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MAJOR developments in the field of civil procedure during the survey period include judicial decisions, statutory enactments, and two sets of amendments to the Texas Rules of Civil Procedure. This survey examines these developments and considers their impact on existing Texas procedure.

I. JURISDICTION OF THE PERSON

During the survey period several courts considered the availability of out-of-state service of process under article 2031b, the Texas long-arm statute. Section 3 of article 2031b authorizes the exercise of jurisdiction over a nonresident when he "engages in business" in Texas. "Doing business," as defined in section 4, includes "entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part . . . in this State or the committing of any tort in whole or in part in this State." While service under article 2031b apparently depends on actionable conduct in the state, Wilkerson v. Fortuna Corp., a recent decision of the United States Court of Appeals for the Fifth Circuit, indicates that the defendant's location may be more important in supporting personal jurisdiction than the place of the conduct giving rise to the cause of action. The plaintiff, an El Paso horse trainer, brought suit in Texas against the operator of the adjacent Sunland Park race track which was located in New Mexico. Claiming that the defendant had refused to provide stalls at Sunland Park for horses the plaintiff had trained and that this conduct was in violation of a rule of the New Mexico Racing Commission, the plaintiff sought recovery for the loss of his training business. Conceding that the defendant had committed no act in Texas which gave rise to the cause of action, the Fifth Circuit nevertheless reversed the trial court's dismissal for lack of personal jurisdiction. Stressing that the race track was nearer El Paso than any urban center in New Mexico and that the defendant regularly solicited customers from El Paso to attend and gamble on its races, the court concluded that article 2031b
was satisfied when the claim arose from the defendant's "general endeavors" in Texas.\(^7\)

\textit{U-Anchor Advertising, Inc. v. Burt}\(^8\) is an indication that the Texas Supreme Court has a more restrictive view of the due process requirements of nonresident service than the federal appellate courts. The plaintiff, a Texas advertising firm, brought suit in Texas against an Oklahoma resident to collect sums due under a written contract. Service was effected by means of article 2031b. The contract was solicited in Oklahoma by the plaintiff and was executed by both parties in that state. With respect to performance, the contract required the plaintiff to erect five advertising displays at specified locations in Oklahoma and obligated the defendant to send payment to the plaintiff's offices in Amarillo. The defendant mailed six checks to Amarillo, but he had no other contacts with Texas. Observing that the question presented was solely one of due process, the court concluded that the defendant's contacts with Texas did not satisfy federal constitutional requirements, and, therefore, affirmed the trial court's dismissal for lack of personal jurisdiction.\(^9\)

Since the outcome in \textit{U-Anchor} turned on a federal question, however, the decision should be considered in light of federal cases sustaining nonresident service in analogous situations. More in line with the federal decisions and somewhat contrary to the rationale of \textit{U-Anchor} is \textit{Gubitosi v. Buddy Schoellkopf Products, Inc.}\(^12\) The plaintiffs filed suit against the defendant, a New York resident, on his two written guaranties insuring payment of certain indebtedness to the plaintiffs in "Dallas, Texas." The guaranties were signed by the defendant in New York, and were mailed from there to the plaintiffs in Texas. With the exception of the foregoing the defendant had no other contacts with Texas. Nevertheless, finding the guaranties payable in Texas to be the critical fact, the court of civil appeals held that due process was satisfied and sustained service on the defendant under article 2031b.\(^13\)

\begin{itemize}
  \item \(^7\) Id. at 749.
  \item \(^8\) 553 S.W.2d 760 (Tex. 1977).
  \item \(^9\) The court had concluded previously that the defendant was "doing business" in Texas within the meaning of the long-arm statute. The court, however, implied that analysis under art. 2031b is unnecessary because "art. 2031b reaches as far as the federal constitutional requirements of due process will permit." Id. at 762.
  \item \(^10\) Reference should also be made to the court's brief discussion of TEX. R. CIV. P. 108. In a footnote the court made the following statement after noting the rule: "[W]e stated the purpose of the amendment [to rule 108] is to permit acquisition of in personam jurisdiction to the constitutional limits." 553 S.W.2d at 762 n.1. Although the rule had no bearing on the case at hand, this dictum may be a suggestion by the Texas Supreme Court that rule 108 is an alternate means to art. 2031b of acquiring personal jurisdiction.
  \item \(^12\) \textit{Id.} at 534-36; \textit{accord}, National Truckers Serv., Inc. v. Aero Sys., Inc., 480 S.W.2d 455 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.); McKanna v. Edgar, 380 S.W.2d 889 (Tex. Civ. App.—Austin 1964), rev'd on other grounds, 388 S.W.2d 927 (Tex. 1965). Declaring what had been hesitatingly suggested in earlier cases, one court recently proclaimed that "[j]urisdiction on the basis of a single act in the forum state has been uniformly upheld." Arterbury v. American Bank & Trust Co., 553 S.W.2d 943, 948 (Tex. Civ. App.—Texarkana 1977, no writ).
\end{itemize}
A curious set of jurisdictional events was considered in DLJ Properties/73 v. Eastern Savings Bank. A Texas resident and a New York bank entered into a contract substantially performable by both parties in Texas. Prior to the bank's failure to fulfill its contractual obligations, the Texas resident assigned his rights under the contract to the plaintiff, a New York partnership. The plaintiff filed suit in Texas against the bank for breach of the contract and effected service under article 2031b. Acknowledging that "doing business" by entering into a contract performable in Texas requires as an element that one of the contracting parties be a "resident of Texas," the court of civil appeals held that the assignment of the contract by the Texas resident to a nonresident did not remove the transaction from the scope of article 2031b.

Generally, a plaintiff must allege facts in his petition showing that he is entitled to resort to substituted service under a particular statute. In order to effect service under article 2031b, the prevailing rule is that a petition must allege that the nonresident defendant "does not maintain a place of regular business in this State or a designated agent upon whom service may be made." Adding to the list of required allegations for service under article 2031b, the court in Gathers v. Walpace Co. found deficient a petition which failed to state "that the cause of action... asserted arose from or was in any manner connected with defendant's purposeful acts in this state." Furthermore, according to Gourmet, Inc. v. Hurley, service issued under article 2031b on the basis of a petition which omitted the required allegations could not thereafter be cured through the filing of an amended petition prior to default judgment or through the introduction of sufficient evidence at the default hearing.

16. 549 S.W.2d at 756.
17. See, e.g., McKanna v. Edgar, 388 S.W.2d 927 (Tex. 1965); Flynt v. City of Kingsville, 125 Tex. 510, 82 S.W.2d 934 (1935); Gianelle v. Morgan, 514 S.W.2d 133 (Tex. Civ. App.—Texarkana 1974, no writ).
18. See McKanna v. Edgar, 388 S.W.2d 927 (Tex. 1965). TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (Vernon 1964) provides that:

Any foreign corporation, association, joint stock company, partnership, or nonresident natural person that engages in business in this State, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the acts or acts of engaging in such business within this State shall be deemed equivalent to an appointment of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State...

19. 544 S.W.2d 169 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.).
20. Id. The court derived this new requirement from the jurisdictional test of O'Brien v. Lanpar Co., 399 S.W.2d 340, 342 (Tex. 1966). At least two questions remain open after this decision: (1) whether the other prongs of the O'Brien test must be alleged in order to sustain jurisdiction under art. 2031b, and (2) whether the pleader has lost his right of amendment if the opposing party uses the special appearance attack under rule 120a instead of a special exception.
22. Id. at 512-13.
II. JURISDICTION OVER PROPERTY

Of great importance to in rem jurisdiction\(^2\) is the decision of the United States Supreme Court in *Shaffer v. Heitner*.\(^2\) Under consideration in *Shaffer* was a Delaware statute which, by authorizing the seizure of a nonresident's property located within the state, compelled the personal appearance of the nonresident to defend an action brought against him. Historically, in rem jurisdiction has been based on attachment or seizure of property present in the forum state, not on contacts between the defendant and the forum state. Observing that "[t]he fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification,"\(^2\) the Supreme Court concluded "that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."\(^2\) Thus, a state seeking to assert jurisdiction over the interest of a nonresident in property located within its territory may only do so on the basis of "minimum contacts" between the nonresident and the state.\(^2\)

III. SERVICE OF PROCESS

Rule 106 of the Texas Rules of Civil Procedure,\(^2\) which provides for service of citation, was amended to authorize service upon a defendant by "the officer's mailing by registered or certified mail, with delivery restricted to addressee only, a true copy of the citation and with a copy of the petition attached thereto."\(^3\) Furthermore, amended rule 107 stipulates that "[w]hen the citation was served by registered or certified mail . . . the return by the officer must also contain the return receipt with the addressee's signature."\(^3\)

IV. VENUE

Subdivision 5 of article 1995\(^3\) provides an exception to exclusive venue in

\(^{24}\) The traditional distinction between the various theories of jurisdiction is explained by the following statement:

If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated 'in personam' and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called 'in rem' or 'quasi in rem.' The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.


\(^{25}\) *Id.* at 2569, 53 L. Ed. 2d at 683.

\(^{26}\) *Id.* at 2584, 53 L. Ed. 2d at 703.

\(^{27}\) *Id.* at 2584-85, 53 L. Ed. 2d at 703. The reference is to the landmark case of *International Shoe Co. v. Washington*, 336 U.S. 310 (1945).

\(^{28}\) The Court acknowledged that its decision would result in a more significant change in practice with respect to quasi in rem actions as opposed to true in rem proceedings. 97 S. Ct. at 2582-83, 53 L. Ed. 2d at 700-01.

\(^{29}\) *Tex. R. Civ. P.* 106.

\(^{30}\) Rule 106 was also amended to provide that where service in person or by registered or certified mail is not practical the trial court, upon motion, may authorize service "by any disinterested adult named by the court in its order." *Id.*

\(^{31}\) *Id.* 107.

\(^{32}\) *Tex. Rev. Civ. Stat. Ann.* art. 1995(5)(a) (Vernon Supp. 1978). This statute provides that a person may be sued in the county expressly named in a contract as the place of performance, subject to subd. 5(b) dealing with consumer transactions.
a defendant's county of residence if the defendant has contracted in writing to perform an obligation in another county. Resolving a conflict in the decisions of the courts of civil appeals, the Texas Supreme Court in *Hopkins v. First National Bank* gave a liberal interpretation to subdivision 5 in determining the proper venue of a suit brought on a written guaranty which did not specify the place of payment. Since the note covered by the guaranty provided for payment in the county of suit, the court reasoned that the guaranty incorporated this payment provision for venue purposes and sustained the application of subdivision 5. This subdivision was also examined in *Loomis v. Blacklands Production Credit Ass'n* which involved a suit on a note payable "'in the city in Texas in which said Association's principal office is located.'" Noting the evidence established that the location of the principal office was in the county of suit, the court concluded that "'where a contract names or identifies a definite place for performance, extraneous proof is proper to establish the county in which the place is located.'"

Aimed at eliminating distant forum abuses in consumer transactions, subdivision 5(b) of article 1995 was added in 1973. This subdivision provides that in an action upon a contract arising out of a "consumer transaction," suit by a creditor upon the contract may be brought against the defendant either in the county in which the defendant signed the contract or in the county in which the defendant resided at the time of the commencement of the action. Cases interpreting subdivision 5(b) include *Ingram v. D.C. Rachal Ford, Inc.* and *Beef Cattle Co. v. N.K. Parrish, Inc.* In *Ingram* a "consumer transaction" was held to encompass a contract for the repair of a personal automobile. Similarly, in *Beef Cattle Co.* the purchase by a corporation of feed to be used in a ranching operation was held to be a "consumer transaction."

Subdivision 6 of article 1995, which governs the venue of an action against a personal representative, provides that a suit against a personal representative to establish a money demand against the estate he represents may be brought in the county in which the estate is administered. Further-

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34. 551 S.W.2d 343 (Tex. 1977), refusing application for writ of error, n.r.e., 546 S.W.2d 84 (Tex. Civ. App.—Corpus Christi 1976).
35. 552 S.W.2d 571 (Tex. Civ. App.—Waco 1977, no writ).
36. Id. at 572.
37. Id.; accord, Bruce Campbell & Son Constr. Co. v. Britton Drive, Inc., 527 S.W.2d 852 (Tex. 1975, no writ).
40. 545 S.W.2d 886 (Tex. Civ. App.—Corpus Christi 1976, writ dism'd).
more, as a result of a recent amendment, subdivision 6 now authorizes suit against an executor, administrator, or guardian "growing out of a negligent act or omission," of the person whose estate is being represented, to be brought in the county "where the negligent act or omission . . . occurred." Another enactment in the area of venue was the amendment of article 2390, which provides for venue of civil actions in the justice court. As a result of this legislation, the venue provisions governing the justice courts are now similar to those of article 1995.45

The venue treatment of a national bank was the subject of Houston National Bank v. Farris.46 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 State . . . court in the county or city in which said association is located."47 The statute usually has been interpreted to require that a suit against a national bank must be brought in the county of its domicile.48 According to an early case, however, "local" actions are excluded from the application of the statute. Focusing on this exception, the Amarillo court of civil appeals held that an action against a national bank for improper drainage of mineral property was "local" in nature and therefore exempted from the federal statute.50

The venue of an action under the Texas Deceptive Trade Practices and Consumer Protection Act is governed by section 17.56.51 This section provides that an action brought under the Act "may be commenced in the county in which the person against whom the suit is brought resides, has his principal place of business or is doing business."52 Construing section 17.56 for the first time, two cases during the survey period held that in establishing venue of a claim seeking redress for a deceptive trade practice a plaintiff must plead and prove a cause of action under the Act.

Determining the proper venue of an ancillary claim was an issue which also received attention during the survey period. Section 2(g) of the Texas comparative negligence statute, which provides that "[a]ll claims for contribution between the named defendants in the primary suit shall be determined in the primary suit," was recently construed. Joining with two earlier cases,55 Winningham v. Connor56 held that section 2(g) is a mandatory venue

43. Id. art. 1995(6).
44. Id. art. 2390.
45. See id. art. 1995 (Vernon 1964).
50. 549 S.W.2d 422.
52. Id.
54. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Vernon Supp. 1978).
56. 552 S.W.2d 579 (Tex. Civ. App.—Tyler 1977, no writ).
provision and that when a crossclaim for contribution is asserted between named defendants, the crossclaim is to be tried in the county where the court hearing the main suit is situated.

Nacol v. Williams emphasizes the danger of taking any action inconsistent with the assertion of a plea of privilege. At the time of filing his plea of privilege, the defendant submitted a motion to rule for costs and a proposed order granting such motion. The trial court entered the order and required the plaintiff to post a cash deposit. Following a subsequent hearing on the plea of privilege, which was contested by the plaintiff, the trial court overruled the plea. Affirming the ruling of the trial court, the court of civil appeals concluded that the defendant had waived his plea of privilege by invoking the general jurisdiction of the trial court on his motion to rule for costs.

V. PLEADINGS

The most significant development in the area of pleadings came in the form of a recent amendment to the Texas Rules of Civil Procedure. Rule 47 now provides that “[a]n original pleading which sets forth a claim for relief . . . shall contain . . . in all claims for unliquidated damages only the statement that the damages sought exceed the minimum jurisdictional limits of the court.” The purpose of the amendment was apparently to prohibit allegations of exaggerated damages of a nature which tend to result in adverse publicity to defendants. “Upon special exception,” however, rule 47 directs the trial court to “require the pleader to amend so as to specify the maximum amount claimed.” One further amendment in this area should be noted by the trial practitioner. Rule 72, which now makes a certificate of service mandatory, provides that counsel “shall certify . . . on the filed pleading in writing over his personal signature” that he has served upon the adverse party any pleading, plea, or motion filed with the court.

The sworn denial required of a defendant who seeks to avoid the evidentiary effect of a sworn account was the subject of considerable appellate attention. Rule 185 provides that a suit on sworn account “shall be taken as prima facie evidence thereof, unless the party resisting such claim shall . . . file a written denial, under oath, stating [1] that each and every item is not just or true, or [2] that some specified item or items are not just and true.” Interpreting the wording of rule 185 strictly, the court in Sigler v. Frost Brothers, Inc. found that a sworn denial stating that “the account which is...

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58. 552 S.W.2d at 383.
60. Id. at 288, accord, Barrett v. Cheatham, 281 S.W.2d 761 (Tex. Civ. App.—Waco 1955, no writ).
62. The word “unliquidated” can be defined only by examining the context in which it is used. At present no clear definition exists with respect to the use of the term at the pleading stage. For a definition of “liquidated claim” in the default judgment context see Freeman v. Leasing Ass’n, 503 S.W.2d 406, 408 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ) (a claim is liquidated if the amount claimed as damages can be accurately calculated by the court, or under its direction, from the allegations contained in the plaintiff’s petition and an instrument in writing upon which the claim is based).
64. Id. 185.
the foundation of the Plaintiff’s action is not just or true in part” was deficient. If a defendant’s sworn denial is levelled at only some specified item or items,” concluded the court, “he must state that ‘some specified item or items are not just and true.’” Additionally, the court in Dixon v. Mayfield Building Supply Co. held that an acknowledgment of a denial contained in the defendant’s answer to a suit on a sworn account was insufficient because rule 185 requires that the account be denied “under oath.”

VI. LIMITATIONS

The discovery rule, which is applicable to limited types of actions establishes that the pertinent statute of limitations will 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. In a sharply divided opinion the supreme court in Robinson v. Weaver refused to extend the discovery rule to the statute of limitations in a malpractice action against a physician who had misdiagnosed the condition of the plaintiff. The supreme court reasoned that a claim of misdiagnosis, unlike the situation where a foreign object is left in the body of a patient, rests solely upon testimonial evidence and entails the corresponding danger of being a fraudulent claim. Since the primary purpose of limitations is to prevent litigation of stale or fraudulent claims, the court declined to apply the discovery rule to encompass a claim of misdiagnosis. In contrast, the court of civil appeals in Fitzpatrick v. Marlowe applied the discovery rule to the negligent treatment by a physician of the plaintiff’s nasal condition.

Although a conflict arose among the courts of civil appeals with respect to the placement of the burden of proof in discovery rule cases, the supreme court has apparently put the controversy to rest by its decision in Weaver v. Witt. In the context of a motion for summary judgment the court held that

66. Id. at 816.
67. Id. (quoting Tex. R. Civ. P. 185).
70. 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, 580 (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”).
71. 1977) (5-4 decision).
72. 533 S.W.2d 190 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.).
"the rule is not a plea of confession and avoidance" and, therefore, the defendant movant has the burden of negating "the pleading of the discovery rule by proving as a matter of law that there was no genuine issue of fact concerning the time when the plaintiff discovered or should have discovered the nature of the injury."\(^7\) According to the court, however, proof of facts suspending the operation of a statute of limitations is the burden of the party pleading suspension in a conventional trial on the merits.\(^6\)

City of Port Arthur v. Bowling,\(^7\) involving an action brought by certain homeowners against a city to recover for damage to their property caused by odors escaping from a nearby sewer line, is a case of first impression. Conceding that the homeowners' allegations, if proved, would amount to a constitutional taking\(^7\) of property by the city, the court was faced with a choice of applying the two-year\(^7\) or ten-year\(^8\) statute of limitations to the plaintiffs' claim. Distinguishing the situation from one in which there has been a taking of property by physical invasion, governed by the ten-year statute of limitations,\(^8\) the court found the case to be more analogous to a nuisance action and, consequently, controlled by the two-year statute of limitations.\(^8\)

Finally, article 5539d, a recent enactment in the limitations area, provides that "[i]f the last day of a limitations period under any statute of limitations falls on a Saturday, Sunday or holiday, the period for filing suit is extended to the next day that the offices of the county are open for business."\(^8\)

VII. Parties

The most significant development in the area of parties was the amendment of rule 42 of the Texas Rules of Civil Procedure.\(^8\) Abandoning its former class action procedures, Texas adopted, with few changes, Federal Rule of Civil Procedure 23,\(^8\) which governs class actions in federal court. Thus, the new rule now defines the permitted classes in terms of functions to be served rather than rights to be litigated as under the old rule, and makes substantial changes to prior practice with respect to notice requirements and the binding effect of a class action judgment.\(^6\) Unlike its federal counterpart, however, rule 42 expressly provides that unnamed members of a class are not to be considered as parties for purposes of discovery.\(^8\)

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75. 21 Tex. Sup. Ct. J. at 68.
76. Id. at n.2.
78. TEX. CONST. art. I, § 17. This article, which is the basis for an action for constitutional taking, provides that "[n]o persons's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . .".
79. TEX. REV. CIV. STAT. ANN. art. 5526(1) (Vernon 1958) (applicable to an action for "injury done to the estate or the property of another").
80. Id. art. 5510 (applicable to an action for the "recovery of lands . . . against another having peaceable and adverse possession thereof").
82. 551 S.W.2d at 157.
84. TEX. R. CIV. P. 42.
85. FED. R. CIV. P. 23.
87. TEX. R. CIV. P. 42(f).
Disapproving a contrary holding in an earlier case,\textsuperscript{88} the Texas Supreme Court in \textit{Clear Lake City Water Authority v. Clear Lake Utilities Co.}\textsuperscript{89} concluded that the liberal joinder procedure of rule 39\textsuperscript{90} is not inconsistent with the joinder requirements of the Texas Uniform Declaratory Judgments Act.\textsuperscript{91} The court reiterated that the joinder provision of the Act,\textsuperscript{92} which stipulates that all parties whose interests will be affected by the declaratory judgment “shall be made parties” to the action, is mandatory. Applying the liberal joinder procedure of rule 39 to an action brought under the Act, the court nevertheless concluded that noncompliance with the provision did not uniformly constitute a jurisdictional defect.\textsuperscript{93}

Two cases which may be of interest to the trust and estate practitioner are \textit{Moore v. Allen}\textsuperscript{94} and \textit{Pampell v. Pampell}.\textsuperscript{95} Article 4412a,\textsuperscript{96} which pertains to actions affecting a charitable trust, was considered in \textit{Moore}. Observing that article 4412a mandates the joinder of the attorney general of Texas as a party in suits of this nature,\textsuperscript{97} the court set aside a judgment construing testamentary instruments creating a charitable trust entered in a suit to which the attorney general of Texas was not a party.\textsuperscript{98} The conclusion of the court in \textit{Pampell} was that all beneficiaries under a will are indispensable parties to an action to construe the will or to partition the estate.\textsuperscript{99}

\textbf{VIII. DISCOVERY}

\textit{Barker v. Dunham}\textsuperscript{100} provides an interpretation of rules 167\textsuperscript{101} and 186a\textsuperscript{102} which authorize the discovery of the reports and opinion testimony of an expert. In a suit to recover damages arising from the failure of a crane boom manufactured by the defendant, the plaintiff filed a motion for production of tangible items and attempted to depose an engineer in the regular employment of the defendant; both procedures focused on the findings and opinions of the engineer. The trial court sustained the defendant’s objection to the attempted discovery on the grounds that the rules limit discovery to experts who are both engaged for consultation and will be called as witnesses. In the ensuing mandamus proceeding\textsuperscript{103} the Texas Supreme Court approved the attempted discovery, concluding that “[t]he rules draw no distinction between an expert who is a regular employee and one who is

\textsuperscript{89} 549 S.W.2d 385 (Tex. 1977).
\textsuperscript{90} TEX. R. CIV. P. 39.
\textsuperscript{91} TEX. REV. CIV. STAT. ANN. art. 2524-1 (Vernon 1965).
\textsuperscript{92} Id. § 11.
\textsuperscript{93} 549 S.W.2d at 389-90.
\textsuperscript{94} 544 S.W.2d 448 (Tex. Civ. App.—Waco 1976, no writ).
\textsuperscript{95} 554 S.W.2d 20 (Tex. Civ. App.—Austin 1977, no writ).
\textsuperscript{96} TEX. REV. CIV. STAT. ANN. art. 4412a (Vernon 1976).
\textsuperscript{97} Id. § 2.
\textsuperscript{98} 544 S.W.2d at 451-52.
\textsuperscript{99} 554 S.W.2d at 21.
\textsuperscript{100} 551 S.W.2d 41 (Tex. 1977).
\textsuperscript{102} TEX. R. CIV. P. 186a.
\textsuperscript{103} Significantly, this case removes any doubts which may have existed regarding the propriety of the issuance of a writ of mandamus for a \textit{denial} of a motion for discovery as opposed to a trial court’s order which \textit{allows} discovery. The court will apparently apply the “clear abuse of discretion” standard in both instances. 551 S.W.2d at 42.
temporarily employed to aid in the preparation of a claim or defense.”\(^{104}\) Furthermore, having placed the burden of disclaiming use of the expert as a witness upon the party resisting the discovery, the court stated that “\[w\]here a party does not positively aver that the expert in question will be ‘used solely for consultation’ and will not be called as a witness at the trial, the policy of allowing broad discovery in civil cases is furthered by permitting discovery of that expert’s reports, factual observations, and opinions.”\(^{105}\)

Two additional cases decided by the supreme court involve the proper scope of discovery in light of specific statutes dealing with the subject matter sought to be discovered. Article 4447d, which confines discovery of hospital records to those “records made or maintained in the regular course of business of a hospital,”\(^{106}\) was interpreted in *Texarkana Medical Hospital v. Jones*.\(^{107}\) Denying a discovery request for the minutes of certain hospital committee and board of directors meetings, the court held that “records made or maintained in the regular course of business of a hospital” were limited to those records kept in connection with the treatment of the individual patients and the administrative files apart from committee deliberations.\(^{108}\) Similarly, *Ex parte Pruitt*,\(^{109}\) an action on a fire insurance policy, concerned the discoverability of certain investigatory records of a county fire marshal made confidential by article 1606c.\(^{110}\) Since article 1606c prohibits the use of such investigatory records “in evidence” upon the trial of an action on a fire insurance policy, the court concluded that discovery of active investigatory files of a county fire marshal was precluded.\(^{111}\)

While the privilege against self-incrimination may be invoked in a civil proceeding,\(^{112}\) the decision in *Henson v. Citizens Bank of Irving*\(^{113}\) is an indication that a party plaintiff in such a proceeding must be circumspect in so doing. Plaintiff appealed the trial court’s dismissal of his action after he refused to answer questions during his oral deposition on the basis of the fifth amendment. In reversing the trial court’s action, the court of civil appeals held that rule 215a authorized dismissal of a party’s suit only for refusal to answer after being directed to do so by order of the court.\(^{114}\) The decision, however, followed rejection of the plaintiff’s contention that he had an absolute right to invoke the privilege and proceed with his action. The court stated that the plaintiff should not be permitted to withhold information which might relieve a defendant of liability and at the same time be permitted to prosecute his claim.\(^{115}\)

Rule 169, which governs requests for admissions of fact, provides that

\(^{104}\) *Id.* at 43.

\(^{105}\) *Id.* at 44.

\(^{106}\) TEX. REV. CIV. STAT. ANN. art. 4447d, § 3 (Vernon 1976).

\(^{107}\) 551 S.W.2d 33 (Tex. 1977).

\(^{108}\) *Id.* at 35.

\(^{109}\) 551 S.W.2d 706 (Tex. 1977).

\(^{109}\) TEX. REV. CIV. STAT. ANN. art. 1606c (Vernon 1962).

\(^{110}\) 551 S.W.2d at 709.

\(^{111}\) *See, e.g., Ex parte Butler, 522 S.W.2d 196 (Tex. 1975); Ex parte Stringer, 546 S.W.2d 837 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ).*

\(^{112}\) 549 S.W.2d 446 (Tex. Civ. App.—Eastland 1977, no writ).

\(^{113}\) *Id.* at 448-49; TEX. R. CIV. P. 215a.

\(^{114}\) 549 S.W.2d at 447.
each of the matters for which an admission is sought shall be deemed admitted unless, "within a period designated in the request, not less than ten days after delivery thereof," the party to whom the request is directed serves a sworn answer. In considering a request for admissions of fact which demanded a response within ten days, the court in Taylor v. Lewis held that the request was defective since the minimum time limit prescribed by rule 169 was contravened. Thus, reasoned the court, the putative request could not constitute a basis for deeming a fact admitted.

The amendments to the Texas Rules of Civil Procedure, which became effective January 1, 1978, made several changes in the area of discovery. The timing of interrogatory practice under rule 168 has been liberalized. The party upon whom interrogatories have been served now has at least thirty days after service within which to answer. Written objections to interrogatories, however, must be submitted within fifteen days after service of the interrogatories. Rule 168 was also amended to provide that "[a]nswers to interrogatories should, to the extent possible, be answered in spaces left therefor following each interrogatory." Thus, the serving party is apparently required to leave a space following each interrogatory for insertion of the answer. Rule 178, which relates to the service of subpoenas, was amended to provide that a subpoena may be served by a sheriff, a constable, or "by any other person who is not a party and is not less than eighteen years of age."

IX. SUMMARY JUDGMENT

Summary judgment practice under rule 166-A has undergone substantial modification as a result of the new amendments. Enlarging the former time requirements, the amended rule provides, "[e]xcept upon leave of court, the motion shall be served at least twenty-one days before the time specified for hearing" and "the adverse party, not later than seven days prior to the day of hearing, may serve opposing affidavits or other written response." Requiring greater specificity in summary judgment practice, rule 166-A now provides that a moving party must establish that there is no genuine issue as to any material fact, and that he is entitled to judgment as a matter of law "on the issues expressly set out in the motion or in an answer or any other response." Most significantly, "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." The combined effect of these two changes apparently is to limit appellate review to the specific issues presented in the motion or response.

118. TEX. R. CIV. P. 168.
119. Id. 178.
120. Id. 166-A.
121. Whether the amendment will require a second level of pleading by the non-movant even though the movant fails to establish his affirmative defense or negate an element of the opposing party's cause of action is unclear. For current practice see Torres v. Western Cas. & Sur. Co., 457 S.W.2d 50, 53 (Tex. 1970); Gibbs v. General Motors Corp., 450 S.W.2d 827 (Tex. 1970).
Under the former rule expert testimony, even if uncontroverted, would not establish a fact as a matter of law for purposes of summary judgment. Modifying this principle, rule 166-A provides that "[a] summary judgment may be based on uncontroverted testimonial evidence . . . of an expert witness, as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts" provided such "evidence is [1] clear, positive and direct, [2] otherwise credible and free from contradictions and inconsistencies, and [3] could have been readily controverted." Codifying existing case law, rule 166-A stipulates that "defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend."

X. SPECIAL ISSUE SUBMISSION

Under former practice the trial judge was required to frame his charge so as to "not therein comment on the weight of the evidence." This phrase was deleted by the 1973 amendments to the Texas Rules of Civil Procedure, and the trial judge is now only prohibited from commenting "directly" on the weight of the evidence. The effect of this change was considered for the first time by the supreme court in Gleghorn v. City of Wichita Falls. In Gleghorn the statement of taking and the evidence in a condemnation proceeding established that the land being taken for additional flowage easement would be submerged infrequently. An instruction to the jury that the land "is to be used" for the purpose of being submerged by water, therefore, was found by the court to be objectionable as a direct comment on the weight of the evidence, rather than a proper explanatory instruction. Similarly, an instruction that the rights taken "include the right of being submerged by water" was disapproved on the same basis.

Several decisions during the survey period focused on the scope of submission of special issues under rule 277. Abolishing the former requirement that special issues be submitted distinctly and separately, rule 277 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

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125. Tex. R. Civ. P. 166-A(e).
129. 545 S.W.2d 446 (Tex. 1977), refusing application for writ of error n.r.e. 531 S.W.2d 879 (Tex. Civ. App.—Eastland 1975).
130. 545 S.W.2d at 447-48.
131. Id. at 448.
question is general or includes a combination of elements or issues.'

Giving this language full effect, the Amarillo court of civil appeals in *Lee v. Andrews* approved the submission of negligence in a single issue inquiring whether the defendant doctor "was negligent in his diagnosis and/or medical care or treatment" of the plaintiff. Similarly, in *City of Baytown v. Townsend* the Houston court of civil appeals endorsed the submission of negligence in an issue inquiring "[w]hose negligence, if any, do you find . . . proximately caused the incident made the basis of this suit" and followed by three possible answers: the defendant, the plaintiff, or both.

Finally, in a suit for breach of contract, the court in *Jon-T Farms, Inc. v. Goodpasture, Inc.* found no error in submitting the cause of action in an issue inquiring whether the defendant did "breach and/or repudiate Contract No. 16,811." In contrast to this wave of courts of civil appeals' decisions is the supreme court's opinion in *Scott v. Atchison, Topeka & Santa Fe Railway*. The trial court in this case had submitted the issue of negligence broadly by inquiring whether "on the occasion in question the [defendant] railroad was negligent." Finding that some of the pleaded acts of negligence were unsupported by the evidence and that the record contained evidence of other possible negligent acts which were not pleaded, the supreme court ruled that "failure to limit the broad ultimate fact issue to acts which were raised by both pleadings and proof violates rule 277." The court stated that compliance with the rule could be accomplished by listing the relevant acts or omissions in a broad issue, in a checklist form, or in a complementary instruction. With respect to the latter method, however, the court disapproved a suggested instruction which would have informed the jury members that they could "consider only those acts which are both alleged in the pleading and supported by the evidence." As a further qualification to the trial court's discretion in electing between the submission of a broad issue or the submission of separate issues on each alleged act of negligence, *Burke Wiley, Inc. v. Lenderman* is a warning that the treatment selected by the trial court must be uniformly applied to

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135. 545 S.W.2d 238 (Tex. Civ. App.—Amarillo 1976, writ granted); see Mobil Chem. Co. v. Bell, 517 S.W.2d 245 (Tex. 1974); Members Mut. Ins. Co. v. Muckleroy, 523 S.W.2d 77 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).
136. 545 S.W.2d at 247.
137. 548 S.W.2d 935 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).
138. Id. at 940.
139. 554 S.W.2d 743 (Tex. Civ. App.—Amarillo 1977, no writ).
140. Id. at 750-51.
142. 21 Sup. Ct. J. at 127 n.2.
143. Id. at 128. The court distinguished Members Mut. Ins. Co. v. Muckleroy, 523 S.W.2d 77 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.), on the basis that the Muckleroy case had some evidence in support of all of the alleged acts of negligence. 21 Sup. Ct. J. at 127.
144. 21 Sup. Ct. J. at 128-29.
145. Id. at 128. The court also held that an "Act of God" defense should be submitted in the form of an explanatory instruction following the definitions of "negligence" and "cause in whole or in part." Id. at 130.
146. 545 S.W.2d 226 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.).
the issues of all parties. Reversing a judgment based on a verdict where the issue treatment was disparate, the court held that “[s]ince the court elected to submit a special issue on each of the several acts of alleged negligence, the defendant was entitled to a special issue on each act of contributory negligence.”

The propriety of the “dynamite” charge was considered by the supreme court in Stevens v. Travelers Insurance Co. With respect to “verdict-urging” instructions in general the court concluded that even though a latent danger of coercion exists, they are “not, in and of themselves, erroneous, so long as the particular charge given is not otherwise objectionable.” In determining whether the particular charge is objectionable, the court stressed that the context and time frame in which the instruction is given will be as important as the words used in such instruction. Further, the charge must be broken down into its several particulars in order to analyze its coercive effect. An individual statement, however, will not invalidate the charge unless the coercive nature of the statement remains after the charge is read as a whole. Applying the above analysis to the case at hand, the court broke the charge down into five parts: (1) a statement that “this case has been ably tried by lawyers, experienced, of long standing, and in the interest of justice if you could end this litigation by your verdict, you should do so,” (2) a statement that advised the jury that “ending the case will meet with the approval of the court,” (3) an admonition regarding the jurors’ beliefs, convictions, and pride of opinion, (4) a statement regarding the cost to the taxpayers of the county to have the particular case tried, and (5) a statement informing the jurors that the trial judge could not accept a report that they could not arrive at an agreement. Only the second statement was found to be coercive, and upon analyzing the charge as a whole, the court concluded that the statement’s impact was mitigated by the trial judge’s cautioning the jury not to forsake their personal convictions. Based on this reasoning, the supreme court held that the charge was not improperly coercive.

With respect to preserving error in the charge, Clarostat Manufacturing, Inc. v. Alcor Aviation, Inc. is authority for the proposition that “the

147. Id. at 227-28.
149. Id. at 214.
150. Id. at 215.
151. Id.
152. The trial judge stated:
I don’t mean to say by that that any individual person on the jury should yield his own conscience and positive conviction, but I do mean that when you are in the jury room, you should discuss this matter among yourselves carefully and listen to each other, and try, if you can, to reach a conclusion on the issues. It is the duty of jurors to keep their minds open and free and to every reasonable argument that may be presented by fellow jurors that they may arrive at the verdict which justly answers the consciences of the individuals making up the jury. A juryman should not have any pride of opinion, and should avoid hastily forming or expressing an opinion. He should not surrender any conscientious views founded upon the evidence unless convinced by his fellow jurors of his error.

153. Id.
154. Id. at 216.
155. Id.
156. 544 S.W.2d 788 (Tex. Civ. App.—San Antonio 1976, writ ref’d n.r.e.).
tender of an omitted issue is sufficient to call the trial court’s attention to the omission, even when the omitted issue is one relied upon by the opponent of the party making the request for submission.”

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Templeton v. Unigard Security Insurance Co. points out the risk of combining requested submissions to the jury with objections to the charge. Noting that the plaintiff failed to submit his requests separately from his objections to the charge, the court concluded that such action was not in compliance with rule 273 and precluded appellate review of any points raised by the requests.

XI. JURY PRACTICE

Rule 265, which concerns the order of proceedings in a trial by jury, was amended to eliminate the reading of pleadings to the jury in an opening statement. Instead, the opening statement of counsel should now consist of a brief explanation of “the nature of his claim or defense and what said party expects to prove and the relief sought.”

XII. JUDGMENT

Finding that rule 81 lodges discretion in a plaintiff as to the filing of an answer to a counterclaim, two cases during the survey period held that a default judgment could not be taken on a counterclaim where no answer was filed, particularly when the counterclaim arises out of the same transaction as the plaintiff’s action.

In order to keep pace with rising interest rates, article 5069 was amended in 1975 to provide that “[a]ll judgments of the courts of this State shall bear interest at the rate of nine percent per annum from and after the date of the judgment.” Faced with a judgment entered prior to the amendment of article 5069 but reformed on appeal after the amendment, the supreme court found the lower interest rate applicable for the reason that “when the trial court’s judgment is erroneous, the judgment of the Court of Civil Appeals must take its place and plaintiff is entitled to interest from the date of the erroneous judgment.”

XIII. MOTION FOR NEW TRIAL

The new amendments to the Texas Rules of Civil Procedure, which became effective January 1, 1978, made sweeping changes in the procedure governing a motion for new trial. Aimed at eliminating pitfalls for the unwary in the preservation of appellate points, rule 324 now provides that

157. Id. at 795. Rule 279 provides, however, that an objection alone to such an omission will suffice if the issue is one relied upon by the opposing party. TEX. R. CIV. P. 279.
159. TEX. R. CIV. P. 273.
160. 550 S.W.2d at 269.
161. TEX. R. CIV. P. 265.
162. Id. 81.
164. TEX. REV. CIV. STAT. ANN. art. 5069-1.05 (Vernon Supp. 1978).
166. TEX. R. CIV. P. 324; see id. 329b; TEX. R. CIV. P. 323, 324 (Vernon 1977).
"[a] motion for new trial shall not be a prerequisite to the right to complain on appeal, in any jury or non-jury case." Moreover, if a motion for new trial is filed, "the omission of a point in such motion shall not preclude the right to make the complaint on appeal." Under amended rule 324 the only time a motion for new trial is required as a predicate to raising a point on appeal is when "a complaint . . . has not otherwise been ruled upon," as in the case of jury misconduct, newly discovered evidence, or the setting aside of a default judgment. On the other hand, "[a] complaint that one or more of a jury's findings have insufficient support in the evidence, or are against the overwhelming preponderance of the evidence as a matter of fact, may be presented for the first time on appeal." The language under the former rule which seemed to require a formal bill of exceptions in support of cross-points has been eliminated. With respect to case law in this area, Thomas v. Davis is an indication that the overruling of an untimely motion for new trial before the trial court loses jurisdiction of the case cannot serve as a basis for appellate review or for extending the time for taking an appeal. Similarly, under the holding in Risher v. Risher, an order setting aside a denial of a timely motion for new trial did not extend the time for filing an amended motion, and the time for taking an appeal commenced to run on the date the original motion was overruled.

XIV. APPELLATE PROCEDURE

Rule 21C was intended to liberalize the requirements for obtaining extensions of time on appeal. The rule provided:

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.

The "reasonable explanation" requirement of rule 21C, which has been the subject of two divergent views, was authoritatively construed by the supreme court in Meshwert v. Meshwert. "Reasonably explaining," according to the court, means "any plausible statement of circumstances

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168. 553 S.W.2d 624 (Tex. 1977) (per curiam).
173. 549 S.W.2d 383 (Tex. 1977).
indicating that failure to file within the sixty-day period was not deliberate or intentional, but was the result of inadvertance, mistake or mischance."\textsuperscript{175} Also considering former rule 21c, the court in Hutcheson v. Hinson\textsuperscript{176} concluded that the grounds asserted in a motion for extension of time must be proved by affidavit or some other form of evidence that can be considered by an appellate court.\textsuperscript{177} While recently the subject of extensive modification, rule 21c\textsuperscript{178} continues to utilize the "reasonably explaining" standard, but now provides that a motion for extension of time to file a transcript, statement of facts, or motion for rehearing is to be submitted to the court of civil appeals. A motion for late filing of an application for writ of error, however, is to be submitted for ruling to the supreme court, with a copy to the court of civil appeals.

Additional amendments, aimed at streamlining the appellate process, were made to the Texas Rules of Civil Procedure. Rule 376\textsuperscript{179} now provides that the clerk of the trial court shall, "[u]pon the filing of the cost bond or deposit," automatically prepare a true copy of the proceedings in the trial court for transmission to the appellate court. As a result the appellant is no longer required to designate matters to be contained in the transcript or to inform the appellee of the matters designated.

The rule\textsuperscript{180} governing the contents of the briefs submitted to the courts of civil appeals has been revised in several respects. First, "[a] complete list of the names of all parties shall be listed on the first page of appellant's brief, so that the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participation in the decision of the case." Additionally, "[t]he brief shall contain a subject index with page references where the discussion of each point relied upon may be found and also a list of authorities alphabetically arranged, together with reference to the pages of the brief where the same are cited." Significantly, a statement of the points upon which the appeal is predicated "will be sufficient if they direct the attention of the court to the error relied upon." However, "[i]n parenthesis after each point, reference shall be made to the page of the record above the matter complained of is to be found." In concluding the brief, the nature of the relief sought should be clearly stated in the prayer.

Similarly, the requisites of an application for a writ of error addressed to the supreme court have been changed. Rule 469\textsuperscript{181} now requires a list of all parties to be included as the first page of an application in order for the members of the court to determine whether they should be disqualified. An alphabetically arranged list of authorities and a brief general statement of the nature of the suit is also required. With respect to points of error, reference in parentheses to the page of the record where the matter com-

\textsuperscript{175} Id. at 384.  
\textsuperscript{176} 543 S.W.2d 719 (Tex. Civ. App.—Tyler 1976, writ ref’d n.r.e.).  
\textsuperscript{177} Id. at 720.  
\textsuperscript{178} TEX. R. CIV. P. 21c.  
\textsuperscript{179} Id. 376.  
\textsuperscript{180} Id. 418.  
\textsuperscript{181} Id. 469.
plained of is located should follow each point. As regards the prayer, the nature of the relief sought in the application should be clearly set forth.

Article 2324\(^{182}\) authorizes the court reporter to make a transcript and to receive "as compensation therefor a reasonable amount, subject to the approval of the judge of the court if objection is made thereto." Intervening in a fiscal battle between a litigant and an official court reporter, the court in *Johnson v. Stewart*\(^{183}\) found article 2324 unconstitutional on the grounds that the statute is subjective in its standards and improperly delegates the exclusive legislative function of setting compensation to the judiciary.

Finally, with respect to appellate procedure, *King v. Tubb*\(^{184}\) is the long-awaited solution to the problem facing an appellee who is seeking to perfect a cross-appeal. Where an appellee has no mandatory steps he must take to perfect his cross-points, the court concluded that the cross-points may be asserted for the first time in the appellee's brief on appeal.\(^{185}\)

**XV. MISCELLANEOUS**

Article 2226,\(^{186}\) which authorizes the recovery of reasonable attorney’s fees in connection with the successful prosecution of certain types of claims, formerly limited such recovery to instances where the creditor "should finally obtain judgment."\(^{187}\) Adding to an existing conflict in the decisions of the courts of civil appeals,\(^{188}\) the court in *Johnson-Walker Moving & Storage, Inc. v. Lane Container, Inc.*\(^{189}\) concluded that a debtor can avoid liability for attorney’s fees under article 2226 by paying the amount of the claim after the creditor has engaged an attorney and filed suit, provided payment is made prior to the rendition of judgment. As a result of the recent amendment, however, the language "should finally obtain judgment" was deleted from article 2226 so that the holding in *Johnson-Walker* may no longer be authoritative.\(^{190}\) As a further result of this amendment, article 2226 now permits the recovery of reasonable attorney’s fees in "suits founded on oral or written contracts," except in the case of insurance policies. Additionally, under two other enactments,\(^{191}\) a reasonable attorney’s fee is recoverable by the prevailing party in a suit for adverse posses-

\(^{182}\) [TEX. REV. CIV. STAT. ANN. art. 2324 (Vernon Supp. 1978).]

\(^{183}\) [554 S.W.2d 775 (Tex. Civ. App.—Corpus Christi 1977, no writ).]


\(^{185}\) [551 S.W.2d at 447.]

\(^{186}\) [TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1978).]

\(^{187}\) [See generally Huff v. Fidelity Union Life Ins. Co., 158 Tex. 433, 312 S.W.2d 493 (1958).]


sion of realty\textsuperscript{192} or a suit for breach of a restrictive covenant pertaining to realty.\textsuperscript{193}

In the area of collateral estoppel by judgment \textit{Hardy v. Fleming}\textsuperscript{194} is an indication that mutuality of parties is no longer required for application of the doctrine. When an earlier trial of a workmen's compensation case resulted in a finding that the plaintiff had not sustained a heart attack and the judgment in that case had become final, collateral estoppel precluded the relitigation of the issue and required the entry of judgment in favor of the defendant even though the defendant was not a party to or in privity with any party to the first case.\textsuperscript{195}

A court of civil appeals had concluded during a previous survey period that the Texas statute authorizing prejudgment garnishment\textsuperscript{196} was unconstitutional as being violative of the due process requirements of the fourteenth amendment.\textsuperscript{197} By contrast, the constitutionality of article 4076,\textsuperscript{198} which permits postjudgment garnishment in Texas, was recently reaffirmed by another court of civil appeals.\textsuperscript{199} Deviating slightly from the principle that a writ of garnishment will never lie against funds deposited with the clerk of a court,\textsuperscript{200} one appellate court\textsuperscript{201} concluded that the exemption ceases when the court enters a judgment ordering the distribution of the funds and nothing remains for the clerk to do except issue the necessary payment. The Texas Rules of Civil Procedure governing attachment,\textsuperscript{202} garnishment,\textsuperscript{203} and sequestration\textsuperscript{204} have undergone substantial revision. The effects of these changes are discussed elsewhere in this \textit{Survey}.\textsuperscript{205}

\textsuperscript{192} Id. art. 5523b, §§ 1, 2.
\textsuperscript{193} Id. art. 1293b.
\textsuperscript{194} 553 S.W.2d 790 (Tex. Civ. App.—El Paso 1977, writ ref’d n.r.e.).
\textsuperscript{195} Id. at 792-93. Considerations of due process may, however, still be applicable. \textit{See} Benson v. Wanda Petroleum Co., 468 S.W.2d 361 (Tex. 1971).
\textsuperscript{196} \texttt{TEX. REV. CIV. STAT. ANN.} art. 4084 (Vernon 1966).
\textsuperscript{198} \texttt{TEX. REV. CIV. STAT. ANN.} art. 4076 (Vernon 1966). \textit{See also} \texttt{TEX. R. CIV. P.} 657-679.
\textsuperscript{199} \textit{Pitts v. Dallas Nurseries Garden Center, Inc.}, 545 S.W.2d 34 (Tex. Civ. App.—Texarkana 1976, no writ); \textit{accord}, \textit{Ranchers & Farmers Livestock Auction Co. v. First State Bank}, 331 S.W.2d 167 (Tex. Civ. App.—Amarillo 1955, writ ref’d n.r.e.).
\textsuperscript{200} \textit{See} \textit{Curtis v. Ford}, 78 Tex. 262, 14 S.W. 614 (1890); \textit{Pace v. Smith}, 57 Tex. 555 (1882).
\textsuperscript{201} \textit{Hardy v. Construction Sys., Inc.}, 556 S.W.2d 843 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ filed).
\textsuperscript{202} \textit{See} \texttt{TEX. R. CIV. P.} 592-608.
\textsuperscript{203} \textit{See id.} 658-664a.
\textsuperscript{204} \textit{See id.} 696-712a.
\textsuperscript{205} \textit{See Dorsaneo, Creditors' Rights}, p. 269 \textit{supra}.