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TEXAS CIVIL PROCEDURE

by

*The Board of Editors**

I. APPELLATE PROCEDURE

PERFECTION of appeal was the subject of several cases in the past year. In *Breeze v. Livingston*¹ the defendant was granted a summary judgment in the trial court, and the plaintiffs filed notice of appeal. When after three months the plaintiffs had neither filed a brief for appeal nor moved for an extension of time for filing, the defendants filed their brief requesting that the court of civil appeals either dismiss the appeal or affirm the judgment of the trial court. The court affirmed the judgment below on the basis of rule 416,² which allows the court to accept the brief of the appellee as a correct presentation of the case when the appellant fails to file a brief.

*Star Corp. v. Wolfe*³ involved the question of whether the appellant corporation was entitled to a reversal of judgment of the trial court in favor of Wolfe because the trial judge was late in filing findings of fact and conclusions of law. The requested findings and conclusions were not filed until ten days before the transcript was due on appeal, and the corporation contended that the thirteen-day delay in filing caused it injury and probable harm because it had no time to request additional findings which would have shown that the judgment was based on a theory of recovery not pleaded by Wolfe. The court was of the opinion that the corporation's contentions were highly speculative, conjectural, and "in the nature of a hypothesis,"⁴ and affirmed the judgment.

The scope of appellate review was at issue in *Sobel v. City of Lacy Lakeview*.⁵ The city obtained a temporary injunction prohibiting operation of Sobel's liquor business because of a city ordinance requiring two toilets in all buildings other than single-family dwellings. On appeal Sobel attacked the injunction on constitutional and other grounds. The court upheld the injunction because the scope of appellate review of temporary injunctions is limited to the question of whether the trial judge's action was a clear abuse of discretion.

The question of what constitutes "good cause" for an extension under rule 5⁶ of the time limits under rule 386⁷ for filing the trial transcript and statement of facts was the subject of two cases. In *Bean v. City of Arlington*⁸ the Fort Worth court of civil appeals held that a motion for extension unsupported by affidavits and alleging only that the appellant's attorney had been ill was insufficient to show good cause. The court, in *Rebkopf v. Texarkana News-*

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¹ 468 S.W.2d 104 (Tex. Civ. App.—El Paso 1971).

² TEX. R. CIV. P. 416.

³ 463 S.W.2d 292 (Tex. Civ. App.—Houston [14th Dist.] 1971).

⁴ *Id.* at 294.

⁵ 465 S.W.2d 794 (Tex. Civ. App.—Waco 1971).

⁶ TEX. R. CIV. P. 5.

⁷ *Id.* 386.

⁸ 464 S.W.2d 208 (Tex. Civ. App.—Fort Worth 1971).

papers, Inc.,⁹ had granted extensions based on the appellant's allegation, unsupported by affidavits from either the district clerk or court reporter, that the court reporter could not prepare the transcript and statement of facts in time for filing within the statutory period. Jurisdiction of the appeal was denied because the court had erroneously granted the motions for extension, which were unverified and, therefore, did not show good cause.

In *Simon v. Brinkman*¹⁰ the losers in the trial court, anticipating an appeal, made a cash deposit of the amount of the judgment against them with the court clerk in lieu of an appeal and supersedeas bond. The clerk gave a certificate evidencing this deposit. The losers then decided to bring the case to the court of civil appeals by writ of error rather than appeal, and the clerk gave a second certificate acknowledging the cash deposit. No new cash deposit was made when the writ of error was filed, but after the appeal was dismissed the cash originally deposited for appeal remained in the hands of the clerk. The second certificate, which was evidently a copy of the first, stated that the deposit was in lieu of an appeal and supersedeas bond, and *not* that it was in lieu of a writ of error bond. The court of civil appeals first took jurisdiction of the writ of error, reversed the judgment of the trial court, and remanded for a new trial;¹¹ however, on rehearing, the court determined that it had no jurisdiction because of the lack of a bond or deposit for the writ of error proceedings and dismissed the writ of error.¹² The Supreme Court of Texas held that the court of civil appeals had jurisdiction of the writ of error. In holding that the original cash deposit was sufficient in lieu of a writ of error bond, the court relied on a statement in *United Ass'n of Journeymen v. Borden*¹³ that rule 430¹⁴ authorizes the amendment of "any sort of instrument which can be said to be a bond."¹⁵ The second certificate issued by the clerk was held to be such an instrument, and the case was remanded to the court of civil appeals for a rehearing on the merits.

II. CONTINUANCE

The appellate courts have continued to allow trial judges wide discretion in granting continuances. The owner and driver of a taxicab were sued by a passenger for personal injuries resulting from a collision involving the taxicab in *Condry v. Mantooth*.¹⁶ The court held that a denial of continuance requested because the owner was in the hospital was not an abuse of discretion since the defendants did not show that the owner's absence prejudiced their rights or that the owner's testimony would have been material. Personal injuries were also the basis of the action in *Linton v. Jones*.¹⁷ The defendants contended that they should have been granted a continuance because they had not received answers to interrogatories directed to the doctors who treated

⁹ 460 S.W.2d 939 (Tex. Civ. App.—Texarkana 1970), *error ref. n.r.e.*

¹⁰ 459 S.W.2d 190 (Tex. 1970).

¹¹ 449 S.W.2d 90 (Tex. Civ. App.—Waco 1970).

¹² *Id.* at 93.

¹³ 160 Tex. 203, 328 S.W.2d 739 (1959).

¹⁴ TEX. R. CIV. P. 430.

¹⁵ 328 S.W.2d at 741.

¹⁶ 460 S.W.2d 513 (Tex. Civ. App.—Houston [1st Dist.] 1970).

¹⁷ 462 S.W.2d 636 (Tex. Civ. App.—Tyler 1971).

the plaintiff, and consequently had not had a chance to direct cross-interrogatories to those doctors. The court held that under rule 192¹⁸ the defendant's failure to file cross-interrogatories before the plaintiff's commission to take the answers of the doctors by interrogatory was issued amounted to a waiver of the right to file cross-interrogatories, and sustained the trial judge's denial of a continuance.

III. JURISDICTION

Two appellate decisions during the survey period involved service of process. In *Franks v. Montandon*¹⁹ a default judgment was entered against the defendant. On appeal he asserted that the judgment was invalid because the substituted service of process pursuant to rule 106²⁰ was inadequate since the trial court failed to consider any oral or written sworn testimony regarding the impracticality of personally serving the defendant. The appellate court stated that since rule 106 is "in derogation of the constitutional mandates of due process,"²¹ it should be strictly construed. The court reversed the default judgment, holding that a trial court may not authorize service under rule 106 "without considering evidence of probative value concerning the impracticality of obtaining service on a party."²² In *Mobile Pipe-Dillingham v. Stark*²³ a default judgment was entered against a foreign corporation. Service of process had been made, but the corporation alleged that the return by the officer executing the citation was inadequate because the return named a different corporation as the one on which service had been made as the defendants' "statutory agent."²⁴ The plaintiff had not named any duly authorized agent of the corporation in his petition. The court reversed the default judgment because there had been no affirmative showing that the corporation named on the return was a duly authorized agent of the defendant foreign corporation.

The jurisdiction of appellate courts was involved in several cases. In *West Flour Mill, Inc. v. Vance*²⁵ the original plaintiff, Vance, held a judgment against the mill and was seeking to execute. The mill, which did not appeal the original judgment, petitioned the appellate court to enjoin the sheriff of McLennan County from executing that judgment pending disposal of its bill of review. The court refused, holding that it had "no jurisdiction to enjoin the Sheriff from levying execution on a judgment that has not been superseded, is not on appeal, and has become final."²⁶ In *M. C. Winters, Inc. v. Cope*²⁷ the appellate court was forced to dismiss an appeal under rule 385²⁸ (relating to interlocutory orders) because the appellant had failed to file his appeal bond

¹⁸ TEX. R. CIV. P. 192.

¹⁹ 465 S.W.2d 800 (Tex. Civ. App.—Austin 1971).

²⁰ TEX. R. CIV. P. 106.

²¹ 465 S.W.2d at 801.

²² *Id.*

²³ 468 S.W.2d 552 (Tex. Civ. App.—Beaumont 1971).

²⁴ Under TEX. BUS. CORP. ACT ANN. art. 8.10 (1956) service may be made on the corporation's appointed agent.

²⁵ 456 S.W.2d 481 (Tex. Civ. App.—Waco 1970).

²⁶ *Id.* at 481-82.

²⁷ 467 S.W.2d 224 (Tex. Civ. App.—Texarkana 1971).

²⁸ TEX. R. CIV. P. 385.

within the twenty days required by rule 385(a). The court recognized the principle that the filing of the appeal bond is jurisdictional.

In *Sikes v. Crescent Finance Corp.*²⁹ the appellant had already perfected his appeal when the trial court granted a motion for a new trial. The appellate court held that the trial court's action was permissible since the new trial was granted within the period during which the trial court has continuing jurisdiction. In this instance, at least, the perfection of an appeal did not divest the trial court of jurisdiction to act. In *Eli Lilly & Co. v. Melton*,³⁰ however, the appellate court held that after the perfection of the appeal the trial court was without jurisdiction to reopen the case and admit additional evidence. The court, thus, refused to apply rule 270,³¹ which allows the trial court to permit introduction of additional evidence "where it clearly appears to be necessary to the due administration of justice."³²

In *Houston Compressed Steel Corp. v. State*³³ the appellate court was asked to apply the doctrine of primary jurisdiction.³⁴ The court refused because the questions for determination by the trial court did not involve "technical and intricate matters of fact." The court held that "[w]here the issue is one inherently judicial in nature, the courts are not ousted from jurisdiction unless the Legislature, by a valid statute, has explicitly granted exclusive jurisdiction to the administrative body."³⁵

In *Kobls v. Kobls*³⁶ a divorced father brought suit in Nueces County against his former wife for a change in custody of their minor child. The former wife then brought a habeas corpus proceeding involving custody against the father in Brazoria County, and that court rendered judgment for the father. The Nueces County court then rendered a summary judgment in favor of the father, regarding the custody question as *res judicata* because of the Brazoria County action. The appellate court reversed, holding that the court in Brazoria County had no jurisdiction because the Nueces County court had active prior jurisdiction³⁷ of the subject matter and parties.

IV. PARTIES

A conflict between rule 39³⁸ and articles 5.22 and 4.04 of the Family Code³⁹

²⁹ 456 S.W.2d 568 (Tex. Civ. App.—Fort Worth 1970).

³⁰ 458 S.W.2d 544 (Tex. Civ. App.—Eastland 1970).

³¹ TEX. R. CIV. P. 270.

³² 458 S.W.2d at 545.

³³ 456 S.W.2d 768 (Tex. Civ. App.—Houston [1st Dist.] 1970).

³⁴ The doctrine of primary jurisdiction is "that the courts cannot or will not determine a controversy involving a question which is within the jurisdiction of an administrative tribunal prior to the decision of that question by the administrative tribunal, where the question demands . . . experience and services of the administrative tribunal to determine technical and intricate matters of fact . . ." *Id.* at 771-72.

³⁵ *Id.* at 772.

³⁶ 461 S.W.2d 455 (Tex. Civ. App.—Corpus Christi 1970).

³⁷ The Texas Supreme Court has stated that when "two actions involving the same subject matter are brought in different courts having co-ordinate jurisdiction, the court which first acquires jurisdiction, its power being adequate to administer full justice to the rights of all concerned, should retain such jurisdiction, undisturbed by the interference of any other court, and dispose of the whole controversy." *Wheeler v. Williams*, 158 Tex. 383, 312 S.W.2d 221 (1958).

³⁸ TEX. R. CIV. P. 39. The rule was amended, effective January 1, 1971, and rewritten to adopt, with minor changes, the provisions of FED. R. CIV. P. 19.

³⁹ TEX. FAM. CODE ANN. tit. 1, arts. 5.22, 4.04 (1971), which were formerly TEX. REV. CIV. STAT. ANN. arts. 4621, 4626 (1960) respectively.

was the subject of *Few v. Charter Oak Fire Insurance Co.*⁴⁰ Mrs. Few, joining her husband pro forma, sued the defendant workmen's compensation insurer for total and permanent incapacity resulting from injuries sustained in the course of her employment. The trial court, naming both Mrs. Few and her husband in the judgment, held in favor of the plaintiffs, but the court of civil appeals reversed on the basis that the husband was an indispensable party who was not joined as required by rule 39.⁴¹ The Texas Supreme Court reversed the court of civil appeals, holding that rule 39 must yield to articles 5.22 and 4.04 of the Family Code, which allow either spouse to sue for personal injuries without joinder of the other spouse.

In *Pan American Petroleum Corp. v. Vines*⁴² a suit for a declaratory judgment to construe the terms of a division order was brought by Vines, who was one of a number of royalty owners who had signed identical division orders regarding gas production. The defendant corporation's plea in abatement, which alleged that the other royalty owners were indispensable parties who had not been joined as required by the Texas Uniform Declaratory Judgment Act⁴³ and rule 39,⁴⁴ was overruled by the trial court. The court of civil appeals held that the other royalty owners were indispensable parties because they would be bound by the construction of the division order, and reversed the judgment of the trial court in favor of Vines.

The question of what parties may be bound by a prior suit on the basis of res judicata was involved in *Benson v. Wanda Petroleum Co.*⁴⁵ One of the defendant corporation's trucks was involved in a collision with an automobile owned by the plaintiff and driven by one Porter. The plaintiff and her deceased husband were on a trip with Porter and his wife, and were in the automobile at the time of the accident. Prior to the instant suit Porter had sued the defendant corporation, and he lost because the jury found that his negligence alone had been the proximate cause of the accident. The trial court, regarding the findings of fact in Porter's suit as res judicata, granted the defendant's motion for summary judgment against Mrs. Benson. The court of civil appeals affirmed, holding that Mrs. Benson was bound because the Bensons and the Porters had been engaged in a joint enterprise as a matter of law, and, therefore, were in privity. The supreme court, however, reversed, adhering to its position that only strict privity will suffice in the absence of an identity of parties. The court indicated that any other holding would deny Mrs. Benson due process.

*Brandt v. Village Homes, Inc.*⁴⁶ involved the general principle that writ-of-error review cannot be had by parties who actually participated in the actual trial of the case.⁴⁷ The defendant's counsel was present and argued the de-

⁴⁰ 463 S.W.2d 424 (Tex. 1971).

⁴¹ At the time of trial, which was before rule 39 was amended (*see note 38 supra*), rule 39 provided that persons having a joint interest shall be made parties. The Texas Supreme Court held that parties required to be joined under rule 39 were indispensable parties in *Petroleum Anchor Equip. Co. v. Tyra*, 406 S.W.2d 891 (Tex. 1966).

⁴² 459 S.W.2d 911 (Tex. Civ. App.—Tyler 1970), *error ref. n.r.e.*

⁴³ TEX. REV. CIV. STAT. ANN. art. 2524-1 (1965).

⁴⁴ TEX. R. CIV. P. 39.

⁴⁵ 468 S.W.2d 361 (Tex. 1971), *rev'g* 460 S.W.2d 453 (Tex. Civ. App.—Houston [14th Dist.] 1970).

⁴⁶ 466 S.W.2d 812 (Tex. Civ. App.—Fort Worth 1971).

⁴⁷ TEX. REV. CIV. STAT. ANN. art. 2249a (1971).

defendant's case at a scheduled hearing on a motion for summary judgment, but the defendants themselves were not present. The court held that the actual trial of the case was at that hearing, that the defendants actually participated in that hearing by counsel, and that, therefore, the defendants were precluded from review by writ of error.

V. PLEADINGS

Several cases during the year involved the general principle that objections to the sufficiency of a pleading cannot be raised for the first time on appeal. In *Great Southwest Life Insurance Co. v. Camp*⁴⁸ the defendant company filed a plea of privilege, and the burden then was placed on the plaintiff to plead and prove that the case came within one of the exceptions to the general venue statute.⁴⁹ Plaintiff filed a controverting plea which was insufficient because it was merely a general denial of the facts alleged in the defendant's plea of privilege. The court held that the controverting plea was, nevertheless, effective because under rule 90⁵⁰ the defendant's failure to take exception to the controverting plea resulted in waiver of any defects in the plea. The same result was reached in *International Security Life Insurance Co. v. Howard*,⁵¹ in which the defendant insurance company contended on appeal that the plaintiff had failed to plead and prove that the osteopathic hospital in which she had been treated was a "legally constituted hospital" under the terms of the insurance policy involved. The court held for the plaintiff because the defendant had not objected to the sufficiency of the pleading at trial. In *Lampman v. First National Bank*⁵² a trial court decision in favor of Lampman had been reversed and remanded for a determination of the amount the bank should recover in attorney's fees. The bank had originally asked for \$500, but on remand it amended its pleadings and requested reasonable attorney's fees. The bank was awarded \$2,150, and Lampman appealed, alleging error because the bank had not asked for a specific amount in its amended pleading. The court rejected the error because Lampman's failure to object to the pleading at trial amounted to a waiver of defects under rule 90.⁵³

In *Triton Insurance Co. v. Garner*⁵⁴ the defendant entered a plea of release. The validity of the plea was not challenged by any of the plaintiff's pleadings, but it was the subject of much dispute at trial. The court held that since the defendant had not objected to plaintiff's pleadings nor to the introduction of evidence concerning the validity of the release, the legal effect was a trial by agreement under rule 67.⁵⁵ Similarly, in *International Security Life Insurance Co. v. Melancon*⁵⁶ the plaintiff sued the defendant company for

⁴⁸ 464 S.W.2d 702 (Tex. Civ. App.—Fort Worth 1971).

⁴⁹ TEX. REV. CIV. STAT. ANN. art. 1995 (1964).

⁵⁰ TEX. R. CIV. P. 90.

⁵¹ 456 S.W.2d 765 (Tex. Civ. App.—Waco 1970), *error ref. n.r.e.*

⁵² 463 S.W.2d 28 (Tex. Civ. App.—Waco 1970), *error ref. n.r.e.*

⁵³ TEX. R. CIV. P. 90.

⁵⁴ 460 S.W.2d 262 (Tex. Civ. App.—Beaumont 1970), *error ref. n.r.e.*

⁵⁵ TEX. R. CIV. P. 67 provides in part that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

⁵⁶ 463 S.W.2d 762 (Tex. Civ. App.—Beaumont 1971), *error ref. n.r.e.*

negligence in the selection of its agent, who apparently misapplied four blank checks signed by the plaintiff. The plaintiff, a widow with little education, obtained a judgment, and on appeal the company asserted that certain evidence regarding the agent's reputation for honesty and trustworthiness was improperly admitted because the issue was not raised by the pleadings. The court held that the company's failure to challenge the pleadings by special exception amounted to trial of the issue by consent under rule 67.⁵⁷

In *Brown v. United States Finance Co.*⁵⁸ the defendant's plea of privilege and the plaintiff's controverting plea were filed in November 1967. Two years and eleven months elapsed before the trial court held a hearing on the pleas and overruled the defendant's plea of privilege. On appeal the defendant argued that the plaintiff's controverting plea had been abandoned, since rule 87⁵⁹ requires a prompt hearing, and that the plaintiff had obviously not shown diligence in securing a hearing. The court overruled this contention, merely noting that the trial court should be allowed wide discretion in determining such matters.

A more complicated pleading problem arose in *Texas Gas Utilities Co. v. Barrett*,⁶⁰ in which the gas company sought to recover minimum payments under a contract for natural gas service. The gas company originally prayed for \$8,335.05, but in its first amended petition the amount was increased to \$34,737.36. The company then filed four supplemental petitions, each of which concluded with a prayer for recovery "as in its *original* petition."⁶¹ The company then asked for leave to file a fifth supplemental petition because of the "erroneous adoption by reference of the prayer in Plaintiff's Original Petition whereas such reference should have been, and was intended to be, to Plaintiff's *First Amended* Original Petition."⁶² The trial court denied the motion and rendered a take nothing judgment, since the defendant had already paid the lesser amount asked for in the original petition. On appeal the Supreme Court of Texas reversed, holding that the fifth supplemental petition was unnecessary, that the first amended original petition was the controlling pleading, and that there was at least a trial by agreement of everything raised by that pleading.

*Starlight Supply Co. v. Feris*⁶³ involved a suit on a sworn account to recover the price of electrical fixtures that Starlight sold to Feris, who installed them in the home of Slayton. Judgment was rendered for Starlight against Feris, but not against Slayton. Starlight appealed the judgment as to Slayton, contending that the dismissal of the action against Slayton was improper because Slayton's denial had not been sworn to as required by rule 185.⁶⁴ The appellate court affirmed, adhering to the principle that rule 185 does not apply to third parties to the transaction.

⁵⁷ TEX. R. CIV. P. 67.

⁵⁸ 463 S.W.2d 454 (Tex. Civ. App.—Houston [14th Dist.] 1971).

⁵⁹ TEX. R. CIV. P. 87.

⁶⁰ 460 S.W.2d 409 (Tex. 1970).

⁶¹ *Id.* at 415 (emphasis added).

⁶² *Id.* at 415-16 (emphasis added).

⁶³ 462 S.W.2d 608 (Tex. Civ. App.—Austin 1970).

⁶⁴ TEX. R. CIV. P. 185.

VI. LIMITATIONS

*Rigo Manufacturing Co. v. Thomas*⁶⁵ involved the question of when the plaintiffs "commenced" suit within the meaning of article 5539a,⁶⁶ which provides for sixty-day tolling of statutes of limitations between the time a suit is dismissed by a court lacking jurisdiction and the time the suit is later "commenced" in a court of proper jurisdiction. The plaintiffs asserted two causes of action against Rigo, a foreign corporation, which arose when their child died after drinking an insecticide manufactured by Rigo. The action for wrongful death was subject to a two-year statute of limitations,⁶⁷ and the action under the survival statute was subject to a three-year limitation.⁶⁸ Plaintiffs filed suit in federal district court within two years after the death of their child, but that court dismissed the action for lack of jurisdiction two years, three months, and sixteen days after the causes of action accrued. The suit was refiled in a state court within the sixty days specified by article 5539a, and the plaintiffs immediately had Rigo served with nonresident notice under rule 108.⁶⁹ Rigo made a special appearance challenging the sufficiency of that service, but the court did not sustain the plea until seventeen and one-half months after the suit was refiled. Proper citation⁷⁰ was then promptly issued and served on Rigo, which contended that the actions were then barred by the statutes of limitations. The Supreme Court of Texas applied the rule that diligence in procuring the issuance and service of citation, not the mere filing of a suit, is required to toll a statute of limitations, and held that the plaintiffs' use of service under rule 108, which could not possibly bring the defendant foreign corporation before the court,⁷¹ was insufficient to toll the statute of limitations. The actions were thus barred because they were not "commenced" within the sixty-day period for refiling set out in article 5539a.

A similar problem was involved in *Gatlin v. Mason*,⁷² in which suit was filed approximately one month before the limitations period would have run. Citation was issued immediately, but the defendant was not served because he was ill. The defendant died within the limitation period, but the plaintiff was not aware of that fact until service of citation under rule 106⁷³ was returned. Plaintiff's counsel immediately checked the probate records, and found neither an application for administration nor any other record concerning the estate of the defendant. The defendant's widow was subsequently appointed administratrix of her husband's estate, the parties attempted unsuccessfully to negotiate a settlement, and the widow as administratrix was finally served appropi-

⁶⁵ 458 S.W.2d 180 (Tex. 1970).

⁶⁶ TEX. REV. CIV. STAT. ANN. art. 5539a (1958).

⁶⁷ *Id.* art. 5526.

⁶⁸ In addition to the normal two-year limitation, *id.*, art. 5538 provides for tolling in survival actions for either one year or until an administrator or executor is qualified, whichever comes first.

⁶⁹ TEX. R. CIV. P. 108 provides for notice to out-of-state resident defendants or non-resident defendants.

⁷⁰ Proper service was under TEX. REV. CIV. STAT. ANN. art. 2031b (1964), the "long-arm" statute.

⁷¹ In personam jurisdiction cannot be acquired under rule 108. *Huggins v. Kinsey*, 414 S.W.2d 208 (Tex. Civ. App.—San Antonio), *error ref., cert. denied*, 390 U.S. 950 (1968).

⁷² 459 S.W.2d 200 (Tex. Civ. App.—Tyler 1970).

⁷³ TEX. R. CIV. P. 106.

mately seven months after the statute of limitations would have run and approximately five months after she was appointed administratrix. Article 5538⁷⁴ provides that the statute of limitations is tolled between the death of a defendant and the qualification of the administrator of his estate. Recognizing that a plaintiff has the duty to exercise reasonable diligence to perfect service of process, the court held that a jury determination of that fact question in favor of the plaintiff would stand.

In *Brandom Manufacturing Corp. v. Bascom*⁷⁵ the court held that evidence was sufficient to support a jury finding that by reasonable diligence the plaintiff should have discovered the fraud of which he was complaining in 1961. The statute of limitations on fraud begins to run either from the time the fraud is actually discovered or from the time it could have been discovered by the use of reasonable diligence;⁷⁶ therefore, the cause of action filed in 1968 was barred.

VII. SUMMARY JUDGMENT

A year ago in *Gibbs v. General Motors Corp.*⁷⁷ the Texas Supreme Court stated that the question involved in granting a summary judgment "is not whether the summary judgment proof raises fact issues . . . but . . . whether the summary judgment proof establishes as a matter of law that there is no genuine issue of fact as to one or more of the essential elements of the plaintiff's cause of action."⁷⁸ Several cases during the past year dealt with the application of this test. In *Oliver v. Allstate Insurance Co.*⁷⁹ Allstate claimed that the policy sued on by the plaintiff was not in effect on the date of collision, and Allstate's motion for summary judgment was granted. On appeal the court took notice of a recent case⁸⁰ in which the Texas Supreme Court stated that evidence that notice of cancellation was not received constitutes some evidence that the notice was not mailed; however, the court held that the plaintiff's refusal to admit receiving notice of cancellation was insufficient as summary judgment evidence, and affirmed the trial court. The Supreme Court of Texas in *Torres v. Western Casualty & Surety Co.*⁸¹ reversed the summary judgment for similar reasons. The plaintiff alleged that he had good cause for filing his claim for workmen's compensation a year later than required by statute, and that the defendant was granted a summary judgment on the basis of proof of late filing only. Summary judgment was held improper because the defendant's summary judgment proof was insufficient to overcome the plaintiff's allegations of good cause. Similarly, in *Parr v. Fortson*⁸² an attorney sued for reasonable attorney's fees, and included in his motion for summary judgment affidavits from three other attorneys stating what reasonable fees would be. The court of civil appeals reversed summary judgment for the attorney be-

⁷⁴ TEX. REV. CIV. STAT. ANN. art. 5538 (1958).

⁷⁵ 458 S.W.2d 541 (Tex. Civ. App.—Waco 1970), *error ref. n.r.e.*

⁷⁶ *White v. Bond*, 362 S.W.2d 295 (Tex. 1962).

⁷⁷ 450 S.W.2d 827 (Tex. 1970).

⁷⁸ *Id.* at 828.

⁷⁹ 456 S.W.2d 558 (Tex. Civ. App.—Dallas 1970), *error dismissed.*

⁸⁰ *Sudduth v. Commonwealth County Mut. Ins. Co.*, 454 S.W.2d 196 (Tex. 1970).

⁸¹ 457 S.W.2d 50 (Tex. 1970).

⁸² 457 S.W.2d 137 (Tex. Civ. App.—Dallas 1970).

cause the affidavits did not prove that there was no genuine issue of fact, but only raised the issue of reasonableness.

Rule 166-A(e)⁸³ was involved in *Perkins v. Crittenden*,⁸⁴ in which the plaintiff was granted a summary judgment in an action on a promissory note. The Texas Supreme Court held that the plaintiff's noncompliance with rule 166-A(e), which requires that a sworn or certified copy of the note be attached to the petition, by attaching only an acknowledged copy, precluded the granting of a summary judgment in favor of the plaintiff in the face of a general denial because the plaintiff had not proved that he was the owner of the note and in possession.

VIII. VENUE

Litigation concerning the exceptions to the general venue statute⁸⁵ continued during the past year. In *Hanover Insurance Co. v. Sanford*⁸⁶ the plaintiffs sought to support venue in the county of their residence under subdivision 27⁸⁷ by proving that the local sales agent of the defendant foreign corporation was an "agency or representative" of that corporation. The court of civil appeals accepted this argument, and further held that the plaintiffs were not required to prove a cause of action against the foreign corporation in order to sustain venue under subdivision 27. Judge Keith concurred, but pointed out that the difference which had developed in the law in treatment of *foreign* corporations under subdivision 27 (no proof of cause of action required) and *domestic* corporations under subdivision 23⁸⁸ (proof of cause of action required) is "an obnoxious and discriminatory result . . . [which] should be called to the attention of the Legislature."⁸⁹

The issue in *Hudgens v. Bain Equipment & Tube Sales, Inc.*⁹⁰ was whether a partnership should be considered an "association" under subdivision 23. The court agreed with the view of Professor Alan R. Bromberg of the Southern Methodist University School of Law,⁹¹ and held that the partnership entity is

⁸³ TEX. R. CIV. P. 166-A(e).

⁸⁴ 462 S.W.2d 565 (Tex. 1970).

⁸⁵ TEX. REV. CIV. STAT. ANN. art. 1995 (1964). As a general rule defendants may be sued only in the county of their residence, but the subdivisions of art. 1995 provide exceptions to that rule.

⁸⁶ 457 S.W.2d 115 (Tex. Civ. App.—Beaumont 1970).

⁸⁷ TEX. REV. CIV. STAT. ANN. art. 1995, § 27 (1964) provides:

Foreign corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in this State, then in the county where the plaintiffs or either of them, reside.

⁸⁸ *Id.*, § 23 provides in part:

Suits against a private corporation, association, or joint stock company may be brought in the county in which its principal office is situated; or in the county in which the cause of action or part thereof arose; or in the county in which the plaintiff resided at the time the cause of action or part thereof arose; provided such corporation, association, or company has an agency or representative in such county

⁸⁹ 457 S.W.2d at 119 (concurring opinion). Judge Keith's opinion contains an excellent discussion of this anomaly and its sources.

⁹⁰ 459 S.W.2d 873 (Tex. Civ. App.—Corpus Christi 1970).

⁹¹ Bromberg, *Source and Comments*, 17 TEX. REV. CIV. STAT. ANN. 300 (1970).

an "association" for venue purposes under subdivision 23.

Interpretation of subdivision 4⁹² was involved in *Jefferson Chemical Co. v. Forney Engineering Co.*⁹³ After an explosion in the waste heat boiler at the plaintiff's plant, the plaintiff brought suit against the companies that supplied the plant with natural gas and the companies that manufactured safety equipment designed to prevent such an explosion. The plaintiff alleged that one of the causes of the explosion was the failure of the natural gas suppliers to maintain adequate pressure in the gas lines to the plaintiff's plant. The suit was brought in Harris County, the residence of the defendant natural gas suppliers. Forney Engineering, one of the manufacturers of safety equipment, claimed that it was entitled to a change of venue because the action against the suppliers was essentially in contract, while the action against Forney was in tort, and, therefore, there was no joint cause of action to sustain venue under subdivision 4. The court decided that the entire suit was one sounding in tort and that the link between the two causes of action was "sufficiently close to bring the entire suit under subdivision 4."⁹⁴

In *Cranbrook Corp. v. Wright*⁹⁵ the plaintiff brought suit in Harris county on two separate causes of action. The first involved a promissory note payable in Harris County, and the second involved a debt arising out of a joint venture of the plaintiff and defendant. The defendant filed a plea of privilege, alleging that the entire suit, or alternatively, the action on the debt, should be transferred to his residence, El Paso County. The trial court transferred the entire suit to El Paso County. On appeal the court held that Harris County was proper venue under subdivision 5⁹⁶ for the action on the promissory note, and that the debt action could be properly joined under the *Middlebrook* doctrine⁹⁷ to avoid multiplicity of suits.

In *Chesbrough v. State*⁹⁸ the suit was originally brought in Bexar County against a Bexar County resident. Harris County defendants were added four years later, when there were no Bexar County residents involved in the suit because the original defendant had moved to Harris County. The court, recognizing the general rule that venue is determined by residence at the time the case is filed,⁹⁹ held that since there were no Bexar County residents involved in the suit at the time the amended petition adding the Harris County defendants was filed, subdivision 4 would not support venue in Bexar County for the cause of action against the Harris County defendants.

⁹² TEX. REV. CIV. STAT. ANN. art. 1995, § 4 (1964) provides in part: "If two or more defendants reside in different counties, suit may be brought in any county where one of the defendants resides."

⁹³ 466 S.W.2d 361 (Tex. Civ. App.—Houston [1st Dist.] 1971).

⁹⁴ *Id.* at 364.

⁹⁵ 469 S.W.2d 324 (Tex. Civ. App.—Houston [14th Dist.] 1971).

⁹⁶ Venue was alleged under TEX. REV. CIV. STAT. ANN. art. 1995, § 5 (1964), which provides: "If a person has contracted in writing to perform an obligation in a particular county, expressly naming such county, or a definite place therein, by such writing, suit upon or by reason of such obligation may be brought against him, either in such county or where the defendant has his domicile."

⁹⁷ *Middlebrook v. David Bradley Mfg. Co.*, 86 Tex. 706, 26 S.W. 935 (1894). See also *Stevens v. Southern Ice & Util. Co.*, 37 S.W.2d 240 (Tex. Civ. App.—Texarkana 1931).

⁹⁸ 465 S.W.2d 224 (Tex. Civ. App.—San Antonio 1971).

⁹⁹ *Haney v. Henry*, 307 S.W.2d 649 (Tex. Civ. App.—Amarillo 1957).

In *Romer v. Gruver State Bank*¹⁰⁰ the bank brought suit on a promissory note signed by James C. Romer and payable in Hansford County. Venue was pleaded in Hansford County under subdivision 5. The plaintiff alleged that James C. Romer signed the note as the agent of a partnership, the members of which were also made defendants. These other defendants, who had not signed the note, filed pleas of privilege and alleged that no partnership existed. The appellate court held that venue was proper as to James C. Romer under subdivision 5 and that venue was proper as to the other defendants under subdivision 29a.¹⁰¹ The court thought that the question of the existence of the partnership was a matter which should be considered at trial rather than at the venue hearing.

In *Heldt Bros. Trucks v. Silva*¹⁰² it was held that venue could not be sustained under subdivision 4 because the plaintiff did not properly allege a cause of action against the nonresident defendant involved. The plaintiff had asserted a cause of action against "a corporation by the name of Heldt Brothers Trucks." The court held that this was not sufficient to give notice of suit to "Heldt Bros. Trucks, a partnership."

IX. MISCELLANEOUS

*State v. Cook United, Inc.*¹⁰³ was one more episode of the continuing dispute between the state and certain stores over the Sunday Closing Law.¹⁰⁴ The stores had been engaging in the practice of selling their merchandise on Saturday night to Sundaco, Inc., which leased the stores' premises for Sunday and sold back the remaining merchandise on Sunday night. The state, maintaining that the whole operation was a sham intended to evade the closing law, filed suits in several counties seeking injunctive relief to prevent the stores from continuing to operate in violation of the law. The stores' response was to allege that the state was subjecting them to a multiplicity of suits, harassment, and vexatious litigation. They further asked for injunctive relief to prevent the state, its subdivisions, and their employees from filing any new causes of action seeking injunctive or civil relief similar to that sought by the suits already filed. The trial court granted the injunction. On appeal the state argued that the granting of the injunction was error because its effect was to enjoin the enforcement of a penal statute. The appellate court, admitting that article 286a is a criminal statute, nevertheless rejected this argument by observing that the state was only prevented from seeking additional *injunctive* or *civil* relief, and that new *criminal* actions were not forbidden by the injunction. According to the court, the effect of the action of the trial court was merely

to tell the State that you already have these people in court; the relief you seek against them of enjoining them from violating the statute can be obtained in

¹⁰⁰ 456 S.W.2d 788 (Tex. Civ. App.—Amarillo 1970).

¹⁰¹ TEX. REV. CIV. STAT. ANN. art. 1995, § 29a (1964) provides: "Whenever there are two or more defendants in any suit brought in any county in this State and such suit is lawfully maintainable therein under the provisions of Article 1995 as to any of such defendants, then such suit may be maintained in such county against any and all necessary parties thereto."

¹⁰² 464 S.W.2d 931 (Tex. Civ. App.—Corpus Christi 1971).

¹⁰³ 463 S.W.2d 509 (Tex. Civ. App.—Fort Worth 1971).

¹⁰⁴ TEX. PEN. CODE ANN. art. 286a (Supp. 1972).

the suits that you have already filed; quit filing different and additional suits all over the State involving the same people, alleging substantially the same facts and seeking the same relief; and get in there and try one or more of these pending cases on the merits to a final conclusion and get the matters in controversy between you and appellees over with.¹⁰⁵

In *Stroud v. Stiff*,¹⁰⁶ a dispute between city officials over who had the authority to call an election and appoint election judges, the mayor sought an injunction to prevent the other city officials from proceeding under two election resolutions. The trial court refused to take jurisdiction over the controversy because of its political nature. The appellate court affirmed, noting the "well settled Texas rule of judicial noninterference in the exercise of political power through election."¹⁰⁷

In *Speaker v. Lawler*¹⁰⁸ the plaintiffs sought a declaratory judgment for the purpose of interpreting a prior judgment of the same court. The appellate court held that Texas' declaratory judgment act¹⁰⁹ could not be used for such a purpose.

¹⁰⁵ 463 S.W.2d at 513-14. The supreme court modified the judgment of the court of civil appeals, finding error in the breadth of the trial court's injunction. Relying on TEX. R. CIV. P. 681, the court held that because only the proper officials of Tarrant and McLennon Counties were served or given notice of the temporary injunction hearing, all county and district attorneys of the state were not effectively enjoined by the trial court. 469 S.W.2d 709 (Tex. 1971).

¹⁰⁶ 465 S.W.2d 407 (Tex. Civ. App.—Amarillo 1971).

¹⁰⁷ *Id.* at 408.

¹⁰⁸ 463 S.W.2d 741 (Tex. Civ. App.—Beaumont 1971), *error ref. n.r.e.*

¹⁰⁹ TEX. REV. CIV. STAT. ANN. art. 2524-1 (1965).