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THE major developments in the field of civil procedure during the survey period are found in judicial decisions. This Survey examines these developments and considers their impact on existing Texas procedure.

I. JURISDICTION OVER THE PERSON

The propriety of out-of-state service under article 2031b,1 the Texas long-arm statute, continues to be the subject of considerable attention. Section 3 of article 2031b authorizes the exercise of jurisdiction over a nonresident when he “engages in business” in Texas.2 “Doing business,” as defined by section 4, includes “entering into a contract by mail or otherwise . . . to be performed in whole or in part by either party in this State.”3 Stretching section 4 to its limits is the situation considered in *Estes Packing Co. v. Kadish & Milman Beef Co.*,4 in which the plaintiff brought suit against a nonresident corporation to recover sums allegedly owed on the sale of beef carcasses. The beef was ordered from the plaintiff, a Texas corporation, by an independent broker located in Illinois, and then sold by the broker to the defendant, a Massachusetts corporation. Subsequently, the broker sent a written confirmation to each of the parties and instructed the plaintiff to deliver the beef to the defendant’s plant in Massachusetts. Prior to the delivery of the beef, the defendant had no notice that the plaintiff was involved in the transaction. When the shipment arrived at its plant the defendant, claiming that the beef was not in good condition, rejected a portion of it. The plaintiff’s invoice stating “All Bills Payable in Fort Worth” accompanied the shipment. Thereafter, the defendant sent a check to the plaintiff in Texas for payment of the beef it had accepted, but the plaintiff refused the partial payment. With the exception of the foregoing, the defendant had had no contacts with the plaintiff in Texas. Nevertheless, finding that the situation met the requirements of section 4, the court of civil appeals sustained service on the defendant under article 2031b.

*Great Commonwealth Life Insurance Co. v. Banco Obrero de Ahorro,*5 a recent decision of the United States Court of Appeals for the Fifth Circuit, is an indication that the minimum contacts necessary to sustain service under article 2031b cannot be too minimal. The plaintiff, a Texas insurance company, deposited $50,000 in a Puerto Rican bank, apparently to facilitate a loan by the bank to an employee of the plaintiff. Later, the bank refused to return the deposit and the plaintiff instituted suit in Texas seeking its recovery.

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1. TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).
2. Id. § 3.
3. Id. § 4.
4. 530 S.W.2d 622 (Tex. Civ. App.—Fort Worth 1975, no writ).
5. 535 F.2d 331 (5th Cir. 1976) (per curiam).
Reducing its inquiry to whether "due process is offended by requiring the Puerto Rican bank to stand suit in the federal district court in Texas merely because funds were deposited in its bank by a Texas resident," the Fifth Circuit affirmed the trial court's dismissal for lack of personal jurisdiction over the bank, concluding that "fundamental fairness seems to favor making this insurance company, which was able to go to Puerto Rico to negotiate this deal and to deposit the funds, return to Puerto Rico to attempt to recover its funds."  

Straining the "long-arm" of article 2031b, a federal district court concluded during a previous survey period that the Texas activities of a subsidiary corporation should be imputed to its parent for jurisdictional purposes, thereby allowing the court to sustain nonresident service on the parent.  

*Murdock v. Volvo of America Corp.* focuses on the evidentiary requirements of such an extension of the long-arm statute. The plaintiffs brought suit in a federal district court against two corporate defendants, one a subsidiary of the other, seeking recovery on a products liability theory for personal injuries arising from a Louisiana automobile collision involving a Volvo automobile. The automobile involved in the collision was manufactured by the parent company in Sweden, marketed by the subsidiary in the United States, and apparently purchased by its owner in Texas. Although the subsidiary did not contest the court's jurisdiction over its person, service on the parent corporation, which was neither incorporated nor licensed to do business in Texas, was challenged through the filing of a motion to dismiss. In response, the plaintiffs claimed that an "agency relationship" between the parent company and the subsidiary justified imputing the Texas activities of the subsidiary to the parent.  

While the parent company owned all of the common stock of the subsidiary and restricted its sales of Volvo automobiles to the subsidiary, the evidence reflected that all sales of Volvo automobiles within Texas were made by the subsidiary and that the accompanying warranties with respect to such automobiles were provided by the subsidiary. Finding that the plaintiffs had failed to carry the burden of establishing the prima facie existence of an agency relationship, the federal district court held that the Texas activities of the subsidiary could not be imputed to the parent for jurisdictional purposes and dismissed the parent from the action.  

II. SERVICE OF PROCESS  

Rule 103 of the Texas Rules of Civil Procedure, which authorizes certain officers to effect service of process in Texas, states that "[a]ll process may be served by the sheriff or any constable of any county in which the party to be served is found ...." Interpreting the rule strictly, the court in *Hisler v.*
Channelview Bank concluded that personal service obtained on a defendant in Chambers County by a sheriff of Harris County violated rule 103 and was defective. As a result, a default judgment entered on the basis of such service was set aside.

III. VENUE

The most significant development in the area of venue was the decision of the United States Supreme Court in American Motorists Insurance Co. v. Starnes. The constitutionality of subdivision 27 of article 1995, which authorizes a wider range of venue for actions against a foreign corporation than is afforded against a domestic corporation under subdivision 23, had been in doubt for many years. In 1963, however, the Texas Supreme Court approved the disparate venue treatment of foreign corporations, and the constitutionality of subdivision 27 was thought to have been decided. Indicating that such a conclusion may have been premature, the United States Supreme Court, in 1973, noted probable jurisdiction of the question and directed that the matter be presented on its merits. Unfortunately, the appellee withdrew his opposition to the change of venue and the question was subsequently determined to be moot. Finally, in Starnes, the Supreme Court was presented with and ruled upon the constitutionality of subdivision 27. As posed by the Court, the question was "whether Exception 27 effects an invidious discrimination against foreign corporations, constituting Exception 27 repugnant to the Equal Protection Clause of the Fourteenth Amendment." Finding that a domestic corporation did not have any appreciable advantage over a foreign corporation under Texas venue practice, the Supreme Court concluded that subdivision 27, though facially discriminatory, was nondiscriminatory in application.

The venue treatment of national banks received substantial attention during the survey period. The federal statute which governs the venue of a suit against a national banking association provides that "[a]ctions and proceedings against any association . . . may be had in any district or
Territorial court of the United States held within the district in which such
association may be established . . . ’. Generally, the statute has been
interpreted to require that a suit against a national bank must be brought in the
county of its domicile. Reading an exception into the statute, the court in
South Padre Development Co. v. Texas Commerce Bank National Associa-
tion, relying on an early case, found that “local” actions are excluded
from the application of the statute. Nevertheless, the action under considera-
tion, a suit seeking recovery for alleged usury in connection with a loan and an
injunction restraining the sale of realty under a deed of trust securing the loan,
was determined to be a “transitory” action governed by the statute.

In a suit brought against a national bank for wrongful garnishment, a court
of civil appeals concluded during a previous survey period that the bank’s
unlawful conduct in the county of suit constituted a waiver of its federal
venue rights. Creating a conflict, the court of civil appeals in First National
Bank v. Stoutco, Inc. held that a national bank’s wrongful garnishment of
funds in the county of suit did not result in a waiver of the bank’s federal right
to be sued in the county of its domicile. According to Western National Bank
v. Hix, however, if a national bank files suit in a forum outside the county of
its residence, this conduct constitutes a waiver of the bank’s federal venue
rights as to any compulsory counterclaim asserted by the defendant in the
suit.

Castoldi v. Miller-Talley Associates concerned an unusual set of venue
events. The question raised was whether, at the time suit was filed in Jim
Wells County, the defendant was a resident of another county for venue
purposes. On July 26, 1974, at 4:00 p.m., the plaintiff commenced suit against
the defendant, a physician, in Jim Wells County. Prior to the filing of the
action, it was undisputed that the defendant resided and practiced his
profession in that county. However, the month before, in June, the defendant
had completed negotiating with another physician the sharing of offices in
Hays County. Additionally, on July 18 the defendant purchased a home in
Hays County and had utilities installed in his proposed office in that county. A
notice posted at his office in the county of suit indicated that the defendant
was concluding his practice at that location as of July 24. Significantly, at
about 1:00 p.m. on July 26, approximately three hours prior to the filing of
plaintiff’s suit, the defendant completed his packing and departed from Jim
Wells County. There was no indication whether the defendant arrived in Hays
County before or after the hour at which the suit was filed. Appealing from an
order overruling his plea of privilege to be sued in Hays County, the
defendant contended that he was not a resident of Jim Wells County at the
time the suit was filed. Finding “that on July 26, 1974, defendant had his

28. 538 S.W.2d at 481.
residence in Jim Wells County at least until 1:00 P.M. when he departed for
Hays County,” the San Antonio court of civil appeals held:

[T]he requirement that defendant be a resident of the county of the forum
at the institution of such suit, is satisfied if defendant was a resident of
such county on the day the suit was filed, without reference to whether
he became a resident of such county after the filing of the suit or
terminated in such county prior to the hour on which suit was filed.33

Subdivision 16 of article 199534 provides that “[s]uits for divorce shall be
brought in the county in which the plaintiff shall have resided for six months
next preceding the bringing of the suit.” A later enactment, section 3.21 of the
Texas Family Code,35 states that “[n]o suit for divorce may be maintained
unless at the time suit is filed the petitioner or the respondent has been a
domiciliary of this state for the preceding six-month period and a resident of
the county in which the suit is filed for the preceding ninety-day period.”

Lutes v. Lutes36 considered the interaction between these two provisions.
Although the petitioner had been a domiciliary of Texas for the preceding six
months and a resident of the county of suit for the preceding ninety days, the
respondent filed a plea of privilege alleging that she resided in another county
and no exception to her right to be sued in her county of residence existed.
After the petitioner filed a controverting plea based on section 3.21, it was
overruled and an appeal followed. Finding that section 3.21 controls over
subdivision 16, the court of civil appeals held that an action for divorce could
be maintained in the county of the residence of the petitioner or the
respondent.37

Subdivision 31 of article 1995,38 which provides for venue in products
liability cases, was added in 1973 to authorize “[s]uits for breach of warranty
by a manufacturer of consumer goods” to be brought in specified counties.
Interpreting subdivision 31 for the first time, White Stores, Inc. v. Fielding39
concludes that a seller of a chair which collapsed and resulted in personal
injuries to the plaintiff is not a “manufacturer” within the meaning of the
provision.

Under the Middlebrook doctrine, a long-standing venue rule predicated on
the public policy of avoiding a multiplicity of suits, a plaintiff who in good
faith asserts two or more claims against the same defendant which are
properly joined in a single action can maintain venue upon all of the claims in a
county where venue is proper as to one of the claims.40 In Brazos Valley
Harvestore Systems, Inc. v. Beavers41 the plaintiffs, a husband and wife, filed
suit against the manufacturer of an automatic cattle feeding system, joining
(1) a claim of the community estate for loss of milk production resulting from
an alleged breach of contract in the installation of the system with (2) a claim
of the community estate for recovery of the wife’s incapacity and medical

33. Id. at 203-04.
34. TEX. REV. CIV. STAT. ANN. art. 1995, subd. 16 (Vernon 1964).
35. TEX. FAM. CODE ANN. § 3.21 (Vernon 1975).
37. Id. at 258.
41. 535 S.W.2d 797 (Tex. Civ. App.—Tyler 1976, writ dism’d).
expense suffered as a result of her fall from the feed system and (3) a claim of the wife's separate estate to recover for pain and suffering arising from the fall. With respect to the claims for personal injuries, the plaintiffs contended that the wife's fall was caused by the manufacturer's negligence in failing to provide sufficient safety measures in connection with the use of the feed system. While venue of the breach of contract claim was proper in the county of suit, there was no independent basis to support the maintenance of the negligence claims in that county. Reaffirming the extension of the Middlebrook doctrine to claims asserted by multiple plaintiffs, the court in Beavers concluded that the negligence claims of the community and separate estates were properly joinable and should be maintained in the same county with the community's contractual claim.

Rule 21a, which permits service of documents to be made by registered mail, states that whenever a party is required to do some act within a prescribed period after service and service is made by mail, "three days shall be added to the prescribed period." A case during a previous survey period concluded that rule 21a was applicable to venue practice and had the effect of enlarging by three days the time within which a controverting plea must be filed. Reaching a different result, the court in Wilson v. Groos National Bank concluded that rule 21a does not have the effect of extending to thirteen days the ten-day period within which a controverting plea must be filed if the plea of privilege is served by mail.

IV. PLEADINGS

Rule 66, which empowers the trial court to allow an amendment to the pleadings during trial, directs that such an amendment shall be freely granted. Although the rule has been interpreted liberally, Burroughs Corp. v. Farmers Dairies is an indication that the authority of rule 66 is not without limits. The plaintiff brought suit against the defendant for rescission of a contract on the basis of fraudulent representation. At the close of the evidence in a trial by jury, the plaintiff was permitted, over the objection of the defendant, to file a trial amendment seeking damages. Following the rendition of an adverse verdict, the defendant appealed, contending that the trial court had abused its discretion in allowing the amendment. Emphasizing that there had been a complete change of the theory of recovery, the court held that the action of the trial court resulted in prejudice to the defendant in

43. 535 S.W.2d at 802-03.
49. 538 S.W.2d 809 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.) (2-1 decision).
that "[t]he trial amendment for damages made the case a new law suit requiring a new and different defense."\(^{50}\)

One further development in the area of pleadings should be of interest to the trial practitioner. A petition containing a prayer that the plaintiff be awarded damages "with interest" was recently held by the supreme court in Black Lake Pipe Line Co. v. Union Construction Co.\(^{51}\) to authorize the recovery of prejudgment interest.

V. LIMITATIONS

The discovery rule, which has been held applicable to limited types of actions,\(^{52}\) established that the pertinent statute of limitations would not commence to run until the discovery of the true facts giving rise to the claimed damage or until the date discovery should reasonably have been made.\(^{53}\) The supreme court in Kelley v. Rinkle\(^{54}\) extended the discovery rule to the running of the statute of limitations in a libel action against a creditor who had submitted a false credit report to a credit agency. Observing that "[a] person will not ordinarily have any reason to suspect that he has been defamed by the publication of a false credit report to a credit agency until he makes application for credit to a concern which avails itself of the information furnished by the credit agency,"\(^{55}\) the court found that the reason leading to the adoption of the rule in earlier cases was applicable to the situation under consideration. Additionally, the supreme court cautioned that the discovery rule will not be applied to libel actions where the defamation is made a matter of public knowledge through such media as newspaper or television.\(^{56}\)

Section 2.725(a) of the Texas Business and Commerce Code\(^{57}\) provides that "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." Smith v. Post-Tensioned Systems, Inc.,\(^{58}\) joining with earlier cases,\(^{59}\) reaffirmed that an action founded

\(^{50}\) Id. at 810.
\(^{51}\) 538 S.W.2d 80, 96 (Tex. 1976).
\(^{53}\) See, e.g., Hays v. Hall, 488 S.W.2d 412, 414 (Tex. 1972) ("the Statute of Limitations commences to run on the date of the discovery of the true facts . . . , or from the date it should, in the exercise of ordinary care and diligence, have been discovered"); Gaddis v. Smith, 417 S.W.2d 577, 579 (Tex. 1967) ("the cause of action accrues when the injury becomes apparent, or should have been discovered by due diligence on the part of the party affected by it").
\(^{54}\) 532 S.W.2d 947 (Tex. 1976), noted in 30 Sw. L.J. 950 (1976).
\(^{55}\) Id. at 949. In another case during the survey period a court of civil appeals applied the discovery rule where the defendants had exposed the plaintiff to excessive radiation during x-ray therapy treatments. Grady v. Faykus, 530 S.W.2d 151 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).
\(^{56}\) 532 S.W.2d at 949.
\(^{58}\) 537 S.W.2d 144 (Tex. Civ. App.—Fort Worth 1976, no writ).
on an open account or an oral contract for the sale of goods and materials is governed by the four-year limitations period of section 2.725(a). Making an *Erie*-educated forecast of Texas law, a federal district court in *Morton v. Texas Welding & Manufacturing Co.* concluded that a personal injury action for breach of implied warranty, though a “tort-contract hybrid” in nature, is also governed by the four-year limitations period provided for in section 2.725(a).

VI. Parties

*Cook v. Citizens National Bank,* following in the footsteps of an earlier case, indicates that specific statutory language providing for joinder of parties will prevail over the liberal joinder procedure of rule 39. The plaintiff brought suit against a corporation as maker of a note and two individuals as guarantors on the note. The corporate defendant filed a plea in abatement on the ground that it had filed for an arrangement under chapter XI of the Bankruptcy Act, and the trial court, at the instance of the plaintiff, severed the claim against the corporation. Subsequently, judgment was entered in the original action against the two guarantors and an appeal followed. Article 1987 provides that a “guarantor” of a contract may be sued without suing the “principal obligor,” when “the principal obligor resides beyond the limits of the State, or where he cannot be reached by the ordinary process of the 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.” Finding that none of the exceptions to article 1987 was applicable, the court of civil appeals held that, while a guarantor who unconditionally guarantees the payment of a note becomes a primary obligor, the guarantor may not be held liable on the obligation without joinder of the original borrower.

Two cases which may be of interest to the trust and estate practitioner are *Glover v. Landes* and *Armstrong v. Armstrong.* In *Glover* a husband and wife executed a joint reciprocal will under which the survivor was to receive all of the estate owned by the other spouse but made no provision for disposition of the estate by the survivor. When the surviving wife died during the pendency of an action contesting the husband’s will, the court concluded that the devisees under the wife’s will were not indispensable parties. The

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61. Id. at 10.
62. Id. at 10.
64. Id. at 10.
68. 530 S.W.2d 910 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref’d n.r.e.).
conclusion of the court in *Armstrong* was that all beneficiaries of a single trust are indispensable parties to an action seeking recovery of a portion of the trust res in which the beneficiaries have a joint interest.

VII. **Discovery**

Article 4411,71 which prohibits the attorney general from making in any action an "admission, agreement or waiver" that prejudices the state, has been a source of confusion in instances where a party has sought discovery from the state.72 During an earlier survey period the confusion was thought to have been resolved when the supreme court ruled73 that article 4411 did not exempt the state from answering interrogatories in accordance with rule 168.74 More recently, one court of civil appeals75 concluded that a different result would obtain in the case of requests for admissions under rule 169,76 primarily for the reason that the matters admitted would be regarded as having been conclusively established. Reiterating its earlier holding, the Supreme Court of Texas reversed, emphasizing "that the State is not exempt from these rules of procedure but is subject to them as any other litigant."77 If any request under rule 169 calls upon the state to make an admission prejudicial to the rights of the state within the meaning of the statute, then the attorney general may raise for ruling the objection that the request is contrary to article 4411.78

Of particular interest to insurance defense counsel is the decision in *Metroflight, Inc. v. Argonaut Insurance Co.*79 Declaring what had been implied in earlier cases,80 a federal district court proclaimed that "Texas law provides a limited privilege for communication between an insured and his insurer," noting that such "privilege is an outgrowth of the privilege protecting communications between a lawyer and his client."81

The trial lawyer anticipating litigation with the state should not overlook the Texas Open Records Act, article 6252-17a,82 as a means of discovery prior to filing suit.83 Declaring that "all persons are . . . at all times entitled to full and

71. **TEX. REV. CIV. STAT. ANN.** art. 4411 (Vernon 1966).
73. Texas Dept’ of Corrections v. Herrin, 513 S.W.2d 6 (Tex. 1974).
74. **TEX. R. CIV. P.** 168. Observing that "Rule 168 operates only to clarify facts," the supreme court reasoned that it "does not believe that the State will be in any way prejudiced by a full revelation of the facts involved in a case." 513 S.W.2d at 8.
76. **TEX. R. CIV. P.** 169.
77. Lowe v. Texas Tech Univ., 540 S.W.2d 297, 301 (Tex. 1976).
78. Id.
81. 403 F. Supp. at 1197.
complete information regarding the affairs of government, the Act provides that "on application for public information to the custodian of information in a governmental body by any person, the custodian shall promptly produce such information for inspection or duplication, or both, in the offices of the governmental body." Significantly, "[n]either the custodian nor his agent who controls the use of public records shall make any inquiry of any person who applies for inspection or copying of public records beyond the purpose of establishing proper identification and the public records being requested . . . ." Although the provisions of the Act are relatively liberal in authorizing access to governmental information, one court of civil appeals has found the provisions not overly broad or vague and upheld the constitutionality of the enactment.

Rule 213, which pertains to the use of depositions in court proceedings, states that "[d]epositions may be read in evidence upon the trial of . . . the suit in which they are taken . . . ." Faced with a contention that the manner in which the plaintiff's counsel had read from depositions at trial was an attempt to influence and prejudice the jury, the court in *Liberty Mutual Insurance Co. v. Rodriguez* had occasion to comment on the method of presenting deposition testimony. Indicating that rule 213 does not authorize a Thespian performance, the court warned that "gestures and voice inflections have no place in the use of depositions, and should be prohibited by the trial judge."

VIII. SUMMARY JUDGMENT

The intricacy of summary judgment procedure was reflected in several decisions during the survey period. Rule 166-A, which governs summary judgment practice, stipulates that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Focusing on these requirements, *Horn v. First Bank* reiterates that an affidavit is defective if it fails to recite that it was made on the personal knowledge of the affiant. *Greater Houston Bank v. Miller & Freeman Ford, Inc.* goes one step further in its interpretation of rule 166-A. A party opposing a motion for summary judgment filed a written objection to an affidavit on the ground that the affiant did not have personal knowledge of one of the matters being verified. Although it recited that the affiant has "personal knowledge of every state-

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84. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 1 (Vernon Supp. 1976-77).
85. Id. § 4.
86. Id. § 5(b).
88. TEX. R. CIV. P. 213.
89. 537 S.W.2d 522 (Tex. Civ. App.—San Antonio 1976, no writ).
90. Id. at 525.
91. TEX. R. CIV. P. 166-A.
93. Id. at 865; accord, Youngstown Sheet & Tube Co. v. Penn, 363 S.W.2d 230, 233 (Tex. 1963).
ment herein made” and is “fully competent to testify to the matters stated therein,” the court of civil appeals, noting that the objection to the formality of the affidavit had preserved the matter for appeal, concluded that the affidavit did not comply with the standards set by rule 166-A. According to the court, “[t]he affidavit must show how the affiant learned of or knew of the facts contained therein” and “[t]he bare statement that the affiant is competent to testify to the matters stated is nothing more than a conclusion.”

Bruce v. McAdoo concerned the propriety of an amendment to the pleadings during a summary judgment contest. Rule 63, which governs the filing of amendments, provides that the parties to an action may amend their pleadings as a matter of right until “within seven days of the date of trial.” Holding that a hearing on a motion for summary judgment is a “trial” within the meaning of rule 63, the El Paso court of civil appeals affirmed the refusal of a trial court to consider an amended pleading filed on the date of such a hearing.

Article 2226, which authorizes the recovery of attorney’s fees in specified cases, was amended in 1971 to provide that “[t]he amount prescribed in the current State Bar Minimum Fee Schedule shall be prima facie evidence of reasonable attorney’s fees,” and that “[t]he 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. Mallory v. Dorothy Prinzhorn Real Estate, Inc., following a decision of the supreme court, has reaffirmed that the “prima facie evidence” of a reasonable attorney’s fee established by the fee schedule is insufficient to sustain the burden of a movant under rule 166-A with respect to the reasonableness issue.

IX. Special Issue Submission

Abolishing the former requirement that special issues be submitted dis-

95. Id. at 391.
96. Id. at 392.
104. Tex. R. Civ. P. 166-A.
tinctly and separately,105 rule 277106 now provides that "[i]t shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly," and that "[i]t shall not be objectionable that a question is general or includes a combination of elements or issues." This language was given full effect in Security Federal Savings & Loan Association v. DeWitt.107 Over the defendant's objection that the question of agency was not submitted separately from the question of conversion, the court of civil appeals approved the use of a single submission inquiring whether the defendant "acting through its agents or employees" converted certain property of the plaintiff.108

Parker v. Keyser,109 on the other hand, is authority that a submission can still be prejudicially multifarious when it inquires as to the conduct of two defendants in a single issue. The submission to the jury, which inquired whether one defendant "and/or" the other defendant converted the property of the plaintiff, was followed by two possible answers, "We do" or "We do not." Following an affirmative answer to the submission by the jury, the trial court entered judgment against both defendants jointly. Since the "and/or" wording of the submission precluded identification of the culpable defendant, the court of civil appeals reversed, noting that the submission inquired "about acts of two different individuals in one issue without allowing the jury to choose one or the other or both."110

Recently amended rule 277,111 which directs that "[i]nferential rebuttal issues shall not be submitted," was followed in Kemp v. Rankin.112 The plaintiff, a former employee of the defendant, sued to recover the amounts owed under an oral employment agreement alleged to entitle her to a monthly salary of $1,200. The defendant answered, contending that the monthly salary agreed upon was $1,100. Concluding that the defendant's requested submission inquiring whether a monthly salary of $1,100 had been agreed upon was an inferential rebuttal issue, the court held that it was properly refused by the trial court.

Wirtz v. Orr,113 a controversy over the meaning of an ambiguous contract, presented an unusual situation. Over the objection that the special issues presented questions of law to the jury, the trial court submitted them inquiring (1) whether "under the contract between the parties" the defendant was not to pay a difference of $18,000 to the plaintiff, and (2) whether "under the contract between the parties" the defendant became obligated to the plaintiff

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107. 536 S.W.2d 262 (Tex. Civ. App.—Amarillo 1976, writ ref’d n.r.e.).
108. Id. at 263-65; accord, Ka-Hugh Enterprises, Inc. v. Fort Worth Pipe & Supply Co., 524 S.W.2d 418 (Tex. Civ. App.—Fort Worth 1975, writ ref’d n.r.e.) (question of agency combined with question of acceptance of offer in single submission). But see Chemical Express Carriers, Inc. v. Nash, 541 S.W.2d 670 (Tex. Civ. App.—Waco 1976, no writ) (question as to existence of injury, when controverted, cannot be combined with question as to amount of damage).
110. Id. at 831.
112. 530 S.W.2d 324 (Tex. Civ. App.—Amarillo 1975, no writ).
113. 533 S.W.2d 468 (Tex. Civ. App.—Eastland 1976, writ ref’d n.r.e.).
for a certain amount. In condemning the phraseology of the issues, the court of civil appeals concluded that "these issues . . . ask the jury a question of law as to the legal effect of the contract rather than asking the jury to resolve the question of the intent of the parties." In *Rourke v. Garza*, a personal injury action arising from a defective scaffolding, the supreme court approved a charge to the jury which submitted a causation issue utilizing the term "producing cause" instead of "proximate cause." The court endorsed an instruction which defined "producing cause" as "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of, if any" and which stated that "[t]here can be more than one producing cause." 

Littleton *v. Woods*, which was also concerned with the element of causation, reviewed a special issue inquiring what sum of money would fairly and reasonably compensate the plaintiffs "for the mental anguish they have suffered in the past, if any, as a result of the occurrence in question?" Concluding that the form of the issue was not sufficiently definite, the court of civil appeals cautioned that "[t]he jury should have been confined to damages for mental anguish suffered as the direct and proximate result of the act, omission or conduct found to have caused it and should not have been left free to speculate as to possible causes and elements of damages."

**X. Jury Practice**

Rule 265, which establishes the order of proceedings in a trial by jury, provides that the party having the burden of proof "shall be permitted at his option to read his pleading or to state to the jury briefly the nature of his claim or defense" as an opening statement to the jury. Interpreting rule 265 strictly, the court in *Ranger Insurance Co. v. Rogers* condemned an opening statement to the jury where counsel for plaintiff outlined in detail the names and substance of the testimony of numerous witnesses he intended to call, primarily because "[t]he practice of detailing the expected testimony in the opening statement places matters before the jury without the trial court having had an opportunity to determine the admissibility of such matters."

When jury misconduct is asserted in a motion for a new trial, the rule has long prevailed in Texas that the movant must establish probable harm as well as the existence of material misconduct. Two cases of interest in this area are *Lemaster v. Chaney & Son Gas Co.* and *State Highway Department v. Pinner*. Considering a remark by several jurors during deliberations that the

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114. *Id.* at 471.
115. *Id.*
116. 530 S.W.2d 794 (Tex. 1975).
117. *Id.* at 801.
118. 538 S.W.2d 800 (Tex. Civ. App.—Texarkana 1976, no writ).
119. *Id.* at 801-02.
120. *Id.* at 802.
121. TEX. R. CIV. P. 265.
122. 530 S.W.2d 162 (Tex. Civ. App.—Austin 1975, writ ref’d n.r.e.).
123. *Id.* at 170.
125. 532 S.W.2d 720 (Tex. Civ. App.—Eastland 1976, writ ref’d n.r.e.) (2-1 decision).
126. 531 S.W.2d 851 (Tex. Civ. App.—Beaumont 1975, no writ) (2-1 decision).
defendant did not have liability insurance, the court in *Lemaster* found that such action constituted jury misconduct.\(^{127}\) Although the minor plaintiff received extensive burns over forty-five percent of her body, was hospitalized for 102 days, and incurred some $20,000 in medical expenses, the jury answered "0" to all damage issues.\(^{128}\) Nevertheless, the court concluded that the plaintiff had failed to demonstrate that the misconduct resulted in the adverse verdict, primarily because one of the jurors had admonished the others that insurance was not to be taken into account.\(^{129}\)

*Pinner*, an action to recover for personal injuries sustained when the plaintiff's vehicle collided with a train, concerned two events of jury misconduct. First, one of the jurors, a driver's education teacher, stated in connection with the issue of contributory negligence that he knew the road where the collision took place and that the plaintiff could not have been going over 40 m.p.h. Additionally, another juror remarked during the discussion of the amount of damages that the attorney for the plaintiff would be paid from the damages awarded. Although the plaintiff was exonerated of contributory negligence and damages in excess of $250,000 were assessed, the court nevertheless concluded that probable harm did not result.\(^{130}\)

Further, while rule 292\(^{131}\) provides that a verdict may be rendered in the district court by ten members of the original jury of twelve, the same ten jurors must concur in "each and all answers" made to the issues submitted. Faced with a verdict in which the same ten jurors did not concur in the answers to all of the issues, the court in *Pinner* concluded that "as long as the same ten jurors voted for enough issues in the charge from which a judgment can be written, no reversible error is presented."\(^{132}\)

The forgetful juror will be glad to know that one case during the survey period concluded that the taking of notes during a trial is not in itself prohibited.\(^{133}\) If the notes are treated by jurors during their deliberations as evidence or as an accurate representation of a portion of the trial testimony to persuade other jurors as to a disputed issue, however, then such action will probably be regarded as jury misconduct and reversible error will likely result.\(^{134}\)

**XI. JUDGMENT**

*Morgan Express, Inc. v. Elizabeth-Perkins, Inc.*,\(^{135}\) a decision of the Dallas court of civil appeals during a previous survey period, authoritatively ruled

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127. 532 S.W.2d at 723-24.
128. *Id.* at 724.
129. *Id.* at 723.
130. 531 S.W.2d at 857.
132. 531 S.W.2d at 857.
134. 529 S.W.2d at 813; *cf. TEX. R. Civ. P.* 281 (jury prohibited from taking depositions of witness to jury room for use during deliberations). *See generally Comment, Exclusion of Depositions from the Jury Room: An Anachronism in Texas—Rule 281, 8 ST. MARY'S L.J. 128 (1976).
135. 525 S.W.2d 312 (Tex. Civ. App.—Dallas 1975, writ ref'd).
that a default judgment on a claim for unliquidated damages must be set aside when challenged by writ of error where no record of the supporting evidence had been made in the trial court. In the wake of Morgan Express, Inc. are Smith v. Smith and O'Brien v. Cole. In Smith the court was faced with a divorce action in which the defendant had appeared and answered but failed to attend the trial. As a result, the trial court, apparently without hearing any evidence, entered a judgment awarding the divorce, custody of the minor child, and substantial property to the plaintiff wife. Upon learning of the outcome, the defendant sought to have the judgment set aside by a writ of error. Recognizing that the plaintiff was required to prove her case even though the defendant failed to appear at the trial, the court nevertheless concluded that the defendant was not entitled to a new trial due to his inability to obtain a statement of facts, primarily because it construed the law as requiring the defendant to plead a meritorious defense or explain his failure to appear at the trial. Since neither Morgan Express, Inc. nor the principles applicable to a writ of error establish such a requirement, the supreme court has granted an application for writ of error in the case.

Confronted with a default judgment which, without the presentation of evidence, was rendered on a claim for a sworn account, the court in O'Brien found support for the judgment in the evidentiary weight granted a sworn account by rule 185. The court reasoned that "[a]n account filed in compliance with rule 185 is itself 'prima facie evidence' of the amount due," and "no further evidence is required." The default judgment also included an award of a reasonable attorney's fee pursuant to article 2226. Since

136. Under TEX. R. CIV. P. 241, a default does not have the effect of admitting allegations of damages unless the claim is liquidated and proved by an instrument in writing. If the claim is unliquidated, TEX. R. CIV. P. 243 stipulates that "the court shall hear evidence as to damages." In Morgan Express the defaulting defendant formally requested a statement of facts on the presentation of plaintiff's evidence on his unliquidated claim, but the reporter certified that he was unable to comply with the request because he was not present when the evidence was given and no other reporter recorded the testimony. If the trial court has an official reporter, TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon 1971) requires him to "[a]ttend all sessions of the court" and to "[t]ake full shorthand notes of all oral testimony offered." The court concluded that when the reporter fails to comply with article 2324 the default judgment must be set aside and the case remanded for a new trial. Furthermore, the defaulting defendant is not required to show that he was unable to obtain a statement of facts by agreement of counsel or by request of the trial judge. In this regard the court observed that a defendant who was not present and was not represented when the testimony was taken is in no position to agree with his opponent concerning the substance of the testimony, and neither should he be required to rely on the unaided memory of the trial judge, who, though presumably fair, has already decided the merits of the case against the defendant. See Figari, Texas Civil Procedure, Annual Survey of Texas Law, 30 SW. L.J. 293, 303-04 (1976).

138. 532 S.W.2d 151 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).
139. 535 S.W.2d at 382; accord, Frymire Eng'r. Co. v. Grantham, 524 S.W.2d 680 (Tex. 1975) (per curiam).
140. 535 S.W.2d at 384.
141. See 525 S.W.2d at 312-15.
143. TEX. R. CIV. P. 185. The rule provides that when any action is founded upon an open account "on which a systematic record has been kept" and is supported by the affidavit of the plaintiff to the effect that the claim is "just and true" and "due" and that "all just and lawful offsets, payments and credits have been allowed," the sworn account "shall be taken as prima facie evidence thereof."
144. 532 S.W.2d at 152.
145. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1976-77); see note 100 supra and accompanying text.
article 2226 provides that the amount set forth in the current State Bar Minimum Fee Schedule is prima facie evidence of a reasonable attorney’s fee and that the court, in a nonjury case, may take judicial knowledge of the schedule, the court in O’Brien further concluded that “no evidence is required to support a default judgment for an attorney’s fee within the minimum prescribed in the schedule.”

In order to set aside a final judgment through the use of an equitable bill of review, the landmark decision of Alexander v. Hagedorn established that the party seeking such relief “must allege and prove: (1) a meritorious defense to the cause of action alleged to support the judgment, (2) which he was prevented from making by the fraud, accident or wrongful act of the opposite party, (3) unmixed with any fault or negligence of his own.” With respect to the second Hagedorn requirement, one court of civil appeals held that a false certification of the defendant’s last known address under rule 239a constituted extrinsic fraud. As a result of the false certification by plaintiff’s counsel, notice under rule 239a was sent to the defendant at a residential address in Dallas and the defendant, who had been in jail for some time and had been served with process there, never received any indication of the entry of a default judgment against him.

One other development in the area of judgments should be of interest to the trial attorney. New York Underwriters Insurance Co. v. Coffman, a recent decision of the Fort Worth court of civil appeals, reaffirms the principle that postjudgment interest should be awarded on accrued prejudgment interest.

XII. Motion for New Trial

In order to set aside a default judgment through the use of a motion for new trial, the burden imposed upon the defendant includes a showing that the motion was filed at a time when the granting of it would “occasion no delay or otherwise work an injury to the plaintiff.” Reviewing an appeal from the overruling of such a motion, the supreme court recently approved a holding “that, as a condition to the granting of his motion for new trial, a defendant seeking relief from a default judgment should be required to reimburse plaintiff for costs of suit incurred in obtaining the judgment.” Disagreeing that “a defendant should be required in every case to reimburse plaintiff for

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146. 532 S.W.2d at 154.
147. 148 Tex. 565, 226 S.W.2d 996 (1950).
148. Id. at 568-69, 226 S.W.2d at 998.
149. Lee v. Thomas, 534 S.W.2d 422 (Tex. Civ. App.—Waco 1976, writ ref’d n.r.e.).
150. Tex. R. Civ. P. 239a. The rule, which provides for notification as to the entry of default judgments, states that:
   At or immediately prior to the time an interlocutory or final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, which certificate shall be filed among the papers in the cause. Immediately upon the signing of the judgment, the clerk shall mail a post card notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket.
152. Id. at 458-59.
all expenses incidentally incurred in obtaining the default judgment, or for expenses which may be incurred as a result of a new trial," the court stated:

[T]he determination of which expenses a defendant must bear should be left to the sound discretion of the trial court, which should consider not only travel expenses incurred by reason of the distance of plaintiff's residence from the place of trial, but also attorney's fees, any loss of earnings caused by trial attendance, expenses of witnesses, and any other expenses of plaintiff arising from defendant's default.\(^{155}\)

Furthermore, the court concluded that in the final analysis "[t]hese factors should be weighed against the amount of money involved in the suit and the degree to which the defendant's failure to answer or appear was caused by his own negligence."\(^{156}\)

Rule 5\(^{157}\) provides:

[I]f a motion for new trial . . . is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail one day or more before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time.

Significantly, "a legible postmark affixed by the United States Postal Service," rule 5 continues, "shall be prima facie evidence of the date of mailing."\(^{158}\) Hodges v. State\(^{159}\) considered the utility of rule 5 in the context of motion for new trial practice. Attempting to take advantage of rule 5, the appellant deposited an envelope containing an amended motion for new trial in the United States mails on March 17, one day before the last date for filing; it was received by the clerk on March 19, twenty-one days after the original motion for new trial was filed.\(^{160}\) Although the appellant was unable to produce the envelope in which he mailed the amended motion, when a question as to timely filing was raised, he submitted an affidavit verifying that the amended motion was in fact deposited in the mail on March 17 in an envelope properly addressed and postage prepaid. Interpreting rule 5 as contemplating methods of proof of the date of mailing other than "a legible postmark affixed by the United States Postal Service," the court found that appellant's proof in the form of a sworn statement of his counsel complied with the rule, and it deemed the amended motion filed in time.\(^{161}\)

XIII. APPELLATE PROCEDURE

The most significant developments in the field of appellate procedure concerned the interpretation of rule 21c.\(^{162}\) Intended to liberalize the requirements for obtaining extensions of time on appeal,\(^{163}\) rule 21c was added to the Texas Rules of Civil Procedure in 1976. It provides:

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155. Id.
156. Id.
158. Id.
159. 539 S.W.2d 394 (Tex. Civ. App.—Austin 1976, no writ).
160. Tex. R. Civ. P. 329b, § 2 stipulates that an amended motion for new trial "shall be filed before the original motion is acted upon and within twenty (20) days after the original motion for new trial is filed."
161. 539 S.W.2d at 396.
163. See Figari, supra note 136, at 309-10.
The failure of a party to timely file a transcript, statement of facts, motion for rehearing in the court of civil appeals or application for writ of error, will not authorize a dismissal or loss of the appeal if the defaulting party files a motion reasonably explaining such failure in the court where jurisdiction to make the next ruling in the case would be affected by such failure.\(^\text{164}\)

The motion seeking the extension "must be filed within fifteen (15) days of the last date for timely filing . . . although it may be acted upon by the court at a date thereafter."\(^\text{165}\) The "reasonable explanation" requirement of rule 21c has been the subject of two divergent views. One view, represented by the majority opinion in \textit{Sloan v. Passman},\(^\text{166}\) while conceding that the adoption of rule 21c was intended to relax the required standard,\(^\text{167}\) nevertheless concluded that "the implicit requirement of promptness and diligence was not deleted from the Texas Rules of Civil Procedure."\(^\text{168}\) Accordingly, "[s]ince an appellant seeking a motion for an extension of time is required to set forth a reasonable explanation for not timely filing the transcript," reasons the majority, "it is also implicit that an appellant is required to reasonably explain his actions or inactions during the entire sixty-day period, including a reasonable explanation for an extraordinary delay in requesting preparation of the transcript."\(^\text{169}\)

The other view, represented by the dissenting opinion in \textit{Sloan},\(^\text{170}\) takes a more liberal approach. Disagreeing with the majority's holding that rule 21c requires a showing of reasonable diligence, the dissent concluded that the "reasonable explanation" requirement of the rule is met by:

» any plausible statement of circumstances indicating that failure to file within the sixty-day period was not deliberate or intentional, but was the result of inadvertence, mistake, or mischance, . . . even though counsel or his secretary may appear to have been lacking in that degree of diligence which careful practitioners normally exercise.\(^\text{171}\)

An authoritative choice between the two interpretations of rule 21c espoused in \textit{Sloan} appears to be at hand as the supreme court has granted review of the point in one of the decisions following the view of the dissent.\(^\text{172}\)

When rule 21c was adopted, rule 386,\(^\text{173}\) which pertained to the prosecution

\(^{164}\) \textsc{Tex. R. Civ. P.} 21c (emphasis added).

\(^{165}\) \textit{Id.}\(^\text{166}\) 536 S.W.2d 575 (Tex. Civ. App.—Dallas 1976, no writ) (2-1 decision), \textit{followed in City of Wichita Falls v. Hollis, 539 S.W.2d 180 (Tex. Civ. App.—Fort Worth 1976, no writ).}\(^\text{167}\) Under former \textsc{Tex. R. Civ. P.} 386 (1967), which authorized an extension of time on appeal upon a demonstration of "good cause," the grant of an extension depended upon a showing of diligence by counsel in perfecting and prosecuting the appeal. \textit{See, e.g., Patterson v. Hall, 430 S.W.2d 483 (Tex. 1968); Matlock v. Matlock, 151 Tex. 308, 249 S.W.2d 587 (1952).}\(^\text{168}\) According to the majority in \textit{Sloan}, however, "[b]y substituting a 'reasonable explanation' for the 'good cause test,' the supreme court merely relaxed the standard required, but did not eliminate the requirement of diligence during the sixty days." 536 S.W.2d at 576.\(^\text{169}\) 536 S.W.2d at 577.\(^\text{170}\) \textit{Id.}\(^\text{171}\) 538 S.W.2d 1 (dissenting opinion), \textit{followed in Steiler v. Stieler, 537 S.W.2d 954 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.); Mulloy v. Mulloy, 538 S.W.2d 818 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ); Gallegos v. Truck Ins. Exchange, 539 S.W.2d 353 (Tex. Civ. App.—San Antonio 1976, no writ); and Meshwert v. Meshwert, 543 S.W.2d 877 (Tex. Civ. App.—Beaumont 1976, writ granted).}\(^\text{172}\) 538 S.W.2d at 1.\(^\text{173}\) \textit{Meshwert v. Meshwert, 20 Tex. Sup. Ct. J. 170 (Jan. 29, 1977), granting application for writ of error in 543 S.W.2d 877 (Tex. Civ. App.—Beaumont 1976).}\(^\text{174}\) \textsc{Tex. R. Civ. P.} 386 (1967).
of an appeal from a final judgment, was amended to conform to the language of rule 21c. Finding that there was not that same effort toward conformity in the amendments to rule 385, which governed the perfection of an appeal from an interlocutory order, one court of civil appeals recently held "that rule 21c does not apply to transcripts and statement of facts filed under Rule 385, and that the showing of good cause is still mandatory for any reasonable extension of time," primarily "[b]ecause of the urgency of the interlocutory order appeals permitted by Rule 385 . . . and the changes noted."177

City of Ingleside v. Johnson, a fiscal battle between a litigant and an official court reporter, concerned the necessity of making an advance payment for the statement of facts. Seeking relief from the refusal of an official court reporter to furnish a statement of facts without advance payment, the appellant in the case sought relief through the filing of an application for writ of mandamus. Emphasizing that under amended rule 354 the bond on appeal secures "all the costs which have accrued in the trial court and the cost of the statement of facts and transcript," the court of civil appeals observed that "[s]ince Rule 354 . . . covers the cost of the statement of facts, then upon the filing of the appeal bond, such party is entitled to the statement of facts without advanced payment and without regard to their financial ability to pay for the same."180 Thus, it appears that when an appellant in a case has posted an appropriate appeal bond, the official court reporter must, upon request, furnish a statement of facts for filing in the appeal without payment of his usual charges. Once the appeal is decided and all costs are taxed, the court reporter will be entitled to seek payment from the losing party for the statement of facts. If the losing party does not respond, then the court reporter may seek relief under the appeal bond.

XIV. MISCELLANEOUS

Article 2226, which authorizes the recovery of a reasonable attorney's fee in connection with the successful prosecution of certain types of claims, appears to limit such recovery to instances where the creditor "should finally obtain judgment." Adding to an existing conflict in the decisions of the courts of civil appeals, the court in Villarreal v. Wennermark concludes that a debtor can avoid liability for attorney's fees under article 2226 by paying the

177. Id. at 682.
180. 537 S.W.2d at 151-52.
amount of the claim after the creditor has engaged an attorney and filed suit, provided payment is made prior to the rendition of judgment.

A court of civil appeals had concluded during a previous survey period that the Texas statute authorizing prejudgment garnishment was unconstitutional as being violative of the due process requirements of the fourteenth amendment. By contrast, the constitutionality of article 4076, which permits postjudgment garnishment in Texas, was recently sustained by another court of civil appeals.

Prior to its recent amendment by the supreme court, rule 164 permitted a nonsuit to be taken "[a]t any time before the jury has retired" or, when the case is tried by the judge, "[a]t any time before the decision is announced." Present rule 164 on the other hand, authorizes a nonsuit to be taken "[a]t any time before the plaintiff has rested his case," that is, before the plaintiff has introduced all of his evidence other than rebuttal evidence. Making clear its intent in this matter, the supreme court recently observed that rule 164 now allows a plaintiff the right to a nonsuit only until his own case-in-chief is rested.