue, and is unenforceable. The decisions of the court of civil appeals, however, were in conflict as to whether venue choices could be increased by an agreement of the parties. This conflict was resolved by the Texas Supreme Court in *Fidelity Union Life Insurance Co. v. Evans*, in which it was held that the expansion of venue by contract is invalid except in such instances as permitted by subdivision 5 of article 1995.

Subdivision 5 of article 1995 provides for an exception to exclusive venue in a defendant's county of residence where the defendant has contracted in writing to perform an obligation in a particular county. The Corpus Christi court of civil appeals in *Rost v. First National Bank* gave a liberal interpretation to subdivision 5 of article 1995 in determining the proper venue of a suit brought on a written guaranty which did not specify where payments under it were to be made. Upon default by the maker of a note, the guaranty bound the defendants to discharge the note. Since the note was payable in the county of suit, the court reasoned that subdivision 5 authorized suit against the defendants in that county.

Rule 86, which prescribes the form of a plea of privilege, provides that the plea shall state that the party claiming the privilege is not a resident of the county in which the suit was instituted and that no exception to exclusive venue in the county of residence exists. Nevertheless, a plea of privilege which does not state that no exception to the exclusive venue in the county of residence exists is not fatally defective. The court in *Beyer v. Collinsworth* held that this omission was cured when the evidence adduced at the venue hearing showed that no exception to exclusive venue in the county of the defendant's residence existed.

Several cases decided during the past year concerned the waiver of a plea of privilege. *Kohut v. Mrs. Baird's Bakeries, Inc.* emphasizes the danger of taking any action inconsistent with the assertion of a plea of privilege prior to a transfer of the case. In *Kohut* a defendant, who had unconditionally answered to the merits and then requested a trial after the plea of privilege was sustained, but before an order was entered, was held to have waived the right to be sued in the county of its residence. A similar situation was involved in

9 International Traveler's Ass'n v. Branum, 109 Tex. 543, 212 S.W. 630 (1919).
12 477 S.W.2d 535, 537 (Tex. 1972).
15 Tex. R. Civ. P. 86.
Thompson v. O'Donohoe, but in Thompson the court ruled against a waiver despite the fact that the defendant had filed in a single instrument a plea in abatement and, "subject to the plea in abatement," a plea of privilege—apparently because the defendant insisted only on his plea of privilege. In Camden Oil Co. v. Hobman a waiver of a plea of privilege resulted from an unusual set of events. The defendant had written to the clerk of the trial court, enclosing both a motion to quash citation and a plea of privilege, and requested that they be filed in that order. Despite the instructions, the clerk filed the plea of privilege three minutes before the motion to quash. In considering a waiver argument by the plaintiff, the court of civil appeals ignored the file marks and regarded the motion and plea filed in the order requested by the defendant. Noting that the motion to quash citation was not a special appearance, the court concluded that the submission of the plea of privilege out of the due order of pleading prescribed by rule 84 resulted in a waiver of the plea.

Article 7.01 of the Insurance Code attempted to fix the venue of suits on private bonds in the county where the bond was filed. This statute was held unconstitutional in Hayman Construction Co. v. American Indemnity Co. The basis for the holding was the failure of article 7.01 to comply with the constitutional requirement that the title of a legislative bill give reasonable notice of its contents.

III. Pleadings

Allright, Inc. v. Roper demonstrates how an unwitting default can result from the use of conditional pleadings. The plaintiff served process on a representative of the defendant who was not authorized to accept process. The defendant filed a motion to quash service and an answer which contained the condition that "the Defendant intends to rely upon said answer, only in case the foregoing Motion to Quash Service is overruled." The motion to quash was subsequently sustained and a few months later the plaintiff took a default judgment against the defendant. Emphasizing that the grant of defendant's motion to quash did not remove the defendant from the jurisdiction of the trial court but merely extended the time for appearance and answer, the court concluded that the condition contained in defendant's answer was not met, and therefore, the answer did not become operative so as to preclude the entry of a default judgment.

IV. Limitations

Article 5539c extends the limitation period for an additional thirty days

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27 482 S.W.2d 711 (Tex. Civ. App.—Waco 1972).
29 TEX. R. CIV. P. 84.
30 TEX. INS. CODE ANN. art. 7.01 (1963).
32 TEX. CONST. art. III, § 35.
33 478 S.W.2d 245 (Tex. Civ. App.—Houston [14th Dist.] 1972), error ref. n.r.e.
34 Id. at 246.
35 Id. at 247; accord TEX. R. CIV. P. 122.
36 TEX. REV. CIV. STAT. ANN. art. 5539c (Supp. 1972). The statute was intended to
on "a counterclaim or cross-claim" which otherwise would have been barred by the applicable statute of limitation between the answer date and the time the plaintiff filed his original petition, provided such claim arises out of the same transaction upon which the plaintiff's suit is based. In a case of first impression under the statute, the court of civil appeals in *Smith v. Lone Star Cadillac* concluded that the extension provided for in article 5539c was applicable to third party claims.

V. Parties

One of the most important decisions by the Texas Supreme Court in the area of procedure during the last year was *Commercial Travelers Life Insurance Co. v. Spears*. Although arising in the context of discovery, the decision turned on the propriety of a class action. At the instance of the plaintiff, the trial court ordered discovery of the identity of the members of a class, allegedly represented by the plaintiff, which consisted of persons who had been denied coverage under hospitalization policies by the defendant insurance company on the same grounds as the plaintiff. Resisting the discovery, the defendant brought an original mandamus proceeding in the supreme court. According to the court, justification for the discovery depended solely upon the propriety of the class action. Noting that the class suit was brought under rule 42(a)(3) and was of the "spurious" variety, the court concluded that the class action was improper since the allegations of class interests and the discovery resulting therefrom "added nothing to the cause of the class representative" and "only served to invite the unnamed class members into the litigation." Apparently, a "spurious" class action will not be countenanced in Texas unless there is substantial justification for its maintenance.

VI. Discovery

In *State v. Ashworth* the Texas Supreme Court considered whether written appraisal reports should be discoverable in a condemnation suit. Observing that the reports were made subsequent to the events upon which the suit was based, and in connection with the investigation and prosecution of such suit, the court concluded that "[t]he written appraisal reports are not subject to discovery under the clear language of Rule 167." Shortly after the *Ashworth* decision, however, rule 167 was amended to allow discovery of reports containing "factual observations and opinions" of an expert, provided the expert is one "who will be called as a witness." Thus, it appears that the appraisal reports considered in *Ashworth* are now subject to discovery.
The question of whether illegally discovered evidence can be used in a civil suit was recently considered in *Day & Zimmermann v. Strickland*. The trial court refused to permit an expert witness for the defendant to testify to anything he observed, or to any opinion he formed from his observation, during an unauthorized inspection of the plaintiff's property. The court of civil appeals concluded that the witness was a trespasser when he made the unauthorized entry and inspection, and that, under rule 167, the defendant could have asked the court to compel the plaintiff to permit an inspection of the property. The court of civil appeals affirmed the action taken by the trial court, and held that the "courts of this state will not admit testimony obtained through the back door when there is provided a lawful method of entry through the front door." Hopefully, *Strickland* is the long-awaited admonition that only legally obtained evidence will be received in a civil trial in this state.

The new amendments to the Texas Rules of Civil Procedure, which became effective February 1, 1973, made sweeping changes in the area of discovery. Rule 167 has been substantially revised. Superseding the Texas Supreme Court's holding in 1969 that liability insurance limits are not discoverable, rule 167 now permits discovery of any insurance agreement under which an insurance company may be liable for all or a portion of the recovery sought in the action. Rule 167 now also provides that any person, whether or not a party, may request and obtain a copy of any statement he has previously made concerning the suit, which is in the possession of a party. As previously mentioned, the new version of rule 167 authorizes discovery of written reports containing "factual observations and opinions" of an expert, provided the expert is one who will be called as a witness.

Rule 167a, which is completely new, empowers the trial court to order a party to submit to a physical or mental examination by a physician on motion "for good cause shown," where the physical or mental condition of such party is in issue. The party submitting to the examination is entitled to receive a copy of the examining physician's report. Upon delivery of the report, the party who prompted the examination becomes entitled to receive a copy of the report of any examination of the same condition, previously or thereafter made at the instance of the party examined. If a physician fails or refuses to make a report, the court may then exclude his testimony at the trial. In the event no examination is sought, the party whose physical or mental con-
dition is at issue may not comment to the jury on the failure of the opposing party to seek or obtain such an examination.

Interrogatory practice under rule 168 has undergone a substantial change as a result of the new amendments. Now, a party may be required to state in his answers the identity of each person he expects to call as an expert witness at the trial and the subject matter of the expert's anticipated testimony. Additionally, where the answer to an interrogatory may be ascertained from records of the party upon whom the interrogatory has been served, the party may answer the interrogatory by specifying the records and affording the opposing party reasonable opportunity to examine and copy such records. The responsibility to supplement answers submitted under rule 168 has also been clarified. A party whose answers to interrogatories were complete when made is now under a duty to amend or supplement his answers if he discovers that the information given was incorrect. A broader duty to supplement answers may be imposed by court order, agreement of the parties, or a request for supplementation of prior answers. Another change in rule 168 should be noted. The attorney for a party is no longer authorized to sign answers to interrogatories.

The procedure relating to requests for admission of facts and genuineness of documents under rule 169 has been clarified by the recent amendments. A party who requests admissions may now initiate an action to determine the sufficiency of the answers or reasons for not admitting or denying the matter requested. If the trial court determines that an answer does not comply with the requirement of the rule, it may order that the matter is admitted or that a corrected answer be served. The effect of an admission under rule 169 has also been clarified. Any matter admitted is now "conclusively established" with respect to the party making the admission, unless the trial court on motion permits a withdrawal or amendment of the admission.

Deposition practice has been streamlined to permit a party in his notice to name a corporation or association and describe with reasonable particularity the matters on which examination is sought. The burden then shifts to the corporation or association being deposed to designate one or more representatives to appear and testify to the matters specified. It should also be noted that a party taking a deposition now has an obligation to give prompt notice of its filing to all other parties.

Under the amended rules, substitution of parties no longer affects the right to use depositions previously taken. Similarly, when a suit has been dismissed and another suit involving the same subject matter is subsequently commenced between the same parties or their successors in interest, all depositions duly taken and filed in the earlier suit may be used in the later suit.

Rule 215b, which is completely new, authorizes the trial court to award a

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55 TEX. R. CIV. P. 168. See also FED. R. CIV. P. 26(b) (4) (A), 26(e), 33.
56 TEX. R. CIV. P. 169.
57 See FED. R. CIV. P. 36.
58 TEX. R. CIV. P. 189, 200; see FED. R. CIV. P. 30(b) (6).
59 TEX. R. CIV. P. 198, 208.
56 Id. 213(2).
58 Id.
59 Id. 215b. See also FED. R. CIV. P. 30(a).
party his reasonable expenses in attending an oral deposition when the party scheduling the deposition fails to attend and proceed with the deposition.

VII. DISMISSAL

It is well settled in Texas that a *nunc pro tunc* order may be entered at any time by the trial court to correct a “clerical error” in an earlier judgment. Since “judicial error” in a judgment is not subject to correction after the expiration of thirty days from its entry, the Texas courts are frequently called upon to distinguish between the two. In *Universal Underwriters Insurance Co. v. Ferguson* the supreme court considered whether an order correcting a dismissal for want of prosecution was prompted by clerical or judicial error. The trial court had dismissed the plaintiff’s suit for want of prosecution after his counsel had failed to appear for a call of the docket. Due to an oversight, the notice of the docket call had listed the defendant’s attorney as counsel for plaintiff, and plaintiff’s counsel never received notification. The plaintiff filed a motion for a *nunc pro tunc* order setting aside the dismissal, contending that the trial court had not intended to dismiss a suit in which notice had not been properly sent due to clerical error. The defendant opposed the motion on the grounds that the mistake was judicial error and that, since thirty days had transpired after entry of the dismissal, the trial court was without jurisdiction to set it aside. The trial court entered an order reinstating the suit and the defendant brought an original mandamus proceeding. Although acknowledging that a clerical mistake caused the entry of the dismissal, the supreme court nevertheless concluded that rendition of the dismissal was a judicial act, since no error was made that prevented the dismissal as entered from reflecting the dismissal as rendered. Since the statute of limitations had run, thus precluding the institution of a new suit, the plaintiff was left with no procedure to obtain reinstatement of his action except through a bill of review proceeding. Where a case is erroneously dismissed without notice, the exacting nature of a bill of review has resulted in a gamut few plaintiffs have been able to run. The dissent in *Ferguson* reasoned that “[e]very mistake in an act, order or procedure is not judicial in nature simply because it is taken, signed or ordered by a judge.” Quoting another author, the dissent concluded that “if the judgment or some provision in it was the result of inadvertence, as where the court was laboring under a mistake or misapprehension as to the state of the record or as to some extrinsic fact, but for which a different judgment would have been rendered, the judgment may be vacated or may be corrected to correspond with what it would have been but for the inadvertence or mistake.”

To alleviate the obstacles encountered by the plaintiff in *Ferguson*, rule

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60 See generally 4 R. McDonald, Texas Civil Practice § 17.08.1 (Elliott rev. 1971).
62 471 S.W.2d 28 (Tex. 1971).
64 471 S.W.2d at 32.
65 Id.; 1 A. Freeman, Judgments § 146 (5th ed. 1925).
165a was recently added to the Texas Rules of Civil Procedure. This new rule permits a trial court to dismiss a case for want of prosecution upon the failure of a plaintiff to appear for any hearing or docket call "of which he had notice." Within thirty days of the entry of the dismissal, the trial court is required to reinstate the case when "the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to accident or mistake." When the trial court finds that neither the party nor his attorney receives notice of the dismissal within twenty days of its entry, the court may reinstate the case at any time "within thirty days after the party or his attorney first received either a mailed notice or actual notice, but in no event later than six months after the date of signing of the order of dismissal."

It has not been clear whether a defendant asserting a motion to dismiss for want of prosecution must establish an "intent to abandon" on the part of the plaintiff in order to sustain the motion. The Beaumont court of civil appeals has concluded that an "intent to abandon" is not a part of the inquiry to be made by a trial court in passing upon a motion to dismiss for lack of prosecution; rather, "the sole test is whether the case was prosecuted with due diligence."

VIII. SUMMARY JUDGMENT

Summary judgment procedure under rule 166-A continues to be the subject of substantial appellate attention. Cowan v. Woodrum, a case involving a somewhat unusual set of procedural events, reiterates the principle that a summary judgment cannot be entered in favor of a party who has not filed a motion asking for one. The defendant had successfully moved for summary judgment in the trial court. Although the plaintiff had opposed the defendant's motion, he did not file a cross-motion for summary judgment. Nevertheless, on appeal, the court reversed the order granting defendant's motion and rendered judgment for the plaintiff on all issues except the damages issue. In reversing the judgment in the plaintiff's favor, the Texas Supreme Court concluded that the plaintiff had filed no motion under rule 166-A and, thus, judgment could not be entered in his favor.

In Lowe v. Employers Casualty Co. the court held that an unresponsive answer to a request for admission is not binding on the party making the request and cannot be used by the party giving such answer as evidence in opposition to a motion for summary judgment. Similarly, a party's answer to an interrogatory cannot be used by him in support of a motion for summary judgment.  

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64 TEX. R. CIV. P. 165a; see FED. R. CIV. P. 60.
67 TEX. R. CIV. P. 166-A.
68 472 S.W.2d 749 (Tex. 1971).
70 479 S.W.2d 383 (Tex. Civ. App.—Fort Worth 1972).
Article 2226, which authorizes the recovery of attorney's fees in specified cases, was amended in 1971 to provide that "the amount prescribed in the current State Bar Minimum Fee Schedule shall be prima facie evidence of reasonable attorney's fees," and that "the court, in non-jury cases, may take judicial knowledge of such schedule and of the contents of the case file in determining the amount of attorney's fees without the necessity of hearing further evidence." Prior to this amendment, it was well settled that the reasonableness of an attorney's fee—an issue of fact—could only be established by opinion evidence, and that opinion adduced by affidavit on a motion for summary judgment was insufficient to establish such fact as a matter of law. During the past year a conflict developed in the decisions of the courts of civil appeals concerning the effect of the amended article 2226 in a summary judgment proceeding. One court, in Duncan v. Butterowe, Inc., concluded that the "prima facie evidence" of a reasonable attorney's fee established by the fee schedule was insufficient to sustain the burden of a movant under rule 166-A with respect to the reasonableness issue. In contrast are McDonald v. Newlywed's, Inc. and Superior Stationers Corp. v. Berol Corp., both of which concluded that the prima facie effect of the fee schedule was, in the absence of opposing evidence, sufficient to entitle a party to a summary judgment as to a reasonable attorney's fee. The latter view is the more logical and would appear to be more in harmony with the intentions of the draftsmen of amended article 2226.

IX. SPECIAL ISSUE SUBMISSION

The Supreme Court of Texas, in Adam Dante Corp. v. Sharpe, substantially simplified the submission of special issues in a conventional occupier-invitee case. The changes resulting from this decision fell into three categories.

First, the court held that the plaintiff-invitee must make prima facie proof that he did not know of and did not appreciate the danger, and that he was not charged in law with knowledge and appreciation of the danger. Upon such a showing, the invitee will be entitled to go to the jury on the issue of the defendant-occupier's negligence. The plaintiff-invitee is no longer required to obtain findings that he did not actually know of and did not appreciate the danger.

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77 483 S.W.2d 334 (Tex. Civ. App.—Texarkana 1972). error ref. n.r.e.
79 483 S.W.2d 452 (Tex. 1972).
80 According to the supreme court, the plaintiff-invitee in the conventional case will now only have to obtain findings as to (1) whether the defendant-occupier created a dangerous condition on his premises, (2) whether the defendant knew or should have known of the condition, (3) whether the defendant was negligent in some particular respect, and (4) whether the defendant's negligence was the proximate cause of the plaintiff's injury. Id. at 458 n.2.
81 Previously, a plaintiff-invitee was required, as an element of his cause of action, to obtain findings that he did not have actual knowledge of the condition and did not fully appreciate the nature and extent of the danger. Id. at 458 n.1.
Second, the defendant-occupier who pleads voluntary assumption of the risk will only be entitled to a single issue inquiring about the plaintiff-invitee's knowledge and appreciation.86

Third, no issue should be submitted to the jury which inquires whether a condition is open and obvious. Under the court's holding, a condition can be open and obvious only when the evidence establishes, as a matter of law, that the invitee had knowledge and full appreciation of the danger.

Two additional cases which may be of interest to the trial lawyer are Del Bosque v. Heitmann Bering-Cortes Co.87 and Metal Structures Corp. v. Plains Textiles, Inc.88 To avoid the frustration of conflicting jury answers, the supreme court in Del Bosque reiterated that the question of sudden emergency should be submitted to the jury in the form of an explanatory instruction rather than a separate special issue. Metal Structures emphasizes the need to submit requested issues and instructions separately to the trial court. Observing that the defendant had submitted his requested issues and instructions in bulk form in one instrument, intermingled in such a way as to be confusing, the court held that the requests were legally insufficient to constitute a basis for appeal.

X. JURY PRACTICE

The most significant development in jury procedures came in the form of a recent amendment to the Texas Rules of Civil Procedure. Rule 29289 now provides that a verdict may be rendered in the district court by ten members of the original jury of twelve, and in the county court by five members of an original jury of six. Any verdict rendered by less than the original twelve or six jurors, however, must be signed by each juror concurring in the verdict. It should be noted, however, that rule 292 permits a verdict by less than a unanimous jury only when the same jurors concur in the answers to all the issues.

Noteworthy developments in the selection, qualifications, and exemptions of persons subject to jury service were the result of statutory enactments.90 The voter registration lists of a county now constitute the "sole and mandatory source" of names for the jury wheel.91 However, persons under twenty-one years of age may still not serve on juries.92

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86 The following issue and accompanying instruction were suggested by the supreme court:

Did plaintiff voluntarily assume the risk of (stating it)?

You are instructed that in order for the plaintiff (naming), to assume the risk, she must have actually known of the condition which caused her injury and she also must have actually and fully appreciated the nature and extent of the danger involved in encountering the condition, and she must have voluntarily and of her own free will encountered the danger of the condition causing her injuries, if any.

Id. at 458 n.2.


88 470 S.W.2d 93 (Tex. Civ. App.—Amarillo 1971), error ref. n.r.e.

89 TEX. R. CIV. P. 292. See also id. 226a.


91 Id. art. 2094.

92 Id. art. 2133. See also OP. TEX. ATT’Y GEN. M-911 (1972).
Insofar as qualifications are concerned, the requirement that a juror be either a freeholder in the state or a householder in the county or wife of a householder in the county has been eliminated. Exemptions from jury service are now automatically extended only to persons over sixty-five years of age and females who have legal custody of a child under the age of ten years.

Rule 223, which governs the selection of the general jury panel in counties having interchangeable juries, requires that "the names of the jurors shall be placed upon the general panel in the order in which they are drawn from the wheel." Noting that rule 223 was designed to insure a random selection of jurors, the Texas Supreme Court, in *Rivas v. Liberty Mutual Insurance Co.*, concluded that there was substantial compliance with the requirements when a general jury panel was listed in the order in which the bailiff collected the letters of summons from the prospective jurors.

Maintaining the lines of communication between a deliberating jury and the trial court established by rule 285, the court in *Logan v. Grady* concluded that prejudicial error resulted from the failure of the jury bailiff to make known to the trial court the jury's request for the testimony of a particular witness. The appellate court also found that rule 283 had been violated, since the jury bailiff responded to the request by advising the jury that they had everything they needed.

Adding to an existing conflict in the decisions of the courts of civil appeals, the court in *A. J. Miller Trucking Co. v. Wood* concluded that it was prejudicial error for the plaintiff's counsel to ask the jury panel on *voir dire* examination whether any of them were engaged in adjusting claims, had written any insurance, or were connected with the insurance industry. Nevertheless, the right of a party to the selection of a fair and impartial jury would seem to far outweigh the possible effect of a good faith inquiry into significant connections with the insurance industry.

In a case of first impression, a final argument by counsel that a recovery of workmen's compensation would result in increased insurance premiums being passed on to the consumer was condemned by the court of civil appeals in *Waddell v. Charter Oak Fire Insurance Co.*, because it improperly appealed to the self-interest of the jurors.

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89 See *TEX. REV. CIV. STAT. ANN. art. 2133* (Supp. 1972).
90 *Id.* art. 2135.
91 *TEX. R. CIV. P. 223.*
93 *TEX. R. CIV. P. 285.*
94 482 S.W.2d 313 (Tex. Civ. App.—Fort Worth 1972).
95 *TEX. R. CIV. P. 283.*
97 474 S.W.2d 763 (Tex. Civ. App.—Tyler 1971), *error ref. n.r.e.*
98 See, e.g., *Braman v. Wiley*, 119 F.2d 991 (7th Cir. 1941); *Bass v. Dehner*, 103 F.2d 28 (10th Cir. 1939); *Martin v. Burgess*, 82 F.2d 321 (5th Cir. 1936); *Eppinger & Russell Co. v. Sheely*, 24 F.2d 135 (5th Cir. 1928); *South Austin Drive-In Theatre v. Thomison*, 421 S.W.2d 933 (Tex. Civ. App.—Austin 1967), *error ref. n.r.e.*
XI. MOTION FOR NEW TRIAL

The attorney who sometimes finds himself short on time will be relieved to know that one court of civil appeals has concluded that a telegram to the trial court from a party against whom a summary judgment had been entered, requesting that the judgment be set aside, was sufficient as a motion for new trial.\textsuperscript{100} A later, formal motion reduced the motion to more conventional form.

The case of Roberts \textit{v. K-Mart Foods, Inc.}\textsuperscript{101} is a warning that a motion for new trial stating only that the trial court "erred in failing to submit and in rejecting the proposed instructions and special issues... on file with the records of this case" does not comply with rule 320,\textsuperscript{102} which requires that each ground on which the motion is founded be specified. The court of appeals reasoned that if this type of a motion for new trial were countenanced, the trial court would be compelled to sift through a multitude of requested issues and instructions to ascertain which had been included in the charge given, and which of such requests, if any, had merit.

In \textit{Draper v. Liberty Mutual Insurance Co.}\textsuperscript{103} rule 329b, which provides that "[n]ot more than one amended motion for new trial may be filed,"\textsuperscript{104} was interpreted to preclude a movant from supplementing an amended motion for new trial by adding a new and previously unstated ground for a new trial.

XII. APPELLATE PROCEDURE

The most significant decision during the survey period dealing with appellate procedure was \textit{Webb v. Jorns},\textsuperscript{105} which was concerned with both the finality of a judgment and the sufficiency of a notice of appeal. The plaintiff brought suit against several defendants as joint tortfeasors. The first defendant was dismissed from the case three months before trial. At the conclusion of the evidence adduced at the trial, the trial court rendered judgment that the plaintiff take nothing from the remaining defendants. The judgment, however, made no mention of the first defendant or his earlier dismissal. Contradicting several earlier Texas cases,\textsuperscript{106} the court of civil appeals sensibly concluded that there was a final judgment, since the dismissal of the first defendant was made final by implication when the take nothing judgment was rendered against the remaining defendants.\textsuperscript{107} On review the supreme court agreed with this result.

\textit{Webb} also considered the proper method of giving notice of appeal in a multiple disposition case. Despite its conclusion that the earlier dismissal was

\begin{footnotesize}
\textsuperscript{101} 470 S.W.2d 751 (Tex. Civ. App.—Dallas 1971); \textit{error ref. n.s.e.}
\textsuperscript{102} Tex. R. Civ. P. 320.
\textsuperscript{103} 484 S.W.2d 135 (Tex. Civ. App.—Texarkana 1972).
\textsuperscript{104} Tex. R. Civ. P. 329b.
\textsuperscript{105} 488 S.W.2d 407 (Tex. 1972), rev'g 473 S.W.2d 328 (Tex. Civ. App.—Fort Worth 1971).
\textsuperscript{107} 473 S.W.2d at 332.
\end{footnotesize}
brought forward and by implication made a part of the later decree, the court of
civil appeals held that the plaintiff failed to give notice of appeal with respect
to the order dismissing the first defendant because the only notice given re-
lated to and was incorporated in the later judgment. It is difficult to see how
the earlier dismissal was brought forward and by implication made a part of
the later judgment for purposes of finality, but not for purposes of the giving
of a notice of appeal. For this reason, the supreme court concluded the notice
of appeal was sufficient as to both rulings.

An unusual situation was presented in Waller v. O'Rear. The appellant
was unable to file a statement of facts in the court of civil appeals because
the court reporter misplaced his notes of the trial and was unable to locate
them. In granting the appellant's motion to reverse and remand the case for
a new trial, the court of civil appeals concluded that "[t]he appealing party is
entitled to a statement of facts in question and answer form, and if, through
no fault of his own, after the exercise of due diligence, he is unable to pro-
cure such a statement of facts, 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."

Texas & Pacific Railway v. Roberts confirms the principle that a Texas
appellate court reviewing the sufficiency of the evidence in a case brought
under the Federal Employers' Liability Act must adhere to the federal rule,
which requires only that the verdict be supported by "some evidence about
which reasonable minds could differ."

The recent amendments to the Texas Rules of Civil Procedure have also
had an impact on appellate practice. In an effort to reduce the size and cost of
the record on appeal, rule 376a was modified to exclude trial briefs and
memoranda from inclusion in the transcript.

Additionally, to expedite the disposition of certain cases, the supreme court
has been given the discretion to revise, reform, or modify the judgment of
the court of civil appeals upon granting writ of error. This may be done with-
out hearing argument in cases where the decision of the court of civil appeals
is in conflict with a previous opinion of the supreme court, or is contrary to
the constitution, the statutes, or the rules of civil procedure.

One other change should be noted by the appellate practitioner. When a
final judgment is rendered in the court of civil appeals or the supreme court,
the clerk of the court is required to issue the mandate to the lower court
without any further payment of costs, except that no mandate will be issued
when it is requested by a party against whom any of the costs of the appeal
have been taxed and who has not made payment.

\footnotesize{\bibitem{108}Id.}
\footnotesize{\bibitem{109}472 S.W.2d 789 (Tex. Civ. App.—Waco 1971), \textit{error ref. n.r.e.}}
\footnotesize{\bibitem{110}Id. at 790.}
\footnotesize{\bibitem{111}481 S.W.2d 798 (Tex. 1972).}
\footnotesize{\bibitem{112}Id. at 800, citing Rodgers v. Missouri Pac. R.R., 352 U.S. 500 (1957); Dice v. Akron,
\footnotesize{\bibitem{113}TEX. R. CIV. P. 376a.}
\footnotesize{\bibitem{114}Id. 483.}
\footnotesize{\bibitem{115}Id. 443, 507.}
XIII. PREJUDGMENT REMEDIES

Of great importance with respect to prejudgment remedies is the decision of the United States Supreme Court in *Fuentes v. Shevin*.

Under consideration in *Fuentes* were the statutes of the states of Florida and Pennsylvania authorizing the summary seizure of goods or chattels in a person's possession under a writ of replevin. Both statutes permitted the issuance of writs ordering state agents to seize a person's possessions upon ex parte application and without notice or opportunity to challenge the seizure at a prior hearing. In invalidating the remedies under consideration, the Supreme Court concluded that "the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor."

Since the Texas statutes authorizing initiation of the prejudgment remedies of attachment, garnishment, and sequestration suffer from the same defect as the replevin provisions considered in *Fuentes*, the procedures under those statutes probably do not meet the due process requirements of the fourteenth amendment.

XIV. MISCELLANEOUS

Despite the provisions of article 2558a, which authorize the county to receive the interest on funds deposited in the registry of the trial court in an interpleader action, the Texas Supreme Court has held that such interest belongs to the party who is found to be the owner of the funds. Any other result, reasoned the court, would offend the Texas and United States Constitutions, as the owner would be deprived of a sum not reasonably related to the value of the county's services in safekeeping the principal.

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117 Id. at 96.
124 Sellers v. Harris County, 483 S.W.2d 242 (Tex. 1972).
126 U.S. Const. amend. XIV.
"Material furnished," as that term is used in article 2226,\textsuperscript{126} has been construed by the supreme court to include water control gates supplied to the prime contractor of a dam, thereby authorizing the recovery of a reasonable attorney's fee in a suit by the supplier of the gates for their purchase price.\textsuperscript{127}

\textsuperscript{126}TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1972).

\textsuperscript{127}Pacific Coast Eng'r Co. v. Trinity Constr. Co., 481 S.W.2d 406 (Tex. 1972).