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## JUSTICIABILITY IN TEXAS: A STUDY IN THE LAW OF PUBLIC CONTRACTS

KENNETH L. MALONE

The Texas government is divided into three distinct departments by an express constitutional provision.<sup>1</sup> This division demands that no department usurp the powers of another,<sup>2</sup> a necessity in the maintenance of such a form of government.<sup>3</sup> The judiciary is vested with, and may exercise, only judicial powers.<sup>4</sup> Justiciability is the concept used by the Texas courts to implement the division of powers and to confine the courts to the exercise of specifically judicial powers.<sup>5</sup> The judiciary will not consider political ques-

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1. TEX. CONST. art. II, § 1; *id.*, comment (1955).

2. *Friedman v. American Sur. Co.*, 137 Tex. 149, 167, 151 S.W.2d 570, 580 (1941); *Wolf v. Young*, 277 S.W.2d 744, 746-47 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.); *Neff v. Elgin*, 270 S.W. 873, 875 (Tex. Civ. App.—San Antonio 1925, writ ref'd); TEX. CONST. art. II, § 1.

3. *Friedman v. American Sur. Co.*, 137 Tex. 149, 167, 151 S.W.2d 570, 580 (1941).

4. TEX. CONST. art. V, § 1. The courts may not make laws to their own liking, or give a remedy not provided for, or withhold one that is secured. Judicial power is the power to adjudicate upon and protect the rights and interests of individual citizens and to that end only to construe and apply the law. Courts determine what the law is in relation to some existing thing already done or happened. *Id.*, comment (1955).

5. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *Bledsoe, Mootness and Standing in Class Actions*, 1 FLA. ST. U.L. REV. 430, 432 (1973). A justiciable controversy is one that is appropriate for judicial determination, and is thus distinguished from a hypothetical, abstract, or moot or academic controversy in that it is definite, concrete and touches the legal relations of parties having adverse legal interests. Justiciability is concerned with insuring that courts adjudicate only disputed issues arising from definite controversies. 300 U.S. 240-41. Courts will not assume jurisdiction unless there is an actual controversy in existence, or the ripening seeds of one such that litigation is imminent and inevitable. *Gray v. Bush*, 430 S.W.2d 258, 263 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.). The parties must have conflicting legal interests, and the judgment must be one which will effectively and practically settle conflicts of such legal interests of the parties. *Layne Tex. Co. v. City of Houston*, 306 S.W.2d 424, 426 (Tex. Civ. App.—Houston 1957, writ ref'd). A justiciable controversy must exist in declaratory judgment cases, and the question must not be hypothetical or abstract, but must be one "touching the legal relation of the parties in legal adverse interest and must be a substantial controversy admitting of specific relief through a decree conclusive in character . . ." *Parks v. Francis*, 202 S.W.2d 683, 686 (Tex. Civ. App.—Fort Worth 1947, no writ); *see Sub-Surface Constr. Co. v. Bryant-Curington, Inc.*, 533 S.W.2d 452, 456 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.); *A.P. Simons Co. v. Julian*, 531 S.W.2d 451, 453 (Tex. Civ. App.—Eastland 1975, no writ); *Fort Worth Lloyds v. Garza*, 527 S.W.2d 195, 200 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

tions,<sup>6</sup> moot or hypothetical cases,<sup>7</sup> questions that are not ripe for decision,<sup>8</sup> or cases prosecuted by a plaintiff who does not have the requisite standing or justiciable interest.<sup>9</sup> Courts are prohibited from rendering advisory opinions and may not consider the wisdom of legislation when construing enactments that are constitutional;<sup>10</sup> the consideration of policy is solely within the purview of legislative power.<sup>11</sup> There being no inherent powers in a court, it is restricted to powers expressly conferred on it by law plus those powers necessarily inferable from that grant.<sup>12</sup> As such, the Texas courts are restricted to the consideration of questions that are "peculiarly suited to judicial solution,"<sup>13</sup> and trial courts will not hear, nor will appellate courts review, controversies that do not fall within those bounds.<sup>14</sup>

In addition to subject matter jurisdiction and jurisdiction over the person,

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6. See *Holland v. Taylor*, 153 Tex. 433, 437, 270 S.W.2d 219, 221 (1954); *Thiel v. Oaks*, 535 S.W.2d 1, 2 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ); *Lydick v. Chairman Dallas County Republican Executive Comm.*, 456 S.W.2d 740, 743 (Tex. Civ. App.—Dallas 1970, no writ).

7. *State v. Margolis*, 439 S.W.2d 695, 698 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.); *Layne Tex. Co. v. City of Houston*, 306 S.W.2d 424, 427 (Tex. Civ. App.—Houston 1957, writ ref'd).

8. *Sub-Surface Constr. Co. v. Bryant-Curington, Inc.*, 533 S.W.2d 452, 456 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.); *Fort Worth Lloyds v. Garza*, 527 S.W.2d 195, 198 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (one question ripe, other not); *Gray v. Bush*, 430 S.W.2d 258, 263 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.).

9. *Scott v. Board of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966). The Texas courts seem to use the terms "litigable interest," "standing," and "justiciable interest" interchangeably and synonymously. There may, however, be some differences. See *Arlington Hotel & Motel Ass'n v. Howard Johnson, Inc.*, 397 S.W.2d 555, 556 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.); *McLean v. Morrow*, 156 S.W.2d 1002, 1003 (Tex. Civ. App.—Austin 1941, writ ref'd w.o.m.). See generally *Sedler, Standing, Justiciability and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 480 (1972).

10. Under TEX. CONST. art. II, § 1 Texas courts are prohibited from rendering advisory opinions, and this power may not be conferred by either the legislature or agreement of the parties. *State v. Margolis*, 439 S.W.2d 695, 698 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.); *Munger v. Richards*, 87 S.W.2d 797, 799 (Tex. Civ. App.—Eastland 1935, writ ref'd). Statutes may be declared unconstitutional for the preservation of personal rights against unwarranted legislation and for that purpose only. *Neff v. Elgin*, 270 S.W. 873, 875 (Tex. Civ. App.—San Antonio 1925, writ ref'd). When a court is called upon to enforce an apparently valid statute, it gives no consideration to the question of whether its enforcement will work an injustice in the case before it. It is simply not a judicial function to determine the wisdom of a statute. *Landis v. Fuqua, Inc.*, 159 S.W.2d 228, 230 (Tex. Civ. App.—Amarillo 1942, writ ref'd).

11. *Ex parte McCloskey*, 82 Tex. Crim. 531, 538, 199 S.W. 1101, 1103-04 (1917); see *Goss v. Franz*, 287 S.W.2d 289, 290 (Tex. Civ. App.—Amarillo 1956, writ ref'd); *Landis v. Fuqua, Inc.*, 159 S.W.2d 228, 230 (Tex. Civ. App.—Amarillo 1942, writ ref'd). *But see J. Weingarten, Inc. v. Sanchez*, 228 S.W.2d 303, 311 (Tex. Civ. App.—Galveston 1950, no writ) (courts not only representative of state in declaration of public policy).

12. *Ex parte Hughes*, 133 Tex. 505, 510-11, 129 S.W.2d 270, 273-74 (1939).

13. *Summers, Justiciability*, 26 MOD. L. REV. 530 (1963).

14. *State v. Society for Friendless Children*, 130 Tex. 533, 534, 111 S.W.2d 1075, 1076 (1938).

courts must have jurisdiction to render the particular judgment sought.<sup>15</sup> Obviously, if the plaintiff lacks the justiciable interest required for a particular judgment he is not entitled to it. In such a case, the court is without jurisdiction in the matter and lacks authority to hear and determine the cause.<sup>16</sup> Courts are confined to the consideration of "suits" involving matters for which the judiciary is expressly granted the power to provide a remedy; therefore, the matter must be justiciable.<sup>17</sup> Although private actions may give rise to questions of justiciability,<sup>18</sup> public actions, particularly those involving public contracts and bond issues, provide the context for a number of justiciability problems.<sup>19</sup>

#### THE REQUIREMENT OF A SPECIAL INTEREST

Governmental bodies generally enter into contracts so as to ultimately benefit those in the community they serve. As such, it would appear that any member of the community would have a sufficient interest in these contracts to commence and prosecute an action relative to them. Generally, however, an individual may not maintain such an action absent a showing of

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15. *Brown v. French*, 413 S.W.2d 924, 926-27 (Tex. Civ. App.—Amarillo), *rev'd on other grounds*, 424 S.W.2d 893 (Tex. 1967).

16. Jurisdiction is the power of a court to hear and determine cases, without which it may not act. *State v. Olsen*, 360 S.W.2d 398, 400 (Tex. 1962); *see Bledsoe, Mootness and Standing in Class Actions*, 1 FLA. ST. U.L. REV. 430, 432 (1973); Comment, *Constitutional Litigation: Standing to Sue in the Supreme Court*, 8 ST. LOUIS U.L.J. 83, 88 (1963).

17. A "suit" as contemplated by TEX. CONST. art. V, § 8, is "any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him." *H.H. Watson Co. v. Cobb Grain Co.*, 292 S.W. 174, 176 (Tex. Comm'n App. 1927, jdgm't adopted). *See generally Ex parte Hughes*, 133 Tex. 505, 510-11, 129 S.W.2d 270, 273-74 (1939) (neither executive nor judicial department can create remedies or causes of action); *Southwestern Bell Tel. Co. v. State*, 523 S.W.2d 67, 71 (Tex. Civ. App.—Austin), *modified and aff'd*, 526 S.W.2d 526 (Tex. 1975).

18. *See, e.g., Harris v. Phillips Pipe Line Co.*, 517 S.W.2d 361, 365 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.); *Reed v. Tanglewilde Civic Club*, 431 S.W.2d 362, 364 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.); *Williams v. White*, 263 S.W.2d 666, 667 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.).

19. *Beane, Antitrust: Standing and Passing On*, 26 BAYLOR L. REV. 331, 331-32 (1974); *see Hoffman v. Elliott*, 476 S.W.2d 845, 846 (Tex. 1972) (*per curiam*); *City of West Lake Hills v. State ex rel. City of Austin*, 466 S.W.2d 722, 727 (Tex. 1971) (*quo warranto*); *Yett v. Cook*, 115 Tex. 205, 220, 281 S.W. 837, 841-42 (1926) (*mandamus*); *City of San Antonio v. Strumberg*, 70 Tex. 366, 369, 7 S.W. 754, 755 (1888) (*injunction*); *Lozano v. Patrician Movement*, 483 S.W.2d 369, 371 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.) (*declaratory judgment*); *Pierce v. Southern Pac. Co.*, 410 S.W.2d 801, 802 (Tex. Civ. App.—Waco 1967, writ ref'd); *City of DeLeon v. Fincher*, 344 S.W.2d 743, 744 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.) (*elections*); *City of Waco v. Akard*, 252 S.W.2d 496, 499-500 (Tex. Civ. App.—Waco 1952, writ ref'd n.r.e.); *San Antonio Conservation Soc'y v. City of San Antonio*, 250 S.W.2d 259, 263 (Tex. Civ. App.—Austin 1952, writ ref'd); *Texas Agricultural Workers Union v. Isbell*, 195 S.W.2d 206, 209 (Tex. Civ. App.—Austin 1946, writ ref'd n.r.e.); *Parrish v. Wright*, 293 S.W. 659, 661-62 (Tex. Civ. App.—Amarillo 1927, writ ref'd); *McLaughlin v. Smith*, 140 S.W. 248, 251 (Tex. Civ. App.—Amarillo 1911, writ ref'd).

some special interest in the subject matter of the suit peculiar to him in either his personal or representative capacity.<sup>20</sup> In *City of San Antonio v. Strumberg*,<sup>21</sup> the Texas Supreme Court rejected intimations that this rule was promulgated to prevent a multiplicity of suits, and asserted that the true underlying reasoning was that "individuals have a right to sue for a redress of their own private injuries, but for such as affect all the public alike he is not the representative of the public interest."<sup>22</sup> This rule and rationale is, of course, applicable to suits on public contracts.<sup>23</sup> The governmental body alone has the right to sue for redress of its own injuries because it receives the direct benefit from the suit and is the real party in interest.<sup>24</sup> The individual citizen is generally precluded from suing because he could only derive an indirect benefit from the suit.<sup>25</sup> The requirement of a special interest ensures the degree of adverseness which the common law system demands and is clearly sound when considered within the scheme of division of powers.<sup>26</sup>

#### SUITS BY TAXPAYERS

The requisite special interest must differ in kind from that of the general public, not merely in intensity,<sup>27</sup> and may not be founded upon mere

20. In the landmark case of *City of San Antonio v. Strumberg*, 70 Tex. 366, 7 S.W. 754 (1888), a property owner and taxpayer sued to enjoin the erection of a public building on Military Plaza, a public park. The plaintiff had no property that abutted the plaza, and asserted no other special injury. The court said:

We think it a principle established by the overwhelming weight of authority in the courts of all countries subject to the common law, that no action lies to restrain an interference with a mere public right, at the suit of an individual who has not suffered or is not threatened with some damage peculiar to himself.

*Id.* at 368, 7 S.W. at 755.

21. *Id.* at 366, 7 S.W. at 754.

22. *Id.* at 369, 7 S.W. at 755.

23. *E.g.*, *Franks v. Welch*, 389 S.W.2d 142, 145 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.); *West Tex. Util. Co. v. Smith*, 168 S.W.2d 665, 666-67 (Tex. Civ. App.—Austin 1943, writ ref'd); *Powell v. City of Baird*, 132 S.W.2d 464, 470 (Tex. Civ. App.—Eastland 1939, no writ).

24. *See Hoffman v. Davis*, 128 Tex. 503, 507, 100 S.W.2d 94, 95 (1937); *Sullivan v. Universal Elec. Constr. Co.*, 227 S.W.2d 387, 391-92 (Tex. Civ. App.—Austin 1950, writ ref'd n.r.e.).

25. "Our courts do not recognize the right of one to bring a lawsuit for another merely because he might derive some indirect benefit therefrom." *Hoffman v. Davis*, 128 Tex. 503, 508, 100 S.W.2d 94, 96 (1937); *accord*, *Sullivan v. Universal Elec. Constr. Co.*, 227 S.W.2d 387, 391 (Tex. Civ. App.—Austin 1950, writ ref'd n.r.e.).

26. *See Comment, Standing, Separation of Powers, and the Demise of the Public Citizen*, 24 AM. U.L. REV. 835, 841 (1975). Judicial decision making must necessarily rely heavily on the parties' presentation of the issues, because these opposing viewpoints are the basis for a more informed decision on the possible alternatives. *Id.* at 841.

27. *Pierce v. Southern Pac. Co.*, 410 S.W.2d 801, 802 (Tex. Civ. App.—Waco 1967, writ ref'd); *Arlington Hotel & Motel Ass'n v. Howard Johnson, Inc.*, 397 S.W.2d 555, 556 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.) (rejected contention that test of justiciable interest is whether plaintiff suffered damage over and above that of gen-

emotional or sentimental interest.<sup>28</sup> The class of cases upon which an individual may sue is stringently circumscribed, so that almost all instances in which a special interest was found involved proposed payments from tax funds.<sup>29</sup> In such cases, the plaintiff is subjected to personal out-of-pocket pecuniary injury as the result of an increased tax burden.<sup>30</sup>

When a taxpayer sues to prevent illegal expenditures of tax funds, the reasons for allowing the suit are as compelling as they are in an action to enjoin the collection of illegal taxes.<sup>31</sup> This reasoning was espoused in the well known "chicken salad" case.<sup>32</sup> There, several private citizens were held to have sufficient interest to sue the State Comptroller to enjoin the payment of funds appropriated for public entertainment at the governor's mansion. The constitution then read that the governor should receive \$4,000.00 annually, "and no more."<sup>33</sup> It was held that the district court, upon suit by taxpayers, was authorized to enjoin those expenditures which resulted in an unconstitutional increase in the emoluments of the governor because they would increase the tax burden.<sup>34</sup>

Defective tax assessments may also provide the basis for taxpayers' suits.<sup>35</sup> When property is omitted from the tax rolls, or an illegal exemption is granted, a taxpayer may sue to compel an assessment without such omission or exemption, so that he will not suffer injury from a higher tax than he ought to be required to pay.<sup>36</sup> The improper assessment of taxes does not, however, allow the taxpayer to escape his obligation to pay his lawful taxes.<sup>37</sup>

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eral public); *San Antonio Conservation Soc'y v. City of San Antonio*, 250 S.W.2d 259, 263 (Tex. Civ. App.—Austin 1952, writ ref'd).

28. *Pierce v. Southern Pac. Co.*, 410 S.W.2d 801, 802 (Tex. Civ. App.—Waco 1967, writ ref'd); see *Gillam v. City of Fort Worth*, 287 S.W.2d 494, 499 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.) (indicating special interest must be pecuniary).

29. See *Calvert v. Hull*, 475 S.W.2d 907, 908 (Tex. 1972); *City of Austin v. McCall*, 95 Tex. 565, 577, 68 S.W. 791, 794-95 (1902); *Altgelt v. City of San Antonio*, 81 Tex. 436, 450, 17 S.W. 75, 77 (1890) (dismissed on rehearing for plaintiff's failure to sufficiently plead injury).

30. See, e.g., *Calvert v. Hull*, 475 S.W.2d 907, 908 (Tex. 1972); *City of Austin v. McCall*, 95 Tex. 565, 577, 68 S.W. 791, 794-95 (1902); *Altgelt v. City of San Antonio*, 81 Tex. 436, 450, 17 S.W. 75, 77 (1890).

31. *Terrell v. Middleton*, 187 S.W. 367, 369 (Tex. Civ. App.—San Antonio 1916, no writ); see *Calvert v. Hull*, 475 S.W.2d 907, 908-09 (Tex. 1972) (plaintiff held to have standing even though trial court's granting of summary judgment for Comptroller was affirmed, apparently for lack of necessary parties).

32. *Terrell v. Middleton*, 187 S.W. 367, 369 (Tex. Civ. App.—San Antonio 1916, no writ).

33. *Id.* at 371.

34. *Id.* at 371.

35. *Whelan v. State*, 155 Tex. 14, 25, 282 S.W.2d 378, 383 (1955); *Altgelt v. City of San Antonio*, 81 Tex. 436, 450, 17 S.W. 75, 76 (1890).

36. *Whelan v. State*, 155 Tex. 14, 25, 282 S.W.2d 378, 384 (1955) (omissions); *Altgelt v. City of San Antonio*, 81 Tex. 436, 450, 17 S.W. 75, 77 (1890) (illegal exemption).

37. *Whelan v. State*, 155 Tex. 14, 22, 282 S.W.2d 378, 383 (1955).

Municipal contracts and bond issues often provide for repayment solely from revenues generated by the improvements purchased.<sup>38</sup> Cities and counties are generally required by statute to adopt this method of payment for the purchase or construction and maintenance of power plants, water and sewer systems, and other utilities.<sup>39</sup> Controversies in this area culminating in election contests, suits to enjoin the sale of bonds, to enjoin performance of the contract, and to declare the contract void have all met a similar fate.<sup>40</sup> Courts have held, both implicitly and expressly, that taxpayers are precluded from bringing a suit, even on void or illegal contracts, since the obligation created is not to be paid from taxes.<sup>41</sup> Without such tax fund payments, one who sues merely as a taxpayer cannot possess a justiciable interest in the action.<sup>42</sup>

#### STATUTORILY CONFERRED JUSTICIABLE INTEREST

The supreme court in *City of San Antonio v. Strumberg*<sup>43</sup> announced the rule absolutely requiring a special interest for a plaintiff to sue for redress of a public wrong<sup>44</sup> and gave no intimation that this rule could be varied by statute; that rule was followed without addition in *Staples v. State ex rel. King*.<sup>45</sup> In *Dickson v. Strickland*,<sup>46</sup> however, even though the plaintiff was held to have no justiciable interest, the assertion was made that the legislature could, by statute, allow suits of this nature without a special interest.<sup>47</sup> In *Dickson*, the court said that plaintiff's "lack of special interest

38. *E.g.*, *Clark v. City of San Angelo*, 269 S.W.2d 594, 595 (Tex. Civ. App.—Austin 1954, no writ); *West Tex. Util. Co. v. Smith*, 168 S.W.2d 665 (Tex. Civ. App.—Austin 1943, writ ref'd); *Fisher v. City of Bartlett*, 76 S.W.2d 535, 536 (Tex. Civ. App.—Austin 1934, writ dism'd).

39. *Hoff v. Westhoff*, 102 S.W.2d 293, 294 (Tex. Civ. App.—Galveston 1936, writ ref'd); *Hazelwood v. City of Cooper*, 87 S.W.2d 776, 777-78 (Tex. Civ. App.—Texarkana 1935, writ ref'd); TEX. REV. CIV. STAT. ANN. arts. 1111-18 (1963), *as amended*, (Supp. 1976) (cities); TEX. REV. CIV. STAT. ANN. art. 2368a, § 9 (1971) (counties).

40. *Franks v. Welch*, 389 S.W.2d 142, 146 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.) (declare contract void); *Estes v. City of Granbury*, 314 S.W.2d 154, 155 (Tex. Civ. App.—Fort Worth 1958, writ ref'd) (enjoin sale of bonds); *Hoff v. Westhoff*, 102 S.W.2d 293, 294 (Tex. Civ. App.—Galveston 1936, writ ref'd) (election contest); *Fisher v. City of Bartlett*, 76 S.W.2d 535, 536 (Tex. Civ. App.—Austin 1934, writ dism'd) (enjoin performance on contract).

41. *Powell v. City of Baird*, 132 S.W.2d 464, 472 (Tex. Civ. App.—Eastland 1939, no writ) (express); *Hoff v. Westhoff*, 102 S.W.2d 293, 294 (Tex. Civ. App.—Galveston 1936, writ ref'd) (implicit).

42. *See, e.g.*, *Franks v. Welch*, 389 S.W.2d 142, 146 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.); *West Tex. Util. Co. v. Smith*, 168 S.W.2d 665, 666 (Tex. Civ. App.—Austin 1943, writ ref'd); *Hoff v. Westhoff*, 102 S.W.2d 293, 294 (Tex. Civ. App.—Galveston 1936, writ ref'd).

43. 70 Tex. 366, 7 S.W. 754 (1888).

44. *Id.* at 369, 7 S.W. at 755.

45. 112 Tex. 61, 71-72, 245 S.W. 639, 642-43 (1922).

46. 114 Tex. 176, 265 S.W. 1012 (1924).

47. *Id.* at 196, 265 S.W. at 1019.

is fatal to his capacity to maintain his suit in the absence of a valid statute authorizing him to sue."<sup>48</sup> The same assertion appeared again in a subsequent case.<sup>49</sup> Later, in *City of Goose Creek v. Hunnicutt*,<sup>50</sup> the court recognized this conflict and held that in light of the constitutional restrictions, statutes could not confer the right to sue on one with no special interest.<sup>51</sup> Subsequent decisions, however, persisted in reciting the contention first made in *Dickson*.<sup>52</sup> In *Houston Natural Gas Corp. v. Wyatt*,<sup>53</sup> after an extensive review of authorities, the Eastland Court of Civil Appeals held that neither the statute nor the city charter provisions allowed the plaintiffs, as mere taxpayers, to sue on a void contract absent a special interest in the suit.<sup>54</sup>

In *Scott v. Board of Adjustment*,<sup>55</sup> the majority of the supreme court allowed an individual to challenge governmental actions without showing special injury.<sup>56</sup> Observing that other states allow such actions, the court said: "Within constitutional bounds, the Legislature may grant a right to a citizen or to a taxpayer to bring an action against a public body or a right of review on behalf of the public without proof of particular or pecuniary damage peculiar to the person bringing the suit."<sup>57</sup> Justice Griffin dissented in *Scott*, and indicated his agreement with the opinion of the Waco Court of Civil Appeals,<sup>58</sup> which had held that the plaintiffs could not maintain the suit because they had suffered no injury.<sup>59</sup>

It now appears, therefore, that the Texas courts have aligned themselves with jurisdictions that allow suits by individuals for the benefit of the public, to the limited extent of permitting such actions when provided for by statute.<sup>60</sup> Two cases subsequent to *Scott*, *McCoy v. Williams*<sup>61</sup> and *Turullols v. San Felipe Country Club*,<sup>62</sup> relied heavily on *Scott* to allow individuals' suits for the

48. *Id.* at 196, 265 S.W. at 1019.

49. *Yett v. Cook*, 115 Tex. 205, 218, 281 S.W. 837, 841-42 (1926).

50. 118 Tex. 326, 15 S.W.2d 227 (1929).

51. *Id.* at 330, 15 S.W.2d at 228, citing TEX. CONST. art. V, § 21, and art. IV, § 22.

52. *E.g.*, *Sullivan v. Universal Elec. Constr. Co.*, 227 S.W.2d 387, 390 (Tex. Civ. App.—Austin 1950, writ ref'd n.r.e.); *Hoff v. Westhoff*, 102 S.W.2d 293, 294 (Tex. Civ. App.—Galveston 1936, writ ref'd); *Hazelwood v. City of Cooper*, 87 S.W.2d 776, 777-78 (Tex. Civ. App.—Texarkana 1935, writ ref'd).

53. 359 S.W.2d 257 (Tex. Civ. App.—Eastland 1962, no writ).

54. *Id.* at 260.

55. 405 S.W.2d 55 (Tex. 1966).

56. *Id.* at 56.

57. *Id.* at 56.

58. *Id.* at 57 (dissenting opinion).

59. *Scott v. Board of Adjustment*, 393 S.W.2d 837, 839 (Tex. Civ. App.—Waco 1965), *rev'd*, 405 S.W.2d 55 (Tex. 1966).

60. *Scott v. Board of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966); *McCoy v. Williams*, 500 S.W.2d 178, 180 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.); *Turullols v. San Felipe Country Club*, 458 S.W.2d 206, 209 (Tex. Civ. App.—San Antonio 1970, writ ref'd n.r.e.).

61. 500 S.W.2d 178 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.).

62. 458 S.W.2d 206 (Tex. Civ. App.—San Antonio 1970, writ ref'd n.r.e.) (two judges participating).



benefit of the public.<sup>63</sup> The precise question of the constitutionality of such actions without a special interest, under the Texas Constitution,<sup>64</sup> was not reached in these cases;<sup>65</sup> further, a special interest has usually been required for the plaintiff to sue in post-*Scott* cases.<sup>66</sup> Since *Scott*, only one case, *Marshall v. City of Lubbock*,<sup>67</sup> has involved a bond issue, and it was held there that the plaintiff failed to state a justiciable interest sufficient to maintain the suit for declaratory relief.<sup>68</sup> In another case, summary judgment for the defendant was affirmed on a plaintiff's suit to cancel a lease granted by the city because the plaintiff failed to show a peculiar injury.<sup>69</sup> Although *Turullols* and *McCoy* involved the cancellation of deeds granted by cities, there seem to be no inroads in the area of public contracts and bond issues in the wake of *Scott*.<sup>70</sup>

#### OTHER OBSTACLES CONFRONTING INDIVIDUAL PLAINTIFFS

Even for the plaintiff who has firmly established a special interest, the doors of the courthouse are not always open. It is, of course, fundamental to the maintenance of any suit that the plaintiff's pleadings be sufficient. As such, the plaintiff's special interest must be specifically alleged. If it is not so alleged, the cause of action is subject to dismissal when the plaintiff fails to amend after the defendant has specially excepted to this defect.<sup>71</sup> In one instance, despite the fact that the cause otherwise would have been a proper one for individual relief, dismissal on special exceptions was held to be harmless error since the legal and illegal items of an alleged deficiency debt

63. It should be noted that *Scott* dealt with Tex. Laws 1961, ch. 322, § 1, at 687, which involved appeals from zoning board of adjustment decisions, while *McCoy* and *Turullols* involved TEX. REV. CIV. STAT. ANN. art. 1015c (1963), a statute relating to public recreational facilities.

64. TEX. CONST. art. II, § 1.

65. See *Scott v. Board of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966); *McCoy v. Williams*, 500 S.W.2d 178, 180 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.); *Turullols v. San Felipe Country Club*, 458 S.W.2d 206, 209 (Tex. Civ. App.—San Antonio 1970, writ ref'd n.r.e.).

66. See *Hoffman v. Elliott*, 476 S.W.2d 845, 846 (Tex. 1972) (per curiam); *City of West Lake Hills v. State ex rel. City of Austin*, 466 S.W.2d 722, 727 (Tex. 1971); *Tri County Citizens Rights Organization v. Johnson*, 498 S.W.2d 227, 229 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.); *Lozano v. Patrician Movement*, 483 S.W.2d 369, 371-72 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.); *Lower Valley Residents Ass'n v. City of El Paso*, 466 S.W.2d 436, 437-38 (Tex. Civ. App.—El Paso 1971, no writ); *Pierce v. Southern Pac. Co.*, 410 S.W.2d 801, 802 (Tex. Civ. App.—Waco 1967, writ ref'd).

67. 520 S.W.2d 553 (Tex. Civ. App.—Amarillo 1975, no writ).

68. *Id.* at 554-55.

69. *Marshall v. City of Lubbock*, 446 S.W.2d 740, 741 (Tex. Civ. App.—Amarillo 1969, no writ).

70. See cases cited note 66 *supra*.

71. *Rawson v. Brownsboro Independent School Dist.*, 263 S.W.2d 578, 581 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.).

could not be determined from the plaintiff's pleadings.<sup>72</sup> In *Armstrong v. Gaddis*,<sup>73</sup> plaintiff's failure to plead that he was an heir was fatal to his mandamus action because he presented no assertion that he succeeded in title to a judgment for his deceased mother.<sup>74</sup> A suit to enjoin collection of an excessive tax was also unsuccessful where the plaintiff failed to allege the amount of the excess or any fact that would allow calculation of it.<sup>75</sup>

Yet another obstacle is found in the fact that just as equity will not enjoin performance on a valid public contract on suit by a taxpayer,<sup>76</sup> neither will it enjoin performance of a merely voidable one.<sup>77</sup> In such circumstances, the public officials have discretion, and they alone determine the course to be taken.<sup>78</sup> In *Osborne v. Keith*,<sup>79</sup> the court held that in order for a citizen to bring such a suit, he must bring himself strictly within the established rule that suits may be brought only in cases of proposed illegal expenditures, and not upon cases of unwise or indiscreet spending.<sup>80</sup> As a result, where the officials have not acted beyond their lawful powers, absent bad faith in arriving at their decision, the wisdom, necessity, or expediency of their acts may not be questioned in the courts.<sup>81</sup> Since these functions are legislative, the officials are answerable only to the people who elected them.<sup>82</sup>

72. *Id.* at 581.

73. 214 S.W.2d 149 (Tex. Civ. App.—San Antonio 1948, no writ).

74. *Id.* at 149-50.

75. *Altgelt v. City of San Antonio*, 81 Tex. 436, 450, 17 S.W. 75, 77 (1890).

76. *Mayer v. Kostas*, 71 S.W.2d 398, 401 (Tex. Civ. App.—Galveston 1934, writ ref'd).

77. *Osborne v. Keith*, 142 Tex. 262, 265, 177 S.W.2d 198, 200 (1944); *Rodgers v. County of Taylor*, 368 S.W.2d 794, 797 (Tex. Civ. App.—Eastland 1963, writ ref'd n.r.e.); *Glimpse v. Bexar County*, 160 S.W.2d 996, 999 (Tex. Civ. App.—San Antonio 1942, writ ref'd).

78. *Osborne v. Keith*, 142 Tex. 262, 265-66, 177 S.W.2d 198, 200-01 (1944); *Rodgers v. County of Taylor*, 368 S.W.2d 794, 797 (Tex. Civ. App.—Eastland 1963, writ ref'd n.r.e.); *Glimpse v. Bexar County*, 160 S.W.2d 996, 998-99 (Tex. Civ. App.—San Antonio 1942, writ ref'd).

79. 142 Tex. 262, 177 S.W.2d 198 (1944).

80. *Id.* at 265, 177 S.W.2d at 200. The court in *Osborne* stated:

The vigilance of a citizen who takes upon himself that burden [suing on a public wrong] in the interest of good government is to be commended. However, the procedure is generally recognized as being drastic and, in order to be authorized to maintain such an action, a citizen must bring himself strictly within the established rules. Governments cannot operate if every citizen who concludes that a public official has abused his discretion is granted the right to come into court and bring such official's public acts under judicial review. The right, therefore, of a citizen to maintain such an action is strictly limited to cases of illegality of the proposed expenditure and does not extend to cases of unwise or indiscreet expenditures. The contract upon which it is proposed to pay out public funds must be illegal and not merely voidable at the option of the public official entrusted with authority in the premises.

*Id.* at 265, 177 S.W.2d at 200.

81. *Osborne v. Keith*, 142 Tex. 262, 267, 177 S.W.2d 198, 201 (1944); *Gillam v. City of Fort Worth*, 287 S.W.2d 494, 499 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.).

82. *Gillam v. City of Fort Worth*, 287 S.W.2d 494, 499 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.).

To state a justiciable interest, then, a plaintiff generally must not only have a special interest in the subject matter of the suit, but the suit must also involve an act that is done without color of authority.<sup>83</sup> This rule is primarily designed to facilitate the smooth operation of government, but it also serves an important function in the scheme of divided governmental power.<sup>84</sup> The delineations between the three governmental branches, although seldom clear, would be hopelessly penumbral if any citizen could invoke judicial power to question any act.<sup>85</sup> Yet sufficient judicial scrutiny is allowed to maintain the balance of powers by allowing suits for abuse of discretion.<sup>86</sup> Such actions, limited solely to the question of abuse of discretion, proscribe legislative and administrative action to their constitutional perimeter, with minimal judicial inhibition and interference.<sup>87</sup>

#### PUBLIC BONDS

Generally, a suit on a void bond issue may not be maintained where there is no power or authority for the issuance of the bonds because equity will not do a useless act.<sup>88</sup> No liability could be imposed upon the governmental body, or any taxpayer, by a bond issue if no semblance of authority for the act was present.<sup>89</sup> The cases of *Polly v. Hopkins*,<sup>90</sup> and *Parks v. West*,<sup>91</sup>

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83. See *Osborne v. Keith*, 142 Tex. 262, 266, 177 S.W.2d 198, 201 (1944); *Bee County v. Roberts*, 437 S.W.2d 62, 64 (Tex. Civ. App.—Corpus Christi 1968, no writ) (suit not allowed); *Lawler v. Castroville Rural High School Dist.*, 233 S.W.2d 613, 616 (Tex. Civ. App.—San Antonio 1950, writ ref'd); *Walton v. Brownsville Navigation Dist.*, 181 S.W.2d 967, 969-70 (Tex. Civ. App.—San Antonio 1944, writ ref'd) (suit not allowed).

84. See *Osborne v. Keith*, 142 Tex. 262, 265, 177 S.W.2d 198, 200 (1944); *Wolf v. Young*, 277 S.W.2d 744, 746-47 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.). "Executive and legislative matters, political matters and matters of policy, in the absence of personal or vested property rights, special provision by the Legislature, or some violation of the constitution, are free from judicial control." *Id.* at 746-47.

85. See *Wolf v. Young*, 277 S.W.2d 744, 746-47 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.); cf. *Osborne v. Keith*, 142 Tex. 262, 265, 177 S.W.2d 198, 200 (1944).

86. See *Kimbrough v. Walling*, 371 S.W.2d 691, 692 (Tex. 1963); *Osborne v. Keith*, 142 Tex. 262, 267, 177 S.W.2d 198, 200 (1944).

87. See *Kimbrough v. Walling*, 371 S.W.2d 691, 692 (Tex. 1963); *Osborne v. Keith*, 142 Tex. 262, 267, 177 S.W.2d 198, 200 (1944); *Wolf v. Young*, 277 S.W.2d 744, 746-47 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.).

88. *Polly v. Hopkins*, 74 Tex. 145, 147, 11 S.W. 1084, 1085 (1889); *Johnson v. Town of Refugio*, 56 S.W.2d 674, 675 (Tex. Civ. App.—San Antonio 1932, no writ) (dictum); *Tyrrell & Garth Inv. Co. v. City of Highlands*, 44 S.W.2d 1059, 1061 (Tex. Civ. App.—El Paso 1931, no writ) (dictum).

89. *Polly v. Hopkins*, 74 Tex. 145, 146-47, 11 S.W. 1084, 1085 (1889); *Johnson v. Town of Refugio*, 56 S.W.2d 674, 675 (Tex. Civ. App.—San Antonio 1932, no writ); *Tyrrell & Garth Inv. Co. v. City of Highlands*, 44 S.W.2d 1059, 1061 (Tex. Civ. App.—El Paso 1931, no writ).

90. 74 Tex. 145, 11 S.W. 1084 (1889).

91. 102 Tex. 11, 111 S.W. 726 (1908).

have been said to represent conflicting lines of authority on this point,<sup>92</sup> but they may well be distinguishable. In *Polly*, the bonds were issued by the county judge to pay for construction of a jail that not only was unauthorized, but was expressly forbidden by the commissioners court.<sup>93</sup> In *Parks*, the contention was that the bonds were void because the issuing school district was formed without regard to county lines.<sup>94</sup> The legislature, although it acted without authority, sanctioned formation in this manner, so that some semblance of authority existed.<sup>95</sup> This indicates that a plaintiff may sue in cases where the issuance, under some circumstances, could be binding on the body politic concerned.<sup>96</sup> It should be noted, however, that where the lack of authority for the bond issue is revealed by a source that any prospective bond purchaser is charged with knowledge of, a taxpayer may not enjoin the issuance since he could not be injured thereby.<sup>97</sup> This rule is particularly applicable to the frequently recurring situation where the contract itself provides that payment can never be demanded from tax funds.<sup>98</sup>

#### ACTIONS FOR RECOVERY

A suit to restrain illegal spending of tax funds may be maintained by a taxpayer since he has a private interest in the subject matter and is suing for himself.<sup>99</sup> After the expenditures are complete, however, a suit to enjoin such use of the funds is moot<sup>100</sup> because the issue in controversy no longer presents a basis for relief.<sup>101</sup> In a suit to enjoin illegal spending, the

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92. Note, 17 TEXAS L. REV. 377 (1939).

93. *Polly v. Hopkins*, 74 Tex. 145, 147, 11 S.W. 1084, 1085 (1889).

94. *Parks v. West*, 102 Tex. 11, 15, 111 S.W. 726, 729 (1908).

95. *Id.* at 15, 111 S.W. at 729.

96. *Polly v. Hopkins*, 74 Tex. 145, 147, 11 S.W. 1084, 1085 (1889); see *Johnson v. Town of Refugio*, 56 S.W.2d 674, 675 (Tex. Civ. App.—San Antonio 1932, no writ); *Tyrrell & Garth Inv. Co. v. City of Highlands*, 44 S.W.2d 1059, 1061 (Tex. Civ. App.—El Paso 1931, no writ).

97. *Polly v. Hopkins*, 74 Tex. 145, 147, 11 S.W. 1084, 1085 (1889); see *Powell v. City of Baird*, 132 S.W.2d 464, 472 (Tex. Civ. App.—Eastland 1939, no writ); *Fisher v. City of Bartlett*, 76 S.W.2d 535, 536 (Tex. Civ. App.—Austin 1934, writ dismissed); *Johnson v. Town of Refugio*, 56 S.W.2d 674, 675 (Tex. Civ. App.—San Antonio 1932, no writ); *Tyrrell & Garth Inv. Co. v. City of Highlands*, 44 S.W.2d 1059, 1061 (Tex. Civ. App.—El Paso 1931, no writ); *Womack v. City of West Univ. Place*, 32 S.W.2d 930, 931 (Tex. Civ. App.—Beaumont 1930, no writ).

98. See, e.g., *Franks v. Welch*, 389 S.W.2d 142, 146 (Tex. Civ. App.—Houston 1965, writ refused n.r.e.); *Estes v. City of Granbury*, 314 S.W.2d 154, 155 (Tex. Civ. App.—Fort Worth 1958, writ refused); *Fisher v. City of Bartlett*, 76 S.W.2d 535, 536-37 (Tex. Civ. App.—Austin 1934, writ dismissed).

99. *Sullivan v. Universal Elec. Constr. Co.*, 227 S.W.2d 387, 390 (Tex. Civ. App.—Austin 1950, writ refused n.r.e.).

100. *Fausett v. King*, 470 S.W.2d 770, 775 (Tex. Civ. App.—El Paso 1971, no writ); *Parr v. First State Bank*, 307 S.W.2d 309, 310 (Tex. Civ. App.—Eastland 1957, no writ); *Rawson v. Brownsboro Independent School Dist.*, 263 S.W.2d 578, 579 (Tex. Civ. App.—Dallas 1953, writ refused n.r.e.).

101. *Bledsoe, Mootness and Standing in Class Actions*, 1 FLA. ST. U.L. REV. 430,

contract having been fully performed, no relief may be granted and jurisdiction is lost.<sup>102</sup> The case, then, may become moot at any time full payment is made, and the trial or appellate court is left with no recourse but to dismiss the action for an injunction.<sup>103</sup>

In a suit for recovery of illegally spent public funds, jurisdiction may never attach because an individual taxpayer is usually unable to state a litigable interest in such a suit.<sup>104</sup> Such recovery belongs to the governmental body.<sup>105</sup> The public officials have discretion in determining whether or not to sue; they alone are in a position to weigh the benefits and detriments of the contract and a suit thereon.<sup>106</sup> Other jurisdictions allow such suits by

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432 (1973); see *Glass v. City of Austin*, 533 S.W.2d 411, 413 (Tex. Civ. App.—Austin 1976, no writ); *Fausett v. King*, 470 S.W.2d 770, 775 (Tex. Civ. App.—El Paso 1971, no writ).

102. See *Glass v. City of Austin*, 533 S.W.2d 411, 413 (Tex. Civ. App.—Austin 1976, no writ); *Fausett v. King*, 470 S.W.2d 770, 775 (Tex. Civ. App.—El Paso 1971, no writ); *Parr v. First State Bank*, 307 S.W.2d 309, 310 (Tex. Civ. App.—Eastland 1957, no writ) (courts do not decide cases in which nothing remains to be litigated); *Rawson v. Brownsboro Independent School Dist.*, 263 S.W.2d 578, 579 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.).

103. See *State v. Society for Friendless Children*, 130 Tex. 533, 534, 111 S.W.2d 1075, 1076 (1938) (trial courts will not litigate moot controversies and appellate courts will not review cases where controversy has terminated); *Glass v. City of Austin*, 533 S.W.2d 411, 413 (Tex. Civ. App.—Austin 1976, no writ); *Fausett v. King*, 470 S.W.2d 770, 775 (Tex. Civ. App.—El Paso 1971, no writ). The court in *Fausett* stated: "We cannot directly pass upon these matters that are of general interest to the public as apparently our Supreme Court has not relaxed its rule of mootness as has been done in a majority of jurisdictions." *Id.* at 775. *Rawson v. Brownsboro Independent School Dist.*, 263 S.W.2d 578, 579 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.).

104. *Scott v. Graham*, 156 Tex. 97, 104, 292 S.W.2d 324, 328-29 (1956). The defendant presented the unique contention, upon plaintiff's suit as a taxpayer to enjoin payment to defendant for services rendered as temporary district attorney, that no injunction should issue because plaintiff could sue to recover the funds in a suit at law on the merits. This contention was rejected because the plaintiff could not bring such an action, but the injunction sought was denied because plaintiff had no justiciable interest in the suit. *Id.* at 104, 292 S.W.2d at 328-29; see *Hoffman v. Davis*, 128 Tex. 503, 507, 100 S.W.2d 94, 95 (1937); *Glass v. City of Austin*, 533 S.W.2d 411, 413 (Tex. Civ. App.—Austin 1976, no writ); *Murray v. Harris*, 208 S.W.2d 626, 627 (Tex. Civ. App.—Waco 1948, no writ); *Guadalupe-Blanco River Authority v. Tuttle*, 171 S.W.2d 520, 524 (Tex. Civ. App.—San Antonio 1943, writ ref'd w.o.m.) (concurring opinion); *City of Corpus Christi v. Flato*, 83 S.W.2d 433, 438-39 (Tex. Civ. App.—San Antonio 1935, writ dism'd).

105. *Scott v. Graham*, 156 Tex. 97, 104, 292 S.W.2d 324, 329 (1956); *Hulett v. West Lamar Rural High School Dist.*, 149 Tex. 289, 291, 232 S.W.2d 669, 670 (1950); *Glass v. City of Austin*, 533 S.W.2d 411, 413 (Tex. Civ. App.—Austin 1976, no writ); *Parr v. First State Bank*, 307 S.W.2d 309, 310 (Tex. Civ. App.—Eastland 1957, no writ); *City of Corpus Christi v. Flato*, 83 S.W.2d 433, 438 (Tex. Civ. App.—San Antonio 1935, writ dism'd) (city's action barred by laches).

106. *Hoffman v. Davis*, 128 Tex. 503, 508, 100 S.W.2d 94, 96 (1937). The court in *Hoffman* stated:

[I]t may be said to be the settled rule in this State that, although a contract made by a county may be illegal, still the county must account for the benefits which it derives thereunder. The officer authorized to prosecute this suit might arrive at the conclusion, after an investigation of all the facts, that, allowing for the benefits

individuals<sup>107</sup> on the theory that the right of recovery cannot be distinguished from the right to enjoin the act, but the contrary rule still applies in Texas courts.<sup>108</sup> Since the public alone may benefit directly from this type of recovery, the right to initiate these actions is vested exclusively in the legally constituted public guardians.<sup>109</sup>

#### THE LEGAL GUARDIAN OF PUBLIC RIGHTS

Although members of the general public often cannot obtain redress for public wrongs, such wrongs do not go without remedy. Actions on public contracts and bonds, as with all public rights, are properly brought "by such officer or officers as have been entrusted by the law making power with this duty."<sup>110</sup> This rule exists because the legislature, by whom such duty is delegated, is vested by the constitution with full and paramount authority over the public domain.<sup>111</sup>

Courts cannot act upon a suit by one who is unable to profit thereby because they may act only to redress grievances and to prevent wrongs, not to decide abstract questions.<sup>112</sup> As a result, jurisdiction is present only in actions by plaintiffs who have an interest in the subject matter of the suit.<sup>113</sup> Only persons with a primary legal right may seek judicial redress for an injury,<sup>114</sup> and the district attorneys, or county attorneys alone, are usually vested with such right.<sup>115</sup>

Other jurisdictions seem to allow suits by individuals for the public when the officials fail to sue and rely upon the exercise of sound judicial discretion

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received, a substantial recovery for the county would not result from the litigation. If not, manifestly the suit should not be prosecuted, and citizens, as such, should not be permitted to determine that it should be.

*Id.* at 508, 100 S.W.2d at 96.

107. *Id.* at 506, 100 S.W.2d at 96.

108. *Hulett v. West Lamar Rural High School Dist.*, 149 Tex. 289, 291, 232 S.W.2d 669, 670 (1950); *Hoffman v. Davis*, 128 Tex. 503, 506, 100 S.W.2d 94, 96 (1937); *Murray v. Harris*, 208 S.W.2d 626, 627 (Tex. Civ. App.—Waco 1948, no writ).

109. *Hulett v. West Lamar Rural High School Dist.*, 149 Tex. 289, 291, 232 S.W.2d 669, 670 (1950); *Hoffman v. Davis*, 128 Tex. 503, 508, 100 S.W.2d 94, 96 (1937); *Murray v. Harris*, 208 S.W.2d 626, 627 (Tex. Civ. App.—Waco 1948, no writ); *City of Corpus Christi v. Flato*, 83 S.W.2d 433, 438 (Tex. Civ. App.—San Antonio 1935, writ *dism'd*).

110. *E.g.*, *City of San Antonio v. Strumberg*, 70 Tex. 366, 369, 7 S.W. 754, 755 (1888); *Hill v. Ramsey*, 307 S.W.2d 832, 833 (Tex. Civ. App.—Austin 1957, writ *ref'd n.r.e.*); *Hill v. Carr*, 307 S.W.2d 828, 830 (Tex. Civ. App.—Austin 1957, no writ).

111. *City of San Antonio v. Strumberg*, 70 Tex. 366, 369, 7 S.W. 754, 755 (1888); *Hill v. Ramsey*, 307 S.W.2d 832, 833 (Tex. Civ. App.—Austin 1957, writ *ref'd n.r.e.*).

112. *Moore v. Stark*, 118 Tex. 565, 578, 17 S.W.2d 1037, 1041 (1929).

113. *Id.* at 578, 17 S.W.2d at 1041.

114. *Nobles v. Marcus*, 533 S.W.2d 923, 927 (Tex. 1976).

115. *See* TEX. CONST. art. V, § 21. *See generally* TEX. REV. CIV. STAT. ANN. arts. 321-28 (1973), *as amended*, (Supp. 1976) (district attorneys); *id.* arts. 329-31 (1973), *as amended*, (Supp. 1976) (county attorneys); *id.* arts. 332-41 (1973), *as amended*, (Supp. 1976).

to prevent abuses of such actions.<sup>116</sup> In Texas, however, such suits would have to be tried in the same manner as all others, *i.e.*, brought by the district or county attorney alone.<sup>117</sup> Consequently, only those few recent cases which have held that a statute granted standing without a special interest<sup>118</sup> have been deemed to be of the type that Texas courts may be safely trusted with in preventing improper uses of their processes.<sup>119</sup> The courts of this state, for the most part, have adhered to the constitutionally mandated division of powers, manifesting the belief that even “[i]f a wrong has been done, the usurpation of the power to prescribe a remedy would be a still greater wrong.”<sup>120</sup> The role then, of the legally constituted guardian of public rights is an important one in Texas jurisprudence and must be carefully scrutinized and policed by the state’s electorate.

#### CONCLUSION

A public bond issue that is void from its inception may not be enjoined in a taxpayer’s suit because he may not suffer a loss thereby. Likewise, it seems that the special injury requirement remains fully applicable to all individual actions on public contracts, despite a slight retrenchment from the rule in those contexts where the courts have found some statutory basis for the action. Whether these rigid proscriptions on suits to protect public rights are in the interest of the public, or work injustices on it, is unimportant from the point of view of the judiciary. The division of governmental power among the three departments is expressly required by the constitution, and until recently, this division has been jealously maintained without encroachment by the courts. Considering this background, statutorily created suits by individuals with no special interest are without authority and might succumb to a proper challenge on those grounds. While these cases stand unreversed, the future of all public actions remains unclear. What is clear, though, is that under the present constitutional mandate, the proper plaintiff for public actions in Texas, absent a special interest in the individual plaintiff, both pragmatically and constitutionally, is the legally constituted guardian of public rights, and not the individual himself.

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116. *Hoffman v. Davis*, 128 Tex. 503, 509, 100 S.W.2d 94, 97 (1937).

117. *Id.* at 509, 100 S.W.2d at 97.

118. *Scott v. Board of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966); *McCoy v. Williams*, 500 S.W.2d 178, 180 (Tex. Civ. App.—El Paso 1973, writ ref’d n.r.e.); *Turullols v. San Felipe Country Club*, 458 S.W.2d 206, 209 (Tex. Civ. App.—San Antonio 1970, writ ref’d n.r.e.).

119. *See, e.g.*, *Osborne v. Keith*, 142 Tex. 262, 265, 177 S.W.2d 198, 200 (1944); *City of San Antonio v. Strumberg*, 70 Tex. 366, 369, 7 S.W. 754, 755 (1888); *Franks v. Welch*, 389 S.W.2d 142, 146 (Tex. Civ. App.—Houston 1965, writ ref’d n.r.e.).

120. *Harrel v. Lynch*, 65 Tex. 146, 152 (1885).