1952

Venue Facts: When to Allege and Prove a Cause of Action

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VENUE FACTS: WHEN TO ALLEGE AND PROVE A CAUSE OF ACTION

> No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile. . . .

THE foregoing, which is taken from *Texas Revised Civil Statutes (Vernon, 1948)*, Article 1995, is the basic venue rule in Texas. Because of the geographical expanse of the state, the rule reflects the underlying policy of relieving defendants from the necessity for traveling long distances in order to litigate their suits. Such policy, as codified, affords the defendant the right to be sued where it is usually most convenient for him to defend. This right is invoked by entering a plea of privilege. For the plaintiff to controvert the defendant's plea of privilege, there must be proper allegation, notice, hearing and proof that the plaintiff's cause of action falls within one or more of the exceptions to the basic rule, which exceptions are shown as subdivisions under Article 1995. It should be noted that there are numerous statutory exceptions to the basic rule, but this Comment will be confined to certain of those found under the main venue statute, Article 1995.

After defendant has properly filed his plea of privilege, he is possessed of a prima facie right to have the case removed to the county of his domicile. In order to overcome this right, and to sustain venue where laid, plaintiff must show the court that one of the statutory exceptions is applicable. Applicability depends upon the existence of certain requisite "venue facts," which plaintiff has the burden to establish.[1]

It has been said that in determining venue, there are two elements[2] or types of venue facts[3] to be considered: (1) those facts which are determined by looking to the petition; and (2) those facts which must be proved by extrinsic evidence. Where

[1] Meredith v. McClendon, 130 Tex. 527, 111 S. W. 2d 1062 (1938).

[2] Commercial Standard Ins. Co. v. Lowrie, 49 S. W. 2d 933, 936, 937 (Tex. Civ. App. 1932) *er. ref.*

[3] See Comment, 13 Tex. L. Rev. 215 (1935); 1 McDONALD, TEXAS CIVIL PRACTICE (1950) § 4.55.

the nature of the suit is a venue fact, the petition is the best evidence.[4] Such petition need not be formally introduced in evidence, for its contents will be judicially noticed.[5] All other venue facts must be proved by outside evidence, the allegations in the petition being of no help.[6] Prior to *Compton v. Elliott*,[7] prima facie proof[8] of such other venue facts was sufficient to support a judgment overruling a plea of privilege. It is now well settled that plaintiff must prove the essential venue facts by a preponderance of the evidence.[9] The defendant is allowed to offer contradictory evidence[10] but in some instances cannot offer evidence supporting affirmative defenses.[11] The venue facts which the plaintiff must allege and prove by a preponderance are said to be those which are found in the particular exception to the general venue statute that is applicable to the type of claim alleged in the petition.[12] Thus, it would seem relatively simple for plaintiff to determine what venue facts he must plead and prove, and for the most part this is true. But there have been added certain venue facts by judicial construction;[13] in other cases the venue facts are not obvious, and it is therefore necessary to resort to judicial decisions.

One of the most troublesome questions which has arisen in regard to plaintiff's controverting affidavit is, When must the plaintiff allege and prove a cause of action as one of his "venue facts?" First, there seems to be some confusion as to when the plaintiff must allege a cause of action in his controverting affidavit.

[4] Gilbert v. Gilbert, 145 Tex. 114, 195 S. W. 2d 936 (1946).

[5] Hill v. Hill, 205 S. W. 2d 82 (Tex. Civ. App. 1947).

[6] World Co. v. Dow, 116 Tex. 146, 287 S. W. 241 (1926).

[7] 126 Tex. 232, 88 S. W. 2d 91 (1935).

[8] See Comment, 13 Tex. L. Rev. 215 (1935).

[9] A. H. Belo Corp. v. Blanton, 133 Tex. 391, 129 S. W. 2d 619 (1939); Compton v. Elliot, cited *supra* note 7.

[10] Compton v. Elliott, *supra* note 7.

[11] Compton v. Elliott, *supra* note 7; Continental Fire & Casualty Ins. Corp. v. American Mfg. Co. of Texas, 206 S. W. 2d 669 (Tex. Civ. App. 1947).

[12] Cowden v. Cowden, 143 Tex. 446, 186 S. W. 2d 69 (1945); Compton v. Elliott, *supra* note 7.

[13] Park v. Wood, 146 Tex. 62, 203 S. W. 2d 204 (1947); Stockyards Nat. Bank v. Maples, 127 Tex. 633, 95 S. W. 2d 1300 (1936).

Some authorities hold that plaintiff is required to plead his cause of action only where the existence of a cause of action is a venue fact.[14] There is much to be said for this view, and Rule 86, Texas Rules of Civil Procedure, which states that the controverting affidavit must only include the "fact or facts relied upon to confer venue," seems to support it. However, in *Jefferies v. Dunklin*,[15] the court concluded that since the plaintiff's controverting plea failed to state a cause of action, it also failed to set up the "fact or facts relied upon to confer venue." As a result, the court found plaintiff's plea to be meaningless and a nullity. The venue hearing in the *Dunklin* case involved a question of the defendant's residence, plaintiff contending that venue was laid in the county of defendant's residence, while the defendant claimed residence elsewhere; plaintiff in the principal case never attempted to sustain venue under one of the exceptions to Article 1995. As a result, it seems that the allegation of a cause of action in plaintiff's controverting affidavit is a minimum venue fact *whenever* defendant files a plea of privilege. In support of its holding, the court in the Dunklin case cited one case[16] involving venue exceptions which require proof of a cause of action as a venue fact. Obviously, where a cause of action is a venue fact, there must be a cause of action *alleged* in order properly to support the proof.

In *Fair v. Mayfield Feed & Grain Co.*,[17] a case involving Subdivision 5, which states that if a person has contracted in writing to perform an obligation in a particular county, suit may be brought either in such county or where the defendant has his domicile, the *Dunklin* case was cited as dissolving the confusion on the point. The court held that in light of the *Dunklin* and *A. H. Belo v. Blanton*[18] cases, the controverting affidavit must allege a

[14] Stone v. Kerr, 62 S. W. 2d 357 (Tex. Civ. App. 1933); Demmer v. Lampasas Auto Co., 34 S. W. 2d 421 (Tex. Civ. App. 1930).

[15] 131 Tex. 289, 115 S. W. 2d 391 (1938).

[16] Henderson Grain Co. v. Russ, 122 Tex. 620, 64 S. W. 2d 347 (1933).

[17] 203 S. W. 2d 801 (Tex. Civ. App. 1947).

[18] 133 Tex. 391, 398, 129 S. W. 2d 619, 623 (1939).

cause of action. The opinion in the *Fair* case was based for the most part upon *Belo v. Blanton,* and it is significant to note that the *Belo* case involved Subdivision 29, which treats of libel or slander, stating that suit shall be brought in the county in which the plaintiff resides or in the county of residence of defendants, or any of them, at the election of the plaintiff. As to this exception, a cause of action is a venue fact. In the *Belo* case it was said that "it was necesary for the controverting plea to unmistakably allege that the party who swore to such plea made the petition a part thereof, and thereby swore to the essential facts embodied in the entire petition." It is submitted that the *Dunklin* view is based upon cases involving exceptions calling for a *cause of action* as a venue fact and is therefore in error as applied to every controverting affidavit However, in view of the fact that the *Dunklin* case is a supreme court decision, a plaintiff should always allege a cause of action in his controverting affidavit, it being a minimum venue fact for all subdivisions of Article 1995.

When must the plaintiff *prove* a cause of action to overcome a plea of privilege? The plaintiff must, of course, prove a cause of action where the existence of a cause of action is a venue fact. In all subdivisions of Article 1995 which include the words "cause of action," there must be alleged and proved a cause of action. In all these cases, a cause of action is a venue fact. However, as shall be seen, judicial construction has made existence of a cause of action a venue fact in some subdivisions wherein "cause of action" is not mentioned. It would be well to note at this time that where the existence of a cause of action is essential to support venue, each element of the cause of action is a *separate* venue fact which must be alleged and proved by a preponderance of evidence.[19]

When there are multiple defendants, Article 1995 has several applicable exceptions, the foremost of which are Subdivisions 4—stating that as to defendants in different counties, suit may be

[19] Crawford v. Sanger, 160 S. W. 2d 115 (Tex. Civ. App. 1941).

brought in any county where one of the defendants resides—and 29a—stating that as to two or more defendants, suit may be maintained against all necessary parties in any county where such suit may be lawfully maintainable as to any of the defendants. The exception in Subdivision 4 requires plaintiff, in order to overcome defendant's plea of privilege, to plead and prove a cause of action against the resident defendant which must be the same claim asserted against him in the petition.[20] The earlier cases indicated that plaintiff must prove a legally enforceable claim against both the resident and nonresident defendant—at least prima facie[21]—but it is well settled today that plaintiff need not prove a cause of action against the non-resident defendant.[22] However, he must, as always, allege a cause of action against all defendants. The nature of the cause of action against both defendants must be the same, and the plaintiff must allege a joint cause of action against all defendants or a cause of action so intimately connected with the cause of action against the non-resident that the two may be joined under the rule intended to avoid multiplicity of suits.[23] Subdivision 4 says nothing of a cause of action in its text, but the courts, by decision, have added that particular set of venue facts to the exception,[24] the reason being that joinder might otherwise be had by fraud.

As for Subdivision 29a, it has been said that "nothing in 29a adds any new venue facts to those normally sufficient under any other subdivision."[25] This subdivision can only apply in conjunction with another venue exception. If plaintiff sustains venue against *one* defendant under any of the other subdivisions of Article 1995, then he has sustained venue as to all other defendants who are necessary parties. Plaintiff must plead a cause of action

[20] Stockyards Nat. Bank v. Maples, cited *supra* note 13.

[21] Taylor v. Whitehead, 88 S. W. 2d 716 (Tex. Civ. App. 1935).

[22] Stockyards Nat. Bank v. Maples, *supra* note 13.

[23] Ramey & Mathis v. Page, 228 S. W. 2d 976 (Tex. Civ. App. 1950); Stockyards Nat. Bank v. Maples, *supra* note 13.

[24] Park v. Wood, cited *supra* note 13.

[25] 1 McDONALD, TEXAS CIVIL PRACTICE (1950) § 4.36, p. 413.

against all defendants,[26] and must prove a cause of action against one of the defendants not urging the plea of privilege, but only when the existence of a cause of action is a venue fact under the subdivision sought to be applied.[27]

Another exception which deals with multiple defendants is found in Subdivision 29, noted *ante.* Thereunder, where there are two defendants, in order to establish venue in the resident's county as against a plea of privilege of a non-resident defendant, the plaintiff must prove by a preponderance of the evidence "that a cause of action for defamation has in fact accrued against the defendant asserting his plea of privilege."[28] It will be noted that in Subdivision 4 plaintiff must prove a cause of action only against the resident defendant and not the non-resident. The exception in Subdivision 29, being mandatory, prevails over that in Subdivision 4. It therefore appears, although there is little authority on the subject, that plaintiff is not relieved of proving the necessary venue facts against the non-resident defendant when he alleges and proves that the resident defendant comes within the exception found in Subdivision 29.

There are other exceptions under Article 1995 wherein it is well settled that the existence of a cause of action is a venue fact necessitating proof by a preponderance of evidence. First, there are the exceptions dealing with domestic corporations—Subdivision 23, whch states that suits may be brought in the county in which the principal office is situated or the cause of action arose. Further, as to foreign corporations, Subdivision 27 indicates that foreign corporations 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. These two exceptions offer the plaintiff several alternatives[29] from which to choose in order to

[26] Jefferies v. Dunklin, cited *supra* note 15; 43 TEX. JUR., *Venue*, § 36, p. 752.

[27] R. E. Cox Dry Goods Co. v. Kellog, 145 S. W. 2d 675 (Tex. Civ. App. 1940) *er. ref.*

[28] 1 McDONALD, TEXAS CIVIL PRACTICE (1950) § 4.35, p. 412.

[29] Victoria Bank & Trust Co. v. Monteith, 138 Tex. 216, 158 S. W. 2d 63 (1941); Lakeside Irr. Co. v. Markham Irr. Co., 116 Tex. 65, 285 S. W. 593 (1926).

sustain venue in the county of suit, each of which constitutes a separate set of venue facts.[30] The plaintiff must prove either that a cause of action, or a part thereof, arose in the county of suit, that defendant has an agent in that county, or that its principal office lies therein—only the first alternative requiring the proving of a cause of action as a venue fact.[31] One alternative in both sections requires proof of a cause of action,[32] although it seems that plaintiff need not establish the amount of damage.[33] Subdivision 23 uses the expression, "cause of action or part thereof arose," while in Subdivision 27 "cause of action or a part thereof accrued" is used. "Accrued" and "arose" have been held to have the same meaning and effect.[34] The Texas Supreme Court has said that since "accrual of a cause of action" as employed in Subdivision 29 had been construed to require a cause of action to be alleged and proved, "then certainly the same meaning and effect must be given to the similar phrase used in Subdivision 23, 'county in which the cause of action, or part thereof, arose'."[35] And in *Belo v. Blanton*[36] the court said there was no distinction and that this variation is without effect upon the necessity for and manner of alleging and proving a cause of action. Thus, it is seen that Subdvision 27 will be given the same construction as is given Subdivision 23, and will require proof of a cause of action as a venue fact under the proper alternative.[37] In addition, the plaintiff must show that part of the cause of action arose or accrued in the county of suit.[38]

The other exception wherein it is settled that proof of a cause

[30] Rural Life Ins. Co. v. Caperton, 156 S. W. 2d 309 (Tex. Civ. App. 1941) *er. dism.*

[31] Victoria Bank & Trust Co. v. Monteith, cited *supra* note 29.

[32] Victoria Bank & Trust Co. v. Monteith, cited *supra* note 29; Home Insurance Co., New York v. Barbee, 166 S. W. 2d 370 (Tex. Civ. App. 1942); *cf.* Stripling v. Hoing, 203 S. W. 2d 1016 (Tex. Civ. App. 1947) (only prima facie proof necessary).

[33] Farmers' Seed and Gin Co. v. Brooks, 125 Tex. 234, 81 S. W. 2d 675 (1935).

[34] Victoria Bank & Trust Co. v. Monteith, *supra* note 29.

[35] *Id.* at 223, 158 S. W. 2d at 67.

[36] Cited *supra* note 9.

[37] 1 McDONALD, TEXAS CIVIL PRACTICE (1950) § 4.30.

[38] Newsom v. Continental Royalty Co., 209 S. W. 2d 813 (Tex. Civ. App. 1948).

of action is necessary to sustain venue is found in Subdivision 29, which is a mandatory section. Under this subdivision one of the venue facts is the existence of a cause of action for defamation,[39] and the plaintiff must allege in his affidavit the elements of a cause of action for defamation and prove the same as in any ordinary trial on the merits.[40]

In addition to the above exceptions, there are several subdivisions to Article 1995 under which the courts seem to require the proving of a cause of action, although there is some confusion among the decisions. In Subdivision 5, an excerpt from which appears *ante*, it is settled that the existence of a cause of action is not a venue fact,[41] the plaintiff being required only to prove the execution of a written contract by the defendant, or his authorized agent.[42] But Subdivisions 7 and 9 are not so clear. The former states that in all cases of fraud and defalcation on the part of public officers suit may be brought in the county where the fraud or defalcation occurred. The cases uniformly hold that upon a venue hearing, plaintiff must allege and prove by a preponderance of the evidence either the necessary elements of actionable fraud to the satisfaction of the trial court,[43] or a cause of action for fraud.[44] The court in *Eppenauer v. Schrup*[45] said: "It is a rule of law in this state that when venue is sought to be acquired under exception 7 of R.C.S., Art. 1995, practically all facts and circumstances must be proved necessary to recover in such action upon

[39] Renfro Drug Co. v. Lawson, 138 Tex. 434, 160 S. W. 2d 246 (1942); Rogers v. Dickson, 157 S. W. 2d 404 (Tex. Civ. App. 1941); Note, 18 Tex. L. Rev. 111 (1939).

[40] Blanton v. Garrett, 133 Tex. 399, 129 S. W. 2d 623 (1939); A. H. Belo Corp. v. Blanton, cited *supra* note 9.

[41] Petroleum Producers Co. v. Steffens, 139 Tex. 257, 162 S. W. 2d 698 (1942); Wood Motor Co. v. Hawkins, 226 S. W. 2d 487 (Tex. Civ. App. 1949). *But cf.* Chapman v. First Nat. Bank of Wellington, 221 S. W. 2d 318 (Tex. Civ. App. 1949).

[42] Petroleum Producers Co. v. Steffens, *supra* note 41; Pavlidis v. Bishop & Babcock Sales Co., 41 S. W. 2d 294, 295 (Tex. Civ. App. 1931).

[43] Texas Employers' Ins. Ass'n. v. Shelton, 237 S. W. 2d 719 (Tex. Civ. App. 1950); Reese v. Phillips, 233 S. W. 2d 588 (Tex. Civ. App. 1950). *But cf.* Shaw Equipment Co. v. City of Olney, 172 S. W. 2d 120 (Tex. Civ. App. 1943).

[44] Coalson v. Holmes, 111 Tex. 502, 240 S. W. 896 (1922).

[45] 121 S. W. 2d 473, 478 (Tex. Civ. App. 1938).

its merits; in other words, to establish that exception it inevitably requires two trials of the issues involved when tried upon its merits."

It would seem manifest, then, that a cause of action for fraud must be proved under Subdivision 7,[46] particularly when the courts have held that to constitute actionable fraud, the plaintiff must show damage as a result of his reliance on the representation.[47] However, it has been held that it is not necessary for plaintiff to prove the exact amount of damages, since plaintiff is not seeking a judgment for damages on trial of the plea of privilege;[48] the issue is rather, "Were the damages more than nominal?"[49]

Subdivision 9, involving suits based on crime or trespass, states that plaintiff may bring suit in the county where the crime, offense, or trespass was committed. The cases construing this subdivision require plaintiff to allege and prove each and every element of a crime or trespass,[50] but require only nominal damages to be shown, it being necessary to show only that a legal right of plaintiff has been violated.[51] The *amount* of damage is not relevant. The cause of action is said to exist though damages are nominal.[52] But in *Hurley v. Reynolds*[53] it was said that matters relating to the existence of a cause of action are irrelevant and not required to be proved under Subdivision 9, since the issue is venue, not liability. However, the very same case held that the plaintiff must allege and prove all the elements of a trespass or crime, those very elements creating the cause of action. In point of fact, it would seem that a plaintiff must allege and prove a cause of action

[46] Smith v. Abernathy, 6 S. W. 2d 147, 150 (Tex. Civ. App. 1928).

[47] Reese v. Phillips, cited *supra* note 43. *But cf.* Sterling Mutual Life Ins. Co. v. Larson, 99 S. W. 2d 1013 (Tex. Civ. App. 1936).

[48] Gomillion v. Lingold, 209 S. W. 2d 205 (Tex. Civ. App. 1948).

[49] Reese v. Phillips, cited *supra* note 43.

[50] Hurley v. Reynolds, 157 S. W. 2d 1018 (Tex. Civ. App. 1941); Walker v. Martin, 129 S. W. 2d 1149 (Tex. Civ. App. 1939).

[51] Maitland v. Santor, 216 S. W. 2d 298 (Tex. Civ. App. 1948); Hawkins v. Schroeter, 212 S. W. 2d 843 (Tex. Civ. App. 1948).

[52] Hawkins v. Schroeter, *supra* note 51.

[53] Cited *supra* note 50.

on the venue hearing, not to create liability, but rather to sustain venue.

In summary, it can be seen that under some of the subdivisions of Article 1995, a plaintiff, in order to sustain venue, must, in all practical respects, suffer two trials on the merits. The court in *Compton v. Elliot* said that this was the price the plaintiff had to pay to sustain venue in a county other than that of the defendant's domicile.[54] Matters would no doubt be facilitated if the plea of privilege and the merits of the case were tried at the same time. But, contrariwise, it seems that defendant is entitled to a separate trial of his plea of privilege as a matter of law,[55] except where he requests a jury trial on the venue hearing, in which latter event Rule 87 expressly authorizes a consolidated trial.

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[54] Cited *supra* note 7.

[55] Newlin v. Smith, 136 Tex. 260, 150 S. W. 2d 233 (1941). *But cf.* Pugh v. Childress & Marshall, 207 S. W. 2d 182 (Tex. Civ. App. 1947).