Texas Civil Procedure

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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 proce-
dure.

I. JURISDICTION OVER THE PERSON

The most significant development in the area of jurisdiction over the
person was the decision of the United States Supreme Court in Kulko v.
Superior Court. The plaintiff, a California resident, commenced an ac-
tion in California against her former husband, who resided in New York,
to obtain an increase in his child support obligation for their two children
who were living with her. Following their marriage during a brief visit to
California in 1959, the plaintiff and defendant lived in New York for
twelve years. During this period two children were born to the marriage,
but in 1972 the parties separated and the plaintiff moved to California.
Later the same year the plaintiff returned to New York to sign a separation
agreement and immediately thereafter flew to Haiti, where she procured a
divorce; she then returned to California. Thereafter, in accordance with
the separation agreement, the children lived with their father in New York
during the school year and spent their summer vacations with their mother
in California. By the time the action was commenced the situation had
reversed and the children were living in California with their mother dur-
ing the school year and spending their summer vacations in New York
with the defendant.

Upon being served with process in the action, the defendant moved to
quash service on the ground that the California court lacked jurisdiction
over his person. As posed by the Court, the question was "whether, in this
action for child support, the California state courts may exercise in per-
sonam jurisdiction over a nonresident, nondomiciliary parent of minor
children domiciled within the State." Reiterating that the existence of
personal jurisdiction requires "a sufficient connection between the defend-
ant and the forum State as to make it fair to require defense of the action

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2. Id. at 1694, 56 L. Ed. 2d at 137 (italics in original).
in the forum, the Court sustained the defendant's contentions, concluding that "the mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain nor expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction."

The reach of the Texas long-arm statute, article 2031b, continues to be the subject of judicial measurement. Black v. Acme Markets, Inc., a recent decision of the United States Court of Appeals for the Fifth Circuit, is both a procedural and a substantive yardstick. The plaintiffs, Texas producers and feeders of cattle, brought suit in Texas against several supermarket chains, alleging that they had violated the federal antitrust laws. One of the defendants, a Massachusetts corporation, was served under article 2031b, and it responded with a motion to dismiss for lack of personal jurisdiction. An affidavit, the factual averments of which were not controverted, was submitted in support of the motion to dismiss. Based upon the affidavit and pleadings, the trial court concluded that it did not have jurisdiction over the movant.

It is well settled in federal court that the plaintiff has the burden of proving that the defendant is amenable to process under the forum state's jurisdictional statute. While the complaint in Black alleged that the defendants had conspired to depress beef prices and had caused injury to the plaintiffs' business "in Texas," no affidavit or other proof of these facts were submitted by the plaintiffs. Nevertheless, finding that the record established that the alleged conspiracy had produced effects in Texas, the Fifth Circuit decided that "in ruling on a motion to dismiss for lack of personal jurisdiction, the allegations of the complaint, except insofar as controverted by the defendant's affidavit, must be taken as true." Black is also informative for its clarification of the "unrelated contacts" theory. Declaring what had been suggested more hesitantly in earlier cases, the Fifth Circuit proclaimed that business contacts that are unrelated to the asserted cause of action are relevant to and will support the exercise of personal jurisdiction. The movant did not maintain an office,
place of business, or any employees in Texas; it had solicited no business and made no sales in Texas; and, significantly, it had purchased no beef products of any kind from any person in Texas. Although unrelated to the asserted cause of action, the defendant had purchased approximately $374,000 worth of aluminum foil from a firm in Carrollton, Texas, $1,069,000 worth of salad oil from a business located in Dallas, Texas, and turkeys valued at $64,000 from a company in Lampasas, Texas, for an aggregate of some $1,500,000 worth of products from the Texas marketplace. Reversing the trial court's dismissal for lack of personal jurisdiction, the Fifth Circuit concluded that "[w]e have no doubt that Texas courts would construe section 2031b to reach an out-of-state corporation which had made purchases of products originating in Texas amounting to nearly $1.5 million in a single year and is alleged to have engaged in a conspiracy whose effects would almost certainly be felt by Texas cattle producers."\(^{12}\)

Stretching the Texas "long-arm" to its limits is the decision considered in *Great Western United Corp. v. Kidwell.*\(^{13}\) The plaintiff, a publicly owned Delaware corporation with major offices in Texas, sought to challenge the constitutionality of the Idaho takeover statute by suing the Idaho official responsible for enforcing it. Previously, the plaintiff had made a tender offer for a substantial number of the shares of Sunshine Mining and Metal Company, a publicly owned company incorporated in Washington with its principal offices and the majority of its assets located in Idaho. After an unsuccessful attempt to comply with the applicable Idaho takeover statute, the plaintiff commenced suit in Texas and effected service on the defendant under article 2031b. Reducing its inquiry to whether "due process permits a court in Texas to exercise jurisdiction over the Idaho official who has enforced the Idaho takeover law to prevent a Texas-based corporation from proceeding with a national tender offer,"\(^{14}\) the Fifth Circuit affirmed the trial court's exercise of personal jurisdiction. The court concluded that "the actions of the Idaho defendant under the Idaho takeover law . . . amounted to the regulation of [plaintiff] Great Western's Texas-based business activities."\(^{15}\)

Straining the "long-arm" of article 2031b in another way, a federal district court had concluded during a previous survey period that the Texas activities of a parent corporation should be imputed to its subsidiary for jurisdictional purposes, thereby allowing the court to sustain nonresident service on the subsidiary.\(^{16}\) In a more recent case, *Walker v.*

\(^{12}\) 564 F.2d at 685.
\(^{13}\) 577 F.2d 1256 (5th Cir. 1978) (2-1 decision), appeal granted, 47 U.S.L.W. 3450 (U.S. Jan. 9, 1979) (No. 78-759).
\(^{14}\) *Id.* at 1266.
\(^{15}\) *Id.* at 1270.
the same court focused on the evidentiary requirements of such an extension of the long-arm statute. The plaintiff brought suit in a federal district court against two corporate defendants, one a subsidiary of the other, seeking recovery for personal injuries arising from an automobile collision in Germany involving an Opel automobile that was manufactured by the subsidiary in Germany. Although the parent corporation did not contest the court's jurisdiction over its person, the subsidiary, which was neither incorporated nor licensed to transact business in Texas, challenged service upon it by filing a motion to dismiss. In response, the plaintiff claimed that a control relationship between the parent company and the subsidiary justified imputing the Texas activities of the parent to the subsidiary. While the parent company owned all of the common stock of the subsidiary, the evidence reflected that they did not have the same corporate offices, that they had no mutual officers or directors, and that each company had its own engineering staff and sources of supply for component parts. Finding that the plaintiff had failed to establish the prima facie existence of a control relationship, the federal district court held that the Texas activities of the parent could not be imputed to the subsidiary for jurisdictional purposes and dismissed the subsidiary from the action.

An additional point of interest in Newgent was the court's treatment of the plaintiff's contention that the subsidiary corporation had waived its jurisdictional defense when an unauthorized answer was filed on its behalf. Service was initially attempted by delivery of a single citation to the parent company's registered agent in Texas. The attorneys for the parent, upon the instructions of its insurer, filed an answer on behalf of both corporations. The subsidiary company, which had not authorized the submission of an answer on its behalf, did not learn of the suit until more than a year after the answer was filed. Upon discovering the mistake, the subsidiary moved to withdraw the answer and attempted to assert its jurisdictional defense. Since the subsidiary was a separate corporate entity and the answer was filed without its knowledge or consent, the court concluded that the answer did not operate as a waiver of its jurisdictional defense.18

Demonstrating yet another application of the Texas long-arm statute, Diversified Resources Corp. v. Geodynamics Oil and Gas, Inc.19 was the first case to apply article 2031b to a suit for the enforcement of a settlement agreement terminating earlier litigation between the parties. The plaintiff sued a nonresident defendant in state court to recover on an agreement and a promissory note given in connection with the settlement of an earlier action between the parties in a federal district court in Texas. Sustaining service on the defendant under article 2031b, the court concluded:

[T]he defendant by executing the note, which clearly reflected the

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18. Id. at 39.
19. 558 S.W.2d 97 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).
payments were due in the State of Texas, and by executing the agreement which settled the lawsuit on file in the Southern District of Texas wherein the settlement was to be performed in the State of Texas, not only purposefully conducted business in the State of Texas but it also contracted to perform its obligations within the State of Texas, thus invoking the benefits and protections of this State's law.\[20\]

II. Special Appearance

Rule 120a, which governs special appearances to challenge personal jurisdiction in the state court, requires that such an appearance “shall be made by sworn motion” filed prior to any other pleading or motion.\[21\] As originally adopted, rule 120a contained no provision allowing an amendment of the special appearance motion to correct a deficiency;\[22\] moreover, the filing of an unsworn motion constituted a general appearance, subjecting the movant to the jurisdiction of the court for all purposes.\[23\] When a special appearance motion is deficient in some respect, rule 120a now permits amendment of the motion in order to cure the defect.\[24\] Despite the plaintiff's contentions that an unsworn special appearance motion cannot be amended under rule 120a to add a verification and that submission of the unsworn motion constituted a general appearance, the court in "Dennett v. First Continental Investment Corp."\[25\] held that rule 120a permits an amendment to verify the motion.\[26\] The court also concluded that the amendment could even be made after the special appearance hearing, since the crucial focus of the rule was on "the allowance of amendment, and the timing of the amendment [was] not determinative."\[27\]

Rule 120a also has been a source of uncertainty for a party obliged to establish his position on jurisdiction at a special appearance hearing. Due to the rule's failure to specify the type of proof that may be received at such a hearing, the use of affidavits for this purpose has always been in doubt. Adhering to a strict approach, the court in "Main Bank & Trust v. Nye"\[28\] condemned the use of affidavits for this purpose and ruled them inadmissible as evidence at special appearance hearings.\[29\]

20. Id. at 99.
22. See TEX. R. CIV. P. 120a (1967).
26. 559 S.W.2d at 385; cf. Duncan v. Denton County, 133 S.W.2d 197 (Tex. Civ. App.—Fort Worth 1939, writ dism'd) (amendment of unsworn controverting affidavit to add verification permitted).
27. 559 S.W.2d at 386 (emphasis in original); cf. Hoffer Oil Co. v. Brian, 38 S.W.2d 596 (Tex. Civ. App.—Eastland 1931, no writ) (amendment of controverting affidavit permitted on date of venue hearing).
29. Id. at 223. In contrast, when an objection to personal jurisdiction is asserted in federal court, affidavits represent a proper method of proof. E.g., Edwards v. Associated
III. SERVICE OF PROCESS

The recent court of civil appeals decision in *Curry Motor Freight, Inc. v. Ralston Purina Co.*\(^{30}\) suggests that courts will consider service of process defective unless the officer's return of citation specifies the manner in which the defendant was served. Finding that a return that stated citation had been executed upon the defendant corporation "by serving" its vice-president was conclusory, the court invalidated service of process and set aside a default judgment based thereon.\(^{31}\)

In *Sheshunoff & Co. v. Scholl*\(^{32}\) the corporation against whom a default judgment had been taken contended that the record failed to establish the agency of the person to whom process was delivered. Overruling this argument, the court held:

When the petition alleges and the citation states the name of the corporation and its registered agent and the return shows service on the defendant through the named individual, no extrinsic evidence of the agent's authority is required unless the fact of agency or authority be put in issue by an affidavit of the party served or a motion by the party to quash.\(^{33}\)

IV. VENUE

*Berton Land Development Corp. v. Ryan Mortgage Investors,*\(^{34}\) a recent decision of the Texas Supreme Court, indicates that affirmative defenses, which are in the nature of confession and avoidance, are not available in a venue contest. In *Berton* the plaintiffs sought to enjoin foreclosure of a deed of trust held by defendants, and affirmatively sought to recover damages for fraud and usury. The defendant filed a plea of privilege to be sued in its county of residence, and subject thereto, asserted in an amended answer the affirmative defense of res judicata. Although the plaintiffs filed a controverting affidavit that specified several exceptions under article 1995,\(^{35}\) they did not respond to the defendant's affirmative defense until filing a trial amendment at the time of the venue hearing.

The trial court, at a hearing on both venue and injunctive relief, overruled the plea of privilege and granted plaintiffs the temporary injunction.

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\(^{30}\) Press, 512 F.2d 258, 262 n.8 (5th Cir. 1975) ("[c]onsideration of affidavits . . . are appropriate means for resolving jurisdictional disputes"); O'Hare Int'l Bank v. Hampton, 437 F.2d 1173, 1176 (7th Cir. 1971) ("when considering a challenge to its jurisdiction, a court may receive and weigh affidavits").

\(^{31}\) Id. at 106-07; accord, Continental Ins. Co. v. Miliken, 64 Tex. 46, 47-48 (1885); Peoples Funeral Serv., Inc. v. Mallard, 337 S.W.2d 476 (Tex. Civ. App.-San Antonio 1960, writ ref'd).

\(^{32}\) 560 S.W.2d 113 (Tex. Civ. App.—Houston [1st Dist.], rev'd on other grounds, 564 S.W.2d 699 (Tex. 1977)).

\(^{33}\) 560 S.W.2d at 116.

\(^{34}\) 563 S.W.2d 811 (Tex. 1978) (per curiam).

On appeal, the Beaumont court of civil appeals reversed and rendered, holding that until set aside by a court of competent jurisdiction, the plea of res judicata conclusively established the nonexistence of the plaintiff's case. The court stated that the plaintiff's response to the defendant's affirmative defense, because not contained within the controverting affidavit, could not be considered at the venue hearing. Since the controverting affidavit failed to include facts necessary to have sustained venue in the county of suit, the court concluded that the plea of privilege should not have been overruled and, therefore, transferred the case to the defendant's county of residence. The Texas Supreme Court, observing that "affirmative defenses go to the merits of an action and not to the interlocutory matter of venue," held that "the affirmative defense of res adjudicata is not subject to consideration in a hearing on a Plea of Privilege." Thus, the cause was remanded for determination of whether the plea of privilege could properly have been overruled under the exceptions averred by the plaintiff.

The venue treatment of national banks received substantial attention during the survey period. The federal statute that governs the venue of a suit against a national banking association provides that "actions and proceedings against any association . . . may be had . . . in any State . . . court in the county or city in which said association is located." Generally, the statute has been interpreted to require that a suit against a national bank be brought in the county of its domicile. According to an early case, however, "local" actions are excluded from the application of the statute. Focusing on this exception, the court in *Peoples National Bank v. Crane* held that an action against a national bank for damages to mineral property and to quiet title to mineral property was "local" in nature and, therefore, exempted from the federal statute. In addition, the court in *Security National Bank v. Washington Loan & Finance Corp.* suggested that a claim against a national bank to determine the ownership of a certificate of deposit, being an action in rem or concerning a particular res, would be "local" to the county in which the certificate is located or held. In accord with earlier cases, *Robertson v. Union Planters National* Bank*.

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37. Id. at 364.
38. 563 S.W.2d at 812; accord, General Motors Acceptance Corp. v. Howard, 487 S.W.2d 708 (Tex. 1972).
43. Id. at 333-34. Compare Houston Nat’l Bank v. Farris, 549 S.W.2d 420 (Tex. Civ. App.—Waco 1977, writ dism’d) (action for improper drainage of mineral property is "local" in nature), with South Padre Dev. Co. v. Texas Commerce Bank Nat'l Ass'n, 538 S.W.2d 475 (Tex. Civ. App.—Corpus Christi 1976, no writ) (action seeking recovery for usury in connection with loan and an injunction restraining sale of realty under deed of trust securing the loan is "transitory" in nature).
44. 570 S.W.2d 40, 44 (Tex. Civ. App.—Dallas 1978, no writ).
45. Rivera v. Austin Nat’l Bank, 547 S.W.2d 735 (Tex. Civ. App.—Corpus Christi 1977,
Bank held that in a suit against a national bank for wrongful repossession of an automobile, the bank's conduct in the county of suit did not constitute a waiver of its federal venue right.

Subdivision 31 of article 1995, which governs venue in products liability cases, was added in 1973 to authorize venue in specified counties in "[s]uits for breach of warranty by a manufacturer of consumer goods." In Hall v. Ford Motor Co., a case construing this subdivision, the Corpus Christi court of civil appeals concluded that in establishing venue of a claim for breach of warranty by a manufacturer of consumer goods, a plaintiff need not prove his cause of action at the venue hearing. A liberal interpretation of subdivision 31 was enunciated by the same court in Trucker's Equipment, Inc. v. Sandoval. "A manufacturer . . . within the meaning of subdivision 31," held the court, "includes an entity which assembles articles or fabrics that someone else has made and by reason of the assembly produces a useful article." Sandoval is also instructive for its interpretation of the term "consumer goods." The allegedly defective product involved in the action was a hydraulic hose and coupling assembly, which was a component of a cotton shredder that was used with a tractor. Relying on a recent decision that held a tractor used for agricultural purposes to be included within the meaning of "consumer goods" in subdivision 31, the court held that a component of a product, for purposes of subdivision 31, assumes the nature of the product. Since the hydraulic hose and the coupling were component parts of the cotton shredder and the shredder was used with a tractor that was within the category of goods used for agricultural purposes, the court could see "no sound reason for differentiating . . . [such] component parts from the entire product in question."

Prior to 1977 the venue of an action under the Texas Deceptive Trade Practices and Consumer Protection Act was governed by former section 17.56, which provided that "[a]n action brought under" the Act may be commenced in the county in which the person against whom the suit is

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46. 561 S.W.2d 901 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).
50. Id. at 522. The Corpus Christi court of civil appeals, during an earlier survey period, concluded that a seller of a chair which collapsed and resulted in personal injuries to the plaintiff was not a "manufacturer" within the meaning of the provision. White Stores, Inc. v. Fielding, 533 S.W.2d 431 (Tex. Civ. App.—Corpus Christi 1976, no writ).
52. 569 S.W.2d at 523.
53. Id.
brought resides, has his principal place of business, or is doing business. Several earlier cases construing that section 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. Apparently dissatisfied with this construction, the legislature amended section 17.56, effective May 23, 1977, to provide that "[a]n action brought which alleges a claim to relief" under the Act may be commenced in the locations previously specified. It remains to be seen whether the amendment will relieve a plaintiff asserting a claim under the Act from having to prove a cause of action in order to establish venue. Hanssard v. Ledbetter, the only case during the survey period that reviewed the amendment to section 17.56, did not address the issue. Noting that the suit before it was instituted prior to the effective date of the amendment, the court acknowledged the rule that venue of an action is controlled by the law in effect at the time of its filing and held that venue of the suit was governed by former section 17.56. In so ruling the court adhered to the previous construction of the provision.

A case worthy of attention by the trust practitioner is Aleman v. Laborers National Pension Fund. Article 7425b—24B, which specifies the situs of suits involving a trust, provides that "[w]here there are two or more trustees, then the venue shall be in the county where the principal office of the trust is maintained." In this suit brought against a pension plan trust, which was created under a federal statute and had ten trustees, the court concluded that, regardless of the nature of the trust, venue was controlled by article 7425b—24(B); thus, the action should be transferred to the county where the principal office of the trust was maintained.

The attorney representing a general partner of a limited partnership and desiring to preserve his client's venue rights should take note of Stroud's Creek Homeowners' Association v. Brown. The plaintiff brought suit to recover damages against a limited partnership for failure to complete certain improvements in a real estate subdivision located in the county of suit. Service was effected upon two individuals who were the general partners of the defendant. After the partnership filed its answer, the plaintiff amended its petition, formally naming the two general partners as individual defendants. In an attempt to obtain a transfer of the claims asserted against them individually, the two general partners filed pleas of privilege seeking a transfer of those claims to their respective counties of residence. Observing that article 2033 provides "[c]itation served upon one member

58. Id. at 36-37.
60. TEX. REV. CIV. STAT. ANN. art. 7425b—24B (Vernon 1960).
of a partnership or firm shall be sufficient to authorize a judgment against the firm and the partners actually served,” the court concluded that “the two general partners... were properly before the court from the time that the original answer was filed” and “[t]he filing of the answer resulted in a waiver of any venue complaint.”

The venue treatment of ancillary claims 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 named defendants in the primary suit shall be determined in the primary suit,” has been construed to be a mandatory venue provision requiring a crossclaim for contribution between defendants named in the primary suit to be tried in the county where the court hearing such suit is situated. When the claim for contribution was asserted by a third-party action against a party not named by the plaintiff in the primary suit, however, the court in *Chaney v. Coleman Co.* found the venue requirements of the statute to be inapplicable, noting that section 2(g) controls only the venue of claims between named defendants in the primary suit.

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 properly joined in a single action against the same defendant can maintain venue upon all of the claims in a county where venue is proper as to one of the claims. Earlier cases focusing on the relative size of the claims suggested that the rule does not apply when the cause of action upon which venue is predicated is merely incidental to the main cause of action. Adhering to the more progressive view, the court in *Lindsey v. Security Savings Association* concluded that “[i]f venue as to one cause of action is proper in the county in which suit was brought, then all properly joined causes of action against the defendant should be maintained in that county to avoid a multiplicity of suits, regardless of the relative size of recovery sought in the various causes.

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63. 567 S.W.2d at 250.
of action." 72

Sanchez v. Lewis Refrigeration Co. 73 warns defendants asserting venue rights that the copy of the plea of privilege served on the plaintiff should show that it has been filed. Holding that "the time for filing a controverting plea does not begin to run until the plaintiff receives notification that the plea of privilege has been filed," 74 the court excused a twenty-two day delay in the filing of a controverting plea due to defendant's service of an unfiled plea of privilege. "To hold otherwise," the court reasoned, "would place an unreasonable and onerous burden on the plaintiff to make continuous inquiry of the court as to whether the plea of privilege had, in fact, been filed." 75

V. Pleadings

Rule 18576 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 specifically why the account is not just and true. Furthermore, "[w]hen the opposite party fails to file such affidavit, he shall not be permitted to deny the claim." 77 In a situation in which the defendant had not included a sworn denial in its answer, the Texas Supreme Court in Airborne Freight Corp. v. CRB Marketing, Inc. 78 confronted the issue of whether the plaintiff must formally introduce evidence of the account at the trial. Relying upon rule 185, the court concluded that "[s]ince the defendant failed to file a sworn denial of the account, no further evidence was required," and "[t]he sworn account therefore constituted prima facie evidence of the debt, without the necessity of formally introducing the account into evidence." 79

It should be noted that in Garza v. Allied Finance Co. 80 a petition containing a prayer for a specific money judgment and general relief was held to be insufficient to support a judgment decreeing a judicial foreclosure of a security interest. Citing rule 301 of the Texas Rules of Civil Procedure, the court held that judicial foreclosure was a separate remedy from a personal judgment against the debtor; thus, it must be specifically requested.

VI. Limitations

Article 5539e 81 extends the limitation period an additional thirty days

72. Id. at 571.
74. Id. at 411 (emphasis added).
75. Id.
76. TEX. R. CIV. P. 185.
77. Id.
78. 566 S.W.2d 573 (Tex. 1978) (per curiam).
79. Id. at 575.
81. TEX. REV. CIV. STAT. ANN. art. 5539e (Vernon Supp. 1978-79). The statute was intended to change the result in cases such as Morris-Buick Co. v. Davis, 127 Tex. 41, 91 S.W.2d 313 (1936). See generally McElhaney, Texas Civil Procedure, Annual Survey of Texas Law, 24 Sw. L.J. 179, 192 (1970).
on a counterclaim or crossclaim that otherwise would have been barred by the applicable statute of limitation between the answer date and the time the plaintiff filed his original petition, provided such claim arises out of the same transaction upon which the plaintiff’s suit is based. A recent decision of the Texas Supreme Court, *Hobbs Trailers v. J.T. Arnett Grain Co.*, adds a new dimension to the interpretation of article 5539c, indicating that realignment of the parties after the filing of suit will not enlarge the application of the statute. The plaintiff, Arnett Grain, filed suit against Hobbs Trailer for breach of warranty at a time when its claims were barred by the applicable statute of limitations. The defendant, Hobbs Trailer, filed an answer raising the defense of limitations and asserted a counterclaim that was not barred. After extensive pleading, however, Arnett Grain was realigned as the defendant and it sought to assert its claim for breach of warranty defensively as a setoff to avoid the plea of limitations. The court acknowledged that,

> [i]f the breach of contract action had been asserted in a counterclaim or crossclaim, Article 5539c would have extended the period for filing the claim for thirty days beyond the date the defendant’s answer was due in the original suit, even though the counterclaim or crossclaim would otherwise be barred by limitation, provided the claim arose out of the same transaction as the plaintiff’s suit. Nevertheless, the court noted that Arnett Grain was the original plaintiff and “only after Hobbs answered as a defendant and the trial court realigned the parties did Arnett Grain become defendant.”

VII. PARTIES

*Breedlove v. United States Department of Air Force*, which arose prior to the recent amendment of the Texas Rules of Civil Procedure concerning garnishment, indicates that the absence of notice to or joinder of the debtor in a prejudgment garnishment proceeding constitutes the omission of an indispensable party and affects the power of the trial court to proceed in the matter. Given the fourteenth amendment due process requirements in the area of creditors’ prejudgment remedies, the court held that “the

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82. 560 S.W.2d 85 (Tex. 1978).
83. Id. at 88.
84. Id.
85. Id. at 89.
86. 569 S.W.2d 582 (Tex. Civ. App.—Tyler 1978, no writ).
absence of the alleged debtor from the garnishment case because of lack of notice to him, resulted in absence of an indispensable party and presented fundamental error" and "[j]urisdiction over [an] indispensable party to suit is as essential to [a] court's right and power to proceed to judgment as its jurisdiction of subject matter."89 On the basis of this omission the court set aside a default judgment entered in the proceeding against the garnishee. Although Texas Rule of Civil Procedure 663a90 was recently enacted to require notice to or joinder of the debtor in such a situation,91 the foundation of this requirement remains constitutional in nature and Breedlove should therefore control a situation arising under the new rule when there has been noncompliance.

VIII. DISCOVERY

The judicial treatment of attorney-client communications was recently discussed by the Texas Supreme Court in West v. Solito.92 In a suit to set aside and cancel certain deeds of mineral interests allegedly made by the plaintiff while she was incompetent, the defendants, through the use of subpoenas duces tecum, sought to depose and obtain various documents from the attorneys who represented the plaintiff at the time in question. Asserting her attorney-client privilege with respect to any information obtained by the attorneys during the period in which they represented her, the plaintiff filed motions for protective orders pursuant to rule 186b.93 At the conclusion of a hearing on the motions and without examining the materials in question, the trial court ordered (1) that the attorney-witnesses should testify as to all matters about which they had knowledge and that any objections based upon the attorney-client privilege were not waived, but were preserved and could be urged at the time of trial and should be determined by the trial court either on motion in limine or upon the tender of such testimony as evidence, and (2) that the attorney-witnesses should produce the records requested without their being subject to inspection by anyone, but should any party so desire he may have the records marked as an Exhibit and made a part of the deposition and in such event such records, without having been inspected or read by any party or any attorney, shall be delivered into the custody of the Court Reporter and shall be sealed by the Court Reporter and delivered into the custody of the Clerk of this Court, subject to the further orders of this Court.94

On appeal, the supreme court concluded that the order of the trial court was too broad with respect to both the deposition testimony and the sub-

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89. 569 S.W.2d at 583-84.
92. 563 S.W.2d 240 (Tex. 1978).
93. TEX. R. Civ. P. 186b.
94. 563 S.W.2d at 243.
poenaed documents. With regard to that portion of the order dealing with the deposition testimony, the court stated:

[I]t requires the attorneys to answer all of the deposition questions posed to them, regardless of any objections based on the attorney-client privilege, thereby causing disclosure of matters that might otherwise be protected by the privilege. A judicial determination of what matters, if any, are privileged in this case comes only after the matters have already been disclosed. A motion in limine or objection to the testimony at the time it is offered as evidence is totally inadequate to preserve the privilege, for once the matter has been disclosed, it cannot be retracted or otherwise protected.95

Further, with respect to the portion of the order requiring surrender of the subpoenaed documents, the court held as follows:

[W]e think that an attorney should not be required to produce documents that he considers to be within the attorney-client privilege until after a trial court has determined whether or not they are privileged. Moreover, the post-production method of protection by making the produced documents subject to the further orders of the court is insufficient to preserve the confidentiality of documents that might be privileged. There is nothing in the order which limits the court's power to release all or part of the produced documents at a later date without first making a determination of what documents are privileged.96

In making these determinations, the court directed the trial court to pursue other alternatives. Relying upon rule 215a,97 the court suggested that the attorney-deponents refuse to answer any questions that would violate the privilege; after completing the deposition as to all other matters, the examining party could apply to the trial court for an order to compel answer to the contested questions, at which time the trial court could determine whether the matter sought to be discovered was within the privilege. Furthermore, to preserve the privilege as to the documents sought, the court concluded that the trial court should examine them to determine which of the items, if any, were privileged prior to the production of any such documents.

Rule 168, which governs interrogatory practice, provides that “[a] party may be required in his answers to identify each person whom he expects to call as an expert witness at the trial and to state the subject matter concerning which the expert is expected to testify.”98 A Houston court of civil appeals found that an interrogatory requesting the defendant to “specify the names of any and all witnesses that it would call upon to testify at the trial” was too general to support the exclusion at trial of the testimony of an expert whose name was not supplied in response.99 The court held that “[s]ince Rule 168 . . . contemplates that a party serving interrogatories re-

95. Id. at 245.
96. Id. at 246.
97. TEX. R. CIV. P. 215a.
98. Id. 168.
quire that the other party identify persons he expects to call as an expert witness, he must specifically request the names of such expert witnesses." 100

IX. SUMMARY JUDGMENT

Rule 166-A, 101 which governs summary judgment practice, stipulates that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." 102 Focusing on the requirement of a "sworn copy," the Texas Supreme Court in *Life Insurance Co. v. Gar-Dal, Inc.* 103 resolved the question of what constitutes sufficient documentary evidence for summary judgment purposes. The court considered an affidavit that stated that an attached photocopy of an instrument was "a true and correct copy" of the original, and held that the photocopy was properly identified and constituted a "sworn copy" within the meaning of rule 166-A. 104 Furthermore, the court observed, the contention that the instrument was not properly sworn or authenticated was directed to a defect of form, 105 and such a defect should be deemed waived if not pointed out to the trial court before summary judgment was rendered. 106 Although the situation in *Gar-Dal* arose under former rule 166-A, the court's classification of a defect in the authentication of an instrument as being one of form would appear equally applicable to practice under present rule 166-A.

Despite the rule 166-A requirement that "[t]he motion for summary judgment shall state the specific grounds therefor," 107 the court in *Jones v. McSpedden*, 108 construing the identical provision under former rule 166-A, 109 concluded that the failure to specify grounds in such a motion was not in itself grounds for reversal. 110 "If the opposing party files an exception to the motion stating that failure to specify the ground for sum-

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100. *Id.* at 537-38 (emphasis in original).
101. TEX. R. CIV. P. 166-A.
102. *Id.* 166-A(e).
103. 570 S.W.2d 378 (Tex. 1978). Although *Gar-Dal* considered a situation arising under former rule 166-A, TEX. R. CIV. P. 166-A (Vernon 1976), the provision concerning sworn copies of instruments was carried forward to present rule 166-A.
105. 570 S.W.2d at 380-81.
106. *Id.*; see *Jones v. McSpedden*, 560 S.W.2d 177, 179 (Tex. Civ. App.—Dallas 1977, no writ).
107. TEX. R. CIV. P. 166-A(e).
110. 560 S.W.2d at 179.
mary judgment leaves him without adequate information for opposing the motion, and this exception is overruled,” stated the court, “then he might have a valid complaint on appeal.”

Rule 166-A further provides 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.” In a suit on a note upon which a summary judgment had been granted, the supreme court recently held that a statement in an opposing affidavit that “all offsets and payments had not been credited to the note” was conclusory and therefore insufficient to raise an issue of fact. Similarly, in an attempt to support a defense of lack of consideration in another suit involving a note, an assertion in an opposing affidavit that the claimants “knew the [certain] interests and stock therein mentioned were of no value whatsoever and worthless” was held to state an opinion about a person’s state of mind and insufficient to raise any genuine issue of material fact on the point.

X. MOTION FOR DIRECTED VERDICT

The most significant development during the survey period concerning the assertion of a motion for directed verdict was Holloway v. Har-Con Engineering Co. In Holloway the plaintiffs brought suit against two sets of defendants to recover damages to their home resulting from a fire caused by either a water heater or a furnace. The primary claims, aimed at the manufacturer and installer of the heater, alleged that the fire was attributable to a defective heater and the improper method used to install it. Alternatively, the plaintiffs alleged that some act or omission by the manufacturer and installer of the furnace caused the damage. At the conclusion of the plaintiffs’ case in chief the trial court granted motions for directed verdicts in favor of the manufacturer and installer of the furnace. Challenging the propriety of this action on appeal, the plaintiffs conceded that the lack of evidence at the time the motions were asserted supported the trial court’s ruling. The plaintiffs, however, argued that the motions were premature because all of the defendants were claimed to be jointly and severally liable; thus, evidence against the manufacturer and installer of the furnace might have been adduced during the presentation of the other defendants’ cases. Observing that the point was one of the first impression in Texas, the court affirmed the action of the trial court, holding that “appellate review of directed verdicts is limited to a consideration of the evidence adduced at the time the motion was granted, and does not involve review of all the evidence in the case.”

111. Id.
112. TEX. R. CIV. P. 166-A(e).
115. 563 S.W.2d 695 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref’d n.r.e.).
116. Id. at 697; accord, Gibson v. Newhouse, 402 S.W.2d 324 (Mo. 1966); cf. Pope v.
XI. Special Issue Submission

Abolishing the former requirement that special issues be submitted distinctly and separately, it 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 question is general or includes a combination of elements or issues.” Scott v. Atchison, Topeka & Santa Fe Railway, a Texas Supreme Court decision reviewed during the previous survey period, has produced significant controversy regarding the submission of generalized special issues. A motion for rehearing filed in the case precipitated a further opinion during this survey period and the rendition of additional guidelines in the area. The trial court 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 that 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 that 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.”

Clarifying its original holding, the court, in an opinion on the motion for rehearing, reiterated that “[i]f there is a variance between the pleadings and the proof . . . , upon proper request, the trial court should limit a broad issue to those acts or omissions which are included within the pleadings and supported by some evidence,” but cautioned that “this does not

Clary, 161 S.W.2d 828, 832 (Tex. Civ. App.—Fort Worth 1942, writ ref’d w.o.m.) (subsequent finding of jury cannot be used to challenge directed verdict).

121. See 572 S.W.2d at 281-82.
122. Id. at 276 n.2.
123. Id. at 277. 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 Muckleroy contained some evidence in support of all of the alleged acts of negligence. 572 S.W.2d at 276.
124. 572 S.W.2d at 278.
125. Id. at 277. 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 279.
require separate questions as to each of such acts or omissions." According to the court, the limitation might be accomplished "by including in a single issue all of the alleged negligent acts or omissions which are raised by the pleadings and evidence, as: 'was the defendant negligent in —— or —— or ——?" or "by submitting a broad negligence inquiry and following it with a complementary instruction which would limit the jury to consideration of the specified acts or omissions raised by the pleadings and the evidence" or by "the checklist form."127

In Cooper v. Boyar128 the Waco court of civil appeals approved the submission of the elements of causation and existence of injury in a single issue inquiring whether the assault on the plaintiff "was the proximate cause of the injury, if any," suffered by him.129 Similarly, in Stoner v. Hudgins130 the Fort Worth court of civil appeals combined two elements when it endorsed the submission of a penal statute violation in an intersectional collision case in an issue inquiring whether the defendant "entered the intersection contrary to law" accompanied by an instruction specifying the requirements of applicable law.131

Under former practice the trial judge was required to frame his charge so as to "not therein comment on the weight of the evidence."132 This phrase was deleted by the 1973 amendments to the Texas Rules of Civil Procedure,133 and the trial judge is now merely prohibited from commenting "directly" on the weight of the evidence.134 The effect of this change was recently considered by the supreme court in McDonald Transit, Inc. v. Moore,135 a suit against the defendant bus company to recover for personal injuries the plaintiff suffered while a passenger on one of its buses. The defense of sudden emergency was raised by the pleadings and evidence, and the trial court instructed the jury regarding the defense as follows:

*When a person is confronted by an emergency arising suddenly and unexpectedly, not proximately caused by any negligence on his part, and which to a reasonable person requires immediate action without time for deliberation, his conduct in such an emergency is not negli-

**Id.** at 282.

126. *Id.* at 282.

127. *Id.*

128. 567 S.W.2d 555 (Tex. Civ. App.—Waco 1978, writ ref’d n.r.e.).


131. *Id.* at 902. The complementary instruction advised the jury that: The law requires a driver on University Drive, facing a steady red signal at Alice Street, to stop before entering the intersection and to remain standing until a signal light indication to proceed is shown, except that after so stopping, he may turn right, after standing until it would appear to a person using ordinary care that the intersection may be entered safely and after yielding the right-of-way to other vehicles.

*Id.*


134. TEX. R. CIV. P. 277.

135. 565 S.W.2d 43 (Tex. 1978).
gence or a failure to use a high degree of care, if, after such emergency arises, he acts as a very cautious, competent, and prudent person would have acted under the same or similar circumstances.136 Ruling that the phraseology of the instruction, prefaced by the word “when,” conveyed to the jury the trial court’s opinion that such an emergency existed, the court of civil appeals concluded that the instruction constituted a comment on the weight of the evidence.137 Disagreeing, the supreme court specifically approved the definition of sudden emergency, concluding that “[t]he employment of the word ‘when’ in the instruction does not indicate a statement by the judge as to the existence of a sudden emergency” because “[i]n common parlance and ordinary usage the word ‘when’ is frequently employed as an equivalent to the word ‘if.’”138

Although rule 277 allows the trial court to “submit an issue disjunctively where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exist,”139 Warren v. Denison140 held that the two conditions inquired about must be mutually exclusive. In Warren an issue was submitted to the jury, inquiring both whether the dwelling in question was not built by the contractor (1) in a workmanlike manner “and/or” of good materials and (2) in accordance with the applicable plans “and/or” the construction contract between the parties, followed by two possible answers, “It was” and “It was not.”141 Noting that the form of the submission foreclosed identification of the condition found by the jury to have existed, the Amarillo court of civil appeals, following an earlier case,142 concluded that “the choices are not mutually exclusive” and “the rule only authorizes disjunctive submission,” not both “conjunctive and disjunctive.”143

General Motors Corp. v. Turner,144 a divided opinion of the Beaumont court of civil appeals, may be the source of “tax relief” for a defendant facing the prospect of a jury award against him for damages in a personal injury case. The trial court in Turner refused a request by the defendants that the jury be given an instruction indicating that any award of damages was not subject to federal taxation. From an adverse verdict, the defendants appealed. Following an earlier decision of the supreme court,145 a majority of the court of civil appeals held that such a submission was improper because it would introduce a wholly collateral matter into the damage issue.146 The dissent advocated a more realistic approach in this era of

136. Id. at 44 (emphasis added).
138. 565 S.W.2d at 45.
141. Id. at 302-03.
143. 563 S.W.2d at 304-05 (emphasis in original).
146. 567 S.W.2d at 822. But see Burlington N., Inc. v. Boxberger, 529 F.2d 284, 295-97 (9th Cir. 1975).
increasingly large verdicts, arguing in favor of the requested submission in order to dispel any misapprehension and to avoid any confusion that might affect jurors attempting to award damages.\textsuperscript{147} The question may be re-examined in the near future as the supreme court has granted an application for writ of error.\textsuperscript{148}

\textbf{XII. JURY PRACTICE}

\textit{Mendoza v. Varon,}\textsuperscript{149} a case involving personal injuries caused by alleged malpractice by the defendant physician in treating the plaintiff’s minor daughter, presented a question of first impression in Texas. The trial court excluded evidence that the defendant and one of his expert witnesses, also a physician, were insured by the same insurance company. On appeal the plaintiff argued that this exclusion violated the rule that facts showing interest on the part of a witness are admissible even though they disclose that the defendant may be protected by insurance.\textsuperscript{150} Conceding “that a large judgment against any doctor will probably affect the insurance rates of other physicians,” the court of civil appeals nevertheless concluded that “this interest is remote, and any proof of bias based upon that interest is outweighed by the prejudice caused by informing the jury of the defendant’s insurance protection.”\textsuperscript{151}

The propriety of a final argument in a worker’s compensation case was considered by the court in \textit{Reese v. Standard Fire Insurance Co.}\textsuperscript{152} Counsel for the defendant had argued that the plaintiff’s attorney had concocted a “sham or plot” to make his client’s claim more valuable, requiring the plaintiff to contact “a thousand doctors” before he found one who would cooperate in the “combination” by providing unnecessary treatment and inflating the plaintiff’s medical bills.\textsuperscript{153} Observing that no evidence adduced at the trial supported any of these assertions, the court concluded that the argument was prejudicial and probably caused the rendition of an improper judgment. Since the argument was also found to be incurable the court further held that the plaintiff did not waive the error by failing to object to it promptly and to request an appropriate jury instruction on the point.\textsuperscript{154}

The juror lacking in mathematical acumen will be glad to know that one case during the survey period concluded that the use of an electronic calculator to determine damages during jury deliberations does not constitute

\begin{itemize}
  \item \textsuperscript{147} 567 S.W.2d at 822-23.
  \item \textsuperscript{149} 563 S.W.2d 646 (Tex. Civ. App.—Dallas 1978, writ ref’d n.r.e.).
  \item \textsuperscript{151} 563 S.W.2d at 649.
  \item \textsuperscript{152} 567 S.W.2d 861 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ granted).
  \item \textsuperscript{153} \textit{Id.} at 862.
  \item \textsuperscript{154} \textit{Id.} at 863.
\end{itemize}
In order to keep pace with rising interest rates, the Texas Legislature amended article 5069 in 1975 to provide that “[a]ll judgments of the courts of this State shall bear interest at the rate of nine per cent per annum from and after the date of the judgment.” Focusing on amended article 5069, the Texas Supreme Court was recently faced with the question whether the amendment applies to a judgment rendered before the effective date of the change so as to authorize the accrual of interest at the new rate from the date of the amendment. Answering in the negative, the court concluded that the increased rate of interest should be applied only to judgments entered after the effective date of the amendment.

Rule 306a, which governs the entry of judgments, provides that the time allowed for perfecting an appeal commences when the trial judge signs the judgment. Confronted with a situation in which the date of the signing of a decree was uncertain due to the wording used, the supreme court seized the opportunity to advocate reform in this area. The court cautioned that the word “Entered” employed by many form books, “is synonymous with neither ‘Signed’ nor ‘Rendered,’” admonishing that “[l]aw professors should teach, writers of legal form books should so correct their books, lawyers should so draft documents, and judges should make certain that above the signature on each judgment or order there are the words: ‘Signed this — day of ———, 19—.'”

It is well settled in Texas that a nunc pro tunc order may be entered at any time by the trial court to correct a “clerical error” in an earlier judgment. Since “judicial error” in a judgment is not subject to correction after the expiration of thirty days from the judgment’s entry, Texas courts are frequently called upon to distinguish between judicial and clerical errors. Mathes v. Kelton was one such instance. The plaintiff in...
Mathes brought suit for the return of a diamond ring held by the defendant, and the defendant asserted a crossaction for recovery on a promissory note executed by the plaintiff and for foreclosure on the ring. At the conclusion of a nonjury trial, the trial court orally rendered judgment awarding recovery on the note in favor of the defendant but directing that the ring be returned to the plaintiff. A written judgment consistent with the oral pronouncements was subsequently prepared and signed. More than thirty days later, the trial judge, purporting to correct a clerical error, entered a nunc pro tunc judgment awarding the defendant foreclosure upon the ring, observing that he had “always intended” for the defendant to be able to foreclose on the ring. 165 Disapproving this action, the supreme court noted that there was no variance between the ruling rendered orally and the judgment as originally signed despite the later statement by the trial judge. Observing that the judgment nunc pro tunc “materially altered” the substance of the original judgment, the supreme court held that “[t]he change constituted the correction of a judicial error which cannot be validly accomplished by a judgment nunc pro tunc.” 166

XIV. MOTION FOR NEW TRIAL

In Scheffer v. Chron 167 the Beaumont court of civil appeals reiterated that the negligence, inadvertence, or mistake of trial counsel is attributable to his client and the resulting failure of counsel to defend the case or properly develop the available evidence does not constitute a sufficient basis upon which a motion for new trial can be granted.

XV. APPELLATE PROCEDURE

As a result of amendments to the Texas Rules of Civil Procedure, which became effective January 1, 1976, 168 an appeal is now perfected by filing a bond or cash deposit securing costs on appeal within thirty days after rendition of the judgment or order overruling a motion for new trial. 169 The transcript and statement of facts still must be filed within sixty days from the rendition of judgment or order overruling motion for new trial, 170 unless the time is extended pursuant to rule 21c. 171 Rule 21c, which was enacted to liberalize the requirements for obtaining extensions of time on

165. Id. at 877.
166. Id. at 878. Nevertheless, since a timely motion for new trial and amendment thereto was filed by the defendant following the entry of the original judgment, the supreme court concluded that the trial court retained jurisdiction over the matter until thirty days after the amended motion for new trial was overruled and thus had plenary power to reverse, modify, or vacate its judgment at the time the judgment nunc pro tunc was entered. For that reason, the court held that the later judgment was valid. Id.
170. Id. 386.
171. Id. 21c.
appeal,172 provides:

(1) An extension of time may be granted for late filing in a court of civil appeals of a transcript, statement of facts, motion for rehearing, or application to the supreme court for writ of error, if a motion reasonably explaining the need therefor is filed within fifteen (15) days of the last date for filing as prescribed by the applicable rule or rules.173

The "reasonable explanation" requirement of rule 21c, which had been the subject of two divergent views,174 was authoritatively construed by the supreme court in Meshwert v. Meshwert.175 "[R]easonably explaining," according to the court, means "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."176

Demonstrating the liberality of the "reasonably explaining" standard announced in Meshwert, the Beaumont court of civil appeals recently granted a motion under rule 21c when the appellant had waited until the fifty-ninth day of the allotted sixty-day period to request a transcript and statement of facts. The court found an explanation by the appellant's counsel that "the delay was the result of a mistake in his calculations" to be sufficient under the rule.177 Nevertheless, while rule 21c reflects a more liberal attitude toward extending the time for filing a transcript, statement of fact, motion for rehearing, or application for writ of error, Smith v. Dreyer178 demonstrates that the rule does not authorize an extension of the thirty-day period allowed for filing a bond or other deposit securing costs on appeal.179 The court in Smith stated that such an appellate step was jurisdictional and could not be extended for any reason.180

While rule 354181 stipulates that a cost bond in the sum of $500 is sufficient to perfect an appeal, it also provides that "[u]pon motion of either

172. See Figari, supra note 24, at 309-10.
175. 549 S.W.2d 383 (Tex. 1977).
176. Id. at 384.
179. Id. at 359.
party the court may increase or decrease the amount of the bond or deposit required." 182  Focusing on this provision and observing that rule 356 183 requires that the bond be filed within thirty days after rendition of judgment or the overruling of a motion for new trial, the court in Fine v. Page 184 observed that "the appeal is perfected when the appellant files a bond in the amount of $500, regardless of whether it is approved by the District Clerk, unless the trial court, upon motion of either party, fixes a different amount." 185 The court invalidated an order increasing a cost bond that had been entered by the trial court over thirty days after the overruling of the appellant's motion for new trial, holding that "a trial court's action to increase or decrease the amount of the bond required to perfect appeal after the expiration of the thirty day period is of no effect" and that "[a]fter the expiration of the thirty day period, an attack of the sufficiency of the bond can be brought solely in the appellate court." 186

Young v. Hicks 187 is a reminder that reversal on appeal does not necessarily require a new trial of the entire case. The plaintiffs in Young sought an injunction requiring the defendant to remove two fences he had built along his property line that extended to the center of, and interfered with plaintiffs' use of, a certain road. At the conclusion of the trial the jury found that the road had become public and that the defendant had erected the fences in order to harass the plaintiffs; the trial court, therefore, issued an injunction requiring the defendant to move the fences. On appeal the court of civil appeals reversed and remanded on all issues because the injunction failed to establish the specific location of the road. 188 Although agreeing that the injunction failed to meet the applicable requirements of specificity, the supreme court concluded that a general remand of the case was unwarranted. Under rule 434, which governs the disposition by the appellate court if a judgment is reversed on appeal, "if it appears to the court that the error affects a part only of the matter in controversy and that such part is clearly separable without unfairness to the parties, the judgment shall only be reversed and a new trial ordered as to that part affected by such error." 189 Relying upon rule 434, the supreme court ordered a limited remand, holding that "[t]he location issue is separable from the other issues in the case and the parties will not be harmed by limiting the trial on remand to this issue." 190

Texas Rule of Civil Procedure 377, which governs the preparation and filing of the statement of facts on appeal, states that "[i]t shall be unnecessary for the statement of facts to be approved by the trial court or judge

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182. Id. 354(a).
183. Id. 356.
185. Id. at 578.
186. Id. at 579.
187. 559 S.W.2d 343 (Tex. 1977) (per curiam).
190. 559 S.W.2d at 344.
thither when agreed to by the parties," but "[i]f any difference arises as to whether the record truly discloses what occurred in the trial court, . . . the matter shall be submitted to and settled by the trial court or judge thereof and the statement of facts shall be by him made to conform to the truth." In *Texas Hauling Contractors Corp. v. Rose Sales Co.* the court was faced with a motion to strike the statement of facts because it was signed by the trial judge but not by counsel for the parties. Thus, the court was obliged to decide whether rule 377 permits authentication of such statement by the trial judge when the parties have not attempted to agree as to its correctness. Adding to an existing conflict among the decisions of the courts of civil appeals, the court overruled the motion to strike in favor of the more liberal approach. While observing that "[t]he clear intent of Rule 377(d) is to avoid the necessity of asking judges to review statements of fact except in instances where disagreement between the parties needs to be resolved" and "that attorneys should be encouraged to follow this procedure," the court held that "when time or circumstances seems to require the prior approval by the trial judge," there is "no need for enforcing strong sanctions against the appellant just because the parties do not approve the statement of facts prior to filing in the appellate court.""\(^{195}\)

**XVI. MISCELLANEOUS**

Article 2226,\(^{196}\) 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 in which the creditor "should finally obtain judgment."\(^{197}\) Because several cases\(^{198}\) construing former article 2226 had concluded that a debtor could avoid liability for attorney's fees thereunder by paying the amount of the claim after the

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191. TEX. R. CIV. P. 377(d).
195. Id. at 243.
creditor has engaged an attorney and filed suit but prior to the rendition of judgment, the language "should finally obtain judgment" was recently deleted from the statute. Giving the change full effect, the court of civil appeals in *Enriquez v. K & D Development & Construction, Inc.* observed that article 2226 "now provides for recovery of attorney's fees if at the expiration of thirty days after presentment, 'payment for the just amount owing has not been tendered' " and that to " 'finally obtain judgment' is no longer a requirement in the Statute."

In *Transamerican Leasing Co. v. Three Bears, Inc.* the question presented was whether a trial court has the plenary power to vacate a judgment while an amended motion for new trial is pending before the court. In this action the trial court had vacated the original judgment more than thirty days after it was rendered, but within the forty-five days from the time the amended motion for new trial had been filed. Relying on Texas Rule of Civil Procedure 329b, section 5, the Texas Supreme Court stated that the trial court retained plenary power over its judgment until thirty days after the amended motion for new trial is overruled. Thus, the court concluded that since the amended motion for a new trial was still pending, the judgment was timely vacated by the trial court.

In the area of collateral estoppel by judgment, *Olivarez v. Broadway Hardware, Inc.* and *Baker v. Story,* following in the footsteps of an earlier case, concluded that mutuality of parties is no longer required in Texas for application of that doctrine.

200. 567 S.W.2d 40, 42 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).
201. 567 S.W.2d 799 (Tex. 1978).
203. 567 S.W.2d at 800.
204. 564 S.W.2d 195, 200-02 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).