St. Mary's Law Journal

Volume 12 | Number 1 Article 11

3-1-1980

Reasonable Diligence by a Judgment Creditor to Discover a Debtor's Fraudulent Concealment of Assets Avoids Limitations Governing Issuance of Executions and Revival of Judgments.

J. Randall Grimes

affirmative defense may lead some courts to conclude the burden of proof is on the defendant to show involuntary intoxication by a preponderance of the evidence.[97] Such a conclusion is not warranted by the *Torres* decision and should not be reached if involuntary intoxication is to be a viable defense in Texas. The differences between insanity and involuntary intoxication are sufficient to justify treating them differently as defenses. The court of criminal appeals in *Torres* neither places the burden of proof by a preponderance of the evidence on the defendant[98] nor requires a finding of insanity under section 8.01(a) of the Penal Code.[99] Involuntary intoxication is a defensive issue, and the defendant need only raise affirmatively the two aspects of the defense, involuntariness and mental dysfunction.[100] The burden of proof remains on the state to overcome this defensive issue beyond a reasonable doubt.[101] If the Texas courts choose to follow a literal interpretation of *Torres*, involuntary intoxication is unlikely to be frequently pled and even less likely to be successful. If, however, the *Torres* decision is recognized as being independent of the Penal Code and the insanity defense, involuntary intoxication will be accepted as a valid defense to criminal responsibility in Texas.

Lewis Buttles

JUDGMENTS—Tolling Limitations—Reasonable Diligence By a Judgment Creditor to Discover a Debtor's Fraudulent Concealment of Assets Avoids Limitations Governing Issuance of Executions and Revival of Judgments

Estate of Stonecipher v. Estate of Butts,
591 S.W.2d 806 (Tex. 1979).

L. W. Stonecipher recovered a money judgment against Thomas Butts and his wife Irene in 1950.[1] Executions issued thereon in May of that year

97. *Id.* at 740-50.

98. *Id.* at 749-50. The court fails to discuss burden of proof at all. Since defensive issues generally need only be affirmatively raised by the defendant, the same requirement should apply to involuntary intoxication, absent express language to the contrary. *See* Wilson v. State, 581 S.W.2d 661, 670-71 (Tex. Crim. App. 1979) (on State's motion for rehearing) (Clinton, J., dissenting).

99. *See* Torres v. State, 585 S.W.2d 746, 749 (Tex. Crim. App. 1979).

100. *See, e.g.*, Wilson v. State, 581 S.W.2d 661, 670-71 (Tex. Crim. App. 1979); Day v. State, 532 S.W.2d 302, 306 (Tex. Crim. App. 1976); Gavia v. State, 488 S.W.2d 420, 421 (Tex. Crim. App. 1972).

101. Wilson v. State, 581 S.W.2d 661, 670-71 (Tex. Crim. App. 1979).

1. In the original suit the Yellow Cab Company, a partnership wholly owned by the

were returned nulla bona.[2] Discovery proceedings revealed the Butts had no assets subject to execution,[3] and in 1961 the judgment became dormant. Stonecipher initiated the present action in 1971 against the Butts and Elmer Newman, a banker accused of collaborating in a scheme to prevent collection of the prior judgment lien.[4] Stonecipher asserted the statutory limitations period had been tolled due to the defendant's fraudulent acts.[5] The trial court rendered judgment for the Butts.[6] The Beaumont Court of Civil Appeals affirmed, reasoning the judgment was dormant and no longer capable of being revived by statute or otherwise, leaving Stonecipher with no recoverable damage.[7] An application for writ of error was granted by the Texas Supreme Court. Held—*Reversed and remanded.* Reasonable diligence by a judgment creditor to discover a debtor's fraudulent concealment of assets avoids limitations governing issuance of executions and revival of judgments.[8]

Generally a judgment lien serves to encumber the realty[9] of a judgment

---

Butts, was joined as a party defendant. *See* Estate of Stonecipher v. Estate of Butts, 579 S.W.2d 27, 28 (Tex. Civ. App.—Beaumont), *rev'd,* 591 S.W.2d 806 (Tex. 1979).

2. A return of nulla bona signifies a diligent search revealed no property that could be levied upon in satisfaction of a levy of execution. *See* Reed v. Lowe, 63 S.W. 687, 689 (Mo. 1901); Langford v. Few, 47 S.W. 927, 930 (Mo. 1898).

3. Estate of Stonecipher v. Estate of Butts, 579 S.W.2d 27, 28 (Tex. Civ. App. —Beaumont), *rev'd,* 591 S.W.2d 806 (Tex. 1979). A partial payment of $5,000 was paid on the judgment which was rendered for $21,8080.36, plus interest. *Id.* at 28.

4. *See id.* at 28. The plaintiff alleged Thomas and Irene Butts transferred property they owned into Newman's name for the express purpose of avoiding a levy on that property in satisfaction of the original debt. *See id.* at 28.

5. *See id.* at 29. According to the applicable statutes, TEX. REV. CIV. STAT. ANN. arts. 3773 (Vernon 1966) and 5532 (Vernon 1958), the judgment was dormant and unable to be revived. Therefore, the complainant pled not for revival of the judgment, but for fraud and deceit. In the alternative, he claimed statutory limitations were tolled due to the defendant's fraudulent acts. Estate of Stonecipher v. Estate of Butts, 591 S.W.2d 806 (Tex. 1979).

6. *See id.* at 807. The judgment for Butts was rendered by order of the court notwithstanding the jury's original verdict in favor of Stonecipher. *Id.* at 807.

7. *See id.* at 807.

8. *Id.* at 810.

9. Personal property of the debtor is not affected by the lien. *See* Fore v. United States, 339 F.2d 70, 72 (5th Cir. 1964), *cert. denied,* 381 U.S. 912 (1976); Donley v. Youngstown Sheet & Tube Co., 328 S.W.2d 192, 197 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.). The term "real estate" includes a freehold interest either in fee simple, for life, or for a term of more than one year. *See, e.g.,* Hall v. Hard, 160 Tex. 565, 571, 335 S.W.2d 584, 588 (1960); Stroble v. Tearl, 148 Tex. 146, 150, 221 S.W.2d 556, 558 (1949); Robertson v. Scott, 141 Tex. 374, 375, 172 S.W.2d 478, 479 (1943). Mineral royalty interests are treated as real property; however, a lien will not attach to rents and profits received from the minerals. *See* United States v. Texas E. Transmission Corp., 254 F. Supp. 114, 118 (W.D. La. 1965); Onyx Ref. Co. v. Evans Prod. Corp., 182 F. Supp. 253, 256 (N.D. Tex. 1959); Munzesheimer v. Leopold, 163 S.W.2d 663, 664 (Tex. Civ. App.—Galveston 1942, writ ref'd w.o.m.). Vendor's lien notes, Sugg v. Mozoch, 293 S.W. 907, 909 (Tex. Civ. App.—Austin 1927, writ ref'd), and

debtor for the benefit of the party holding the judgment.[10] The holder, or judgment creditor, is accorded the right to levy on the property in satisfaction of his judgment.[11] A lien subsequently acquired by another party is usually subordinate to the original creditor's recorded claim.[12] In Texas articles 5447 through 5451 of the Revised Civil Statutes specify the procedures that are mandatory for creation of this lien.[13] The bare announcement of a judgment alone will not create a lien, but rather the filing requisites enumerated in article 5449[14] must be satisfied.[15] Once a final judgment for the payment of money is rendered, the abstract of judgment is filed with and recorded by the county clerk of any county in which the creditor desires to establish a lien.[16] Upon proper recordation and indexing of the judgment, all non-exempt realty[17] owned by the debtor in that

---

mechanic's lien notes, South Tex. Lumber Co. v. Nicoletti, 54 S.W.2d 893, 896 (Tex. Civ. App.—Beaumont 1932, writ dism'd), are excluded from attachment.

10. *See* TEX. REV. CIV. STAT. ANN. art. 5449 (Vernon 1958). *See generally* Hudspeth, *Judgment Liens and Abstracts of Judgment in Texas*, 32 TEX. B.J. 520, 520-21 (1969).

11. *See* TEX. REV. CIV. STAT. ANN. art. 5449 (Vernon 1958).

12. *See* United States v. Ray Thomas Gravel Co., 380 S.W.2d 576, 579 (Tex. 1964); North E. Independent School Dist. v. Aldridge, 528 S.W.2d 341, 343 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.). An unrecorded interest, however, of which creditor had knowledge when he acquired his lien takes precedence. *See, e.g.*, Eagle Lumber Co. v. Trainham, 365 S.W.2d 702, 704 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.); Steele v. Harris, 2 S.W.2d 537, 538 (Tex. Civ. App.—Waco 1928, no writ); David v. State Bank, 238 S.W. 979, 983-84 (Tex. Civ. App.—Amarillo 1922, no writ).

13. *See* TEX. REV. CIV. STAT. ANN. art. 5447 (Vernon Supp. 1980), art. 5449 (Vernon 1958), art. 5449(a) (Vernon Supp. 1980), art 5450 (Vernon 1958), & art. 5451 (Vernon 1958).

14. *Id.* art. 5449 (Vernon 1958).

15. *See* Donley v. Youngstown Sheet v. Tube Co., 328 S.W.2d 192, 194 (Tex. Civ. App.—Eastland 1959, writ ref'd n.r.e.); R. B. Spencer & Co. v. Green, 203 S.W.2d 957, 960 (Tex. Civ. App.—El Paso 1947, no writ); 29 TEXAS L. REV. 530, 534-35 (1951); *cf.* Fore v. United States, 339 F.2d 70, 72 (5th Cir. 1964), *cert. denied*, 381 U.S. 912 (1965) (money judgment, not secured by lien, merely evidences a debt and has no priority among claimants).

16. *See* TEX. REV. CIV. STAT. ANN. art. 5449 (Vernon 1958) & art. 5449(a) (Vernon Supp. 1980). The abstract may be filed in all counties where the debtor presently owns or may in the future acquire real property. *See Student Symposium—Creditor's Post-Judgment Remedies in Texas*, 5 ST. MARY'S L.J. 715, 768 (1974).

17. Real property that is exempt, or beyond the purview of the lien, consists primarily of the debtor's homestead. Banks v. Gumm, 360 S.W.2d 836, 836-37 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.); Reisberg v. Hubbard, 326 S.W.2d 605, 605 (Tex. Civ. App.—Eastland 1959, no writ); *see* TEX. CONST. art. XVI, § 50. The exemption does not apply, however, to any excess of residence homestead beyond constitutional provisions. *See* Harrison v. First Nat'l Bank, 224 S.W. 269, 274 (Tex. Civ. App.—Fort Worth), *aff'd*, 238 S.W. 209 (1920). Also exempt is a wife's separate property when the lien derives from a judgment against her husband for his separate liabilities. *See* Bice v. Campbell, 231 F. Supp. 948, 951 (N.D. Tex. 1964); Foster v. Christensen, 67 S.W.2d 246, 249 (Tex. Comm'n App. 1934, judgmt adopted).

county, including any after-acquired property,[18] becomes subject to the resultant security interest. In addition, recording serves as constructive notice to potential purchasers that the property is encumbered by a prior judgment lien.[19]

The lienholder is afforded several alternatives for achieving foreclosure. It is primarily accomplished by execution sale[20] or by a bill in equity to foreclose the lien.[21] In the absence of a void judgment,[22] the validity of the judgment lien may not be questioned by an adverse party during foreclosure.[23] When the debtor has conveyed property after the lien has attached, that realty is subject to divestiture in the creditor's favor[24] provided any remaining property of the debtor is levied upon first.[25]

The duration of a judgment has been statutorily established to span ten years from the date of rendition.[26] A writ of execution[27] may issue at

---

18. *See* Cheswick v. Weaver, 280 S.W.2d 942, 944 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e.). Any real property not exempt from a forced sale and acquired by the debtor subsequent to establishment of the lien is subject to attachment. The coverage extends to property obtained by purchase, devise, or inheritance. *See* Frankie v. Lone Star Brewing Co., 42 S.W. 861, 862 (Tex. Civ. App. 1892, writ ref'd).

19. *See* Baker v. West, 120 Tex. 113, 119-20, 36 S.W.2d 695, 697-98 (1931); 15 BAYLOR L. REV. 248, 253 (1963).

20. *See* TEX. R. CIV. P. 621. Property that has been attached by a judgment lien and levied on by the sheriff may be sold under authority of a writ of execution. *See* Swafford v. Holman, 446 S.W.2d 75, 79-80 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.). Proceeds of the sale inure to the benefit of the creditor according to the dollar value of his judgment as established by the court. *See* TEX. REV. CIV. STAT. ANN. art. 3824 (Vernon 1966).

21. A bill in equity is not an independent lawsuit to enforce the judgment lien, but a petition by the creditor containing a statement of facts and requesting foreclosure by the court. *See* Baker v. West, 120 Tex. 113, 119, 36 S.W.2d 695, 697 (1931). Although Texas recognizes both the execution sale and bill of foreclosure, some states only authorize the sale by execution. *See* Fikes v. Buckholts State Bank, 273 S.W. 957, 961 (Tex. Civ. App.—Austin 1925, writ dism'd).

22. To support a lien a judgment must be valid. *See* Trigg v. Royal Indem. Co., 468 S.W.2d 468, 469 (Tex. Civ. App.—Austin 1971, no writ) (execution may be issued only on a final judgment); 29 TEXAS L. REV. 530, 534 (1951).

23. *See* Klier v. Richter, 119 S.W.2d 100, 101 (Tex. Civ. App.—San Antonio 1938, writ ref'd); *cf.* City of Lufkin v. McVicker, 510 S.W.2d 141, 144 (Tex. Civ. App.—Beaumont 1973, no writ) (void judgment is of no effect).

24. *See* Snow v. Harding, 180 S.W.2d 965, 968 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.). A judgment lien does not create a property right pre se, rather it bestows a right to foreclosure which, when accomplished, relates back to the exclusion of interests arising after the lien was established. Onyx Ref. Co. v. Evans Prod. Corp., 182 F. Supp. 253, 256 (N.D. Tex. 1959).

25. *See* Semple v. Eubanks, 35 S.W. 509, 511 (Tex. Civ. App. 1896, writ ref'd); *cf.* Nichols v. Canslor, 140 S.W.2d 254, 256 (Tex. Civ. App.—Fort Worth 1940, writ dism'd judgmt cor.) (property fraudulently conveyed by debtor must be sold for benefit of creditor first).

26. *See* TEX. REV. CIV. STAT. ANN. art. 3773 (Vernon 1966) which provides:

> If no executon is issued within ten years after the rendition of a judgment in any

any time during this period resulting in an additional ten year extension from the date the execution was issued by the court.[28] This provision enables a judgment creditor to maintain the force of his judgment indefinitely so long as the lapse of ten years does not render the judgment dormant.[29] The lien, itself, is extended by filing new abstracts within the ten year period.[30] Should the judgment ever become barred, however, the lien will be immediately expunged.[31] Hence, a lien may be extended for successive ten year periods by issuing execution on the judgment and filing consecutive abstracts within ten year increments.[32]

Article 5532[33] provides two additional remedies for maintaining the force and validity of a judgment and the accompanying lien.[34] The creditor may initiate a *scire facias* proceeding[35] or bring an action on the original debt.[36] The primary purpose of article 5532, however, is to specify a

---

court of record, the judgment shall become dormant and no execution shall issue thereon unless such judgment be revived. If the first execution has issued within the ten years, the judgment shall not become dormant, unless ten years shall have elasped between the issuance of executions thereon, and execution may issue at any time within ten years after the issuance of the preceding execution.

Id.

27. Execution is a process employed to enforce a judgment. Upon the creditor's motion, execution issues from a court directing a sheriff's sale of any real property owned by the debtor and subject to a valid judgment lien. *See* TEX. R. CIV. P. 621 & 622.

28. *Id. See generally* 15 BAYLOR L. REV. 248, 252-53 (1963).

29. *See* General Am. Life Ins. Co. v. Ramp, 135 Tex. 84, 93, 138 S.W.2d 531, 536 (1940); Benson v. Greenville Nat'l Exchange Bank, 253 S.W.2d 918, 926 (Tex. Civ. App.—Texarkana 1952, writ ref'd n.r.e.).

30. *See* TEX. REV. CIV. STAT. ANN. art. 5449 (Vernon 1958).

31. *See id.* The force of the lien is directly contingent on the validity of the judgment. *See id. See generally* 29 TEXAS L. REV. 530, 534 (1951).

32. *See* TEX. REV. CIV. STAT. ANN. art. 3773 (Vernon 1966); 29 TEXAS L. REV. 530, 536 (1951). *See generally Student Symposium—Creditor's Post-Judgment Remedies in Texas,* 5 ST. MARY'S L.J. 715, 767 (1974).

33. TEX. REV. CIV. STAT. ANN. art. 5532 (Vernon 1958) provides: "A judgment in any court of record, where execution has not issued within twelve months after the rendition of the judgment, may be revived by *scire facias* or an action of debt brought thereon within ten years after date of such judgment, and not after." *Id.*

34. *Id; see* Zummo v. Cotham, 137 Tex. 517, 518, 155 S.W.2d 600, 601 (1941); Estate of Stonecipher v. Estate of Butts, 579 S.W.2d 27, 28-29 (Tex. Civ. App.—Beaumont), *rev'd,* 591 S.W.2d 806 (Tex. 1979).

35. *Scire facias* is a process used to revive a judgment after the twelve month period stated in article 5532 has elapsed. Berly v. Sias, 152 Tex. 176, 181, 255 S.W.2d 505, 508 (1953). The procedure is provided since a judgment upon which no execution has been issued for twelve months is viewed as dormant. *See* TEX. REV. CIV. STAT. ANN. art. 5532 (Vernon 1958).

36. In much the same manner as a *scire facias* proceeding, an action on the original debt may be brought by the creditor to revive a dormant judgment within ten years of the date of judgment. *Id.*

limitations period after which the judgment is barred.[37] The article provides for revival of judgments asserting that dormancy ensues when execution has not issued within twelve months after rendition.[38] The language in article 5532 referring to dormancy is inconsistent with article 3773, the latter stipulating a judgment becomes dormant only when execution has not issued within ten years.[39] The discrepancy arises because article 3773 was amended in 1933 to include the ten year period, but article 5532 was not accorded a comparable revision.[40] In *Cox v. Nelson*,[41] the Texarkana Court of Civil Appeals resolved this conflict by holding a judgment is effective for ten years during which time it may be extended for an additional ten years by reissuing execution, using the *scire facias* proceeding, or instituting an action on the debt.[42]

Statutes of limitation were first enacted by the English Parliament to correct "abuses from stale demands."[43] Their purpose today remains essentially the same, to stimulate parties toward diligent filing of claims thereby assuring the most accurate presentation of facts possible[44] and aiding in administration of justice by reducing the quantity of vexatious litigation.[45] Additionally, state legislatures are afforded the opportunity of statutorily defining the time limits within which an action must be

37. *See* Mitchell v. Mitchell, 575 S.W.2d 311, 312 (Tex. Civ. App.—Dallas 1978, no writ); Stanton v. Brown, 269 S.W.2d 853, 854 (Tex. Civ. App.—Galveston 1954, no writ). *See generally* 29 TEXAS L. REV. 530, 536 (1951).

38. TEX. REV. CIV. STAT. ANN. art. 5532 (Vernon 1958). *See generally* Olds, *Judgment Liens in Texas*, 5 HOUS. L. REV. 664 (1968).

39. *Compare* TEX. REV. CIV. STAT. ANN. art. 5532 (Vernon 1958) (implies that a judgment becomes dormant after twelve months, absent execution) *with id.* art. 3773 (expressly states dormancy ensues only after ten years, also absent execution). *See generally* 31 TEXAS L. REV. 73, 74 (1952).

40. *Compare* 1933 Tex. Gen. Laws, ch. 144, § 1, at 369-70 (codified as TEX. REV. CIV. STAT. ANN. art. 3773 (Vernon 1966)) (limitation extended to ten years) *with* TEX. REV. CIV. STAT. ANN. art. 5532 (Vernon 1958) (limitation remains twelve months). *See generally* Wilson, *The Dormant Judgment in Texas*, 2 BAYLOR L. REV. 421 (1950).

41. 223 S.W.2d 84 (Tex. Civ. App.—Texarkana 1949, writ ref'd). The court noted article 3773 was amended by the legislature with the intent the unnecessary methods of revival in article 5532 would be avoided. *Id.* at 85.

42. *See id.* at 85. The Texas Supreme Court approved this proposition in Sanders v. Harder, 148 Tex. 593, 595, 227 S.W.2d 206, 207 (1950).

43. 1 H. WOOD, LIMITATION OF ACTIONS § 2 (4th ed. 1916).

44. *See* Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944); Executive Jet Aviation v. United States, 507 F.2d 508, 515 (6th Cir. 1974); Taliaferro v. Dykstra, 388 F. Supp. 957, 960 (E.D. Va. 1975). *See generally Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

45. *See* Kaczmarek v. New Jersy Turnpike Auth., 390 A.2d 597, 602 (N.J. 1978); *See generally Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185-86 (1950).

brought.[46] Traditionally, courts have been reluctant to imply or read into statutes of limitation exceptions not provided for in the adopted language.[47] The philosophy that legislative reform is the proper recourse from injustices arising from applications of these statutes has prevailed.[48] Nevertheless, a limited number of exceptions, including fraud[49] and discovery,[50] are recognized by many courts as having a tolling effect on limitations.

The analogous doctrines of undiscovered fraud and fraudulent concealment have consistently provided sources of relief from an inequitable bar by limitations.[51] The undiscovered fraud rule provides that a statute of limitations does not begin to run against an action for fraud until the fraud is discovered or could have been discovered by the exercise of due diligence.[52] The fraudulent concealment doctrine, although derived from the doctrine of undiscovered fraud, is broader since it is not limited to actions based on fraud alone[53] but may be applied in any type of claim. Assertion of the doctrine of fraudulent concealment requires a showing of due diligence,[54] lack of knowledge by the aggrieved party,[55] and conceal-

---

46. *See* 30 Sw. L.J. 950, 951 (1976).

47. State v. Williamson-Dickie Mfg. Co., 399 S.W.2d 568, 571 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.); Southern Pac. Transp. Co. v. State, 380 S.W.2d 123, 127-28 (Tex. Civ. App.—Houston 1964, writ ref'd); Continental Supply Co. v. Hutchings, 267 S.W.2d 914, 915 (Tex. Civ. App.—Dallas 1954, writ ref'd).

48. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 321 (1965); Burnett v. New York Central R.R., 380 U.S. 424, 425-27 (1965).

49. L.C.L. Theatres, Inc. v. Columbia Pictures Indus., Inc., 566 F.2d 494, 496 (5th Cir. 1978); Quinn v. Press, 135 Tex. 60, 64, 140 S.W.2d 438, 440 (1940); Pace v. McEwen, 574 S.W.2d 792, 796-97 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

50. McClung v. Lawrence, 430 S.W.2d 179, 181 (Tex. 1968); Gaddis v. Smith, 417 S.W.2d 577, 579-80 (Tex. 1967); Snellings v. Snellings, 482 S.W.2d 707, 709 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.).

51. *See, e.g.*, Morgan v. Koch, 419 F.2d 993, 997 (7th Cir. 1969); Department of Water & Power v. Allis-Chalmers Mfg. Co., 213 F. Supp. 341, 346 (S.D. Cal. 1963); Daves v. Lawyers Sur. Corp., 459 S.W.2d 655, 657 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.). *See generally* Comment, *Intent to Conceal: Tolling the Antitrust Statute of Limitations Under the Fraudulent Concealment Doctrine*, 64 GEO. L.J. 791 (1976).

52. *See, e.g.*, Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946); Exploration Co. v. United States, 247 U.S. 435, 449 (1918); Gee v. CBS, Inc., 471 F. Supp. 600, 622 (E.D. Pa. 1979); Austin Lake Estates, Inc. v. Meyer, 557 S.W.2d 380, 383 (Tex. Civ. App.—Austin 1977, no writ). This rule has been applied to physicians when their negligence was not apparent until after limitations had run. *See* Nichols v. Smith, 507 S.W.2d 518, 519 (Tex. 1974).

53. *See generally* Comment, *Intent to Conceal: Tolling the Antitrust Statute of Limitatons Under the Fraudulent Concealment Doctrine*, 64 GEO. L.J. 791, 794-95 (1976).

54. *See, e.g.*, Hupp v. Gray, 500 F.2d 993, 996-97 (7th Cir. 1974); Mittendorf v. J.R. Williston & Beane, Inc., 372 F. Supp. 821, 830-32 (S.D. N.Y. 1974); Crown Coat Front Co. v. United States, 275 F. Supp. 10, 16 (S.D. N.Y. 1967), *aff'd*, 395 F.2d 160 (2d Cir.), *cert. denied*, 393 U.S. 853 (1968).

ment by the defendant of the cause of action.[56] The undiscovered fraud rule was first articulated by the United States Supreme Court in *Bailey v. Glover*,[57] when the Court disapproved the use of limitations as a bar to legitimate claims.[58] Both doctrines offer a means of averting an unfair bar by limitations when the underlying cause of action has been fraudulently disguised.[59] It would subvert the intent of limitations statutes to permit a party who has fraudulently concealed a cause of action to thereafter gain protection by the statutes' existence.[60]

Texas courts have long acknowledged the tolling effect of fraud on statutes of limitation.[61] The general trend of the decisions supports the rule that when simple fraud or fraudulent concealment is employed to prevent a complainant from gaining knowledge of an underlying cause of action, limitations will not start running until the fraud is discovered or might be discovered by reasonable diligence.[62] This precept has been given a strict

---

55. *See, e.g.*, Atwell v. Retail Credit Co., 431 F.2d 1008, 1012 (4th Cir. 1970), *cert denied*, 401 U.S. 1009 (1971); Baker v. F & F Inv. Co., 420 F.2d 1191, 1199 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970); Mansour v. Reeves Bldgs., Inc., 383 F. Supp. 482, 484 (S.D. W. Va. 1973), *aff'd per curium*, 504 F.2d 812 (4th Cir. 1974).

56. *See, e.g.*, Weinberger v. Retail Credit Co., 498 F.2d 552, 555-56 (4th Cir. 1974); City of Detroit v. Grinnel Corp., 495 F.2d 448, 461 (2d Cir. 1974); Glazer Steel Corp. v. Toyomenka, Inc., 392 F. Supp. 500, 503 (S.D. N.Y. 1974).

57. 88 U.S. (21 Wall.) 342, 349-50 (1874) (defrauding party secretly transferred assets to third party and then declared bankruptcy to avoid payment of debt owed claimant).

58. *Id.* at 349.

59. *See* Gaudin v. KDI Corp., 576 F.2d 708, 712 (6th Cir. 1978); Cook v. Avien, Inc., 573 F.2d 685, 694-95 (1st Cir. 1978). *See generally* Comment, *Intent to Conceal: Tolling the Antitrust Statute of Limitations Under the Fradulent Concealment Doctrine*, 64 GEO. L.J. 791 (1976).

60. *See* NLRB v. Don Burgess Constr. Corp., 596 F.2d 378, 382-83 (9th Cir. 1979); Alabama Bancorporation v. Henley, 465 F. Supp. 648, 652 (N.D. Ala. 1979).

61. *See, e.g.*, Fitzpatrick v. Marlowe, 553 S.W.2d 190, 194 (Tex. Civ. App.— Tyler 1977, writ ref'd n.r.e.); Texas Employers' Ins. Ass'n v. Soliz, 288 S.W.2d 165, 167 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.); Steele v. Glenn, 57 S.W.2d 908, 910-11 (Tex. Civ. App.—Eastland), *dism'd per curiam*, 141 Tex. 565, 61 S.W.2d 810 (1933). A cause accrues to a party when suit may be brought on the wrong that created the right of action. Fraud tolls limitations because the defendant is estopped from asserting limitations as a defense, even though accrual of the cause relates back to the commission of the fraud. *See* Mandola v. Mariotti, 557 S.W.2d 350, 351 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.); Tarkington v. Beneficial Fin. Co., 516 S.W.2d 722, 725 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).

62. *See, e.g.*, Citizen's State Bank v. Shapiro, 575 S.W.2d 375, 380 (Tex. Civ. App. —Tyler 1979, writ ref'd n.r.e.); Ellison v. McGlaun, 482 S.W.2d 304, 311-12 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.); Republic Supply Co., v. French Oil Co., 392 S.W.2d 462, 464-65 (Tex. Civ. App.—El Paso 1965, no writ). Some cases hold fraud alone will not suffice, but rather affirmative concealment of the fraud must have occurred to toll limitations. *See* Morris v. Texas Elks Crippled Children's Hosp., Inc., 525 S.W.2d 874, 882-83 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.); Shipp v. O'Dowd, 454 S.W.2d 845, 847

construction by Texas courts in keeping with the concept that exceptions to statutes of limitations are recognized only sparingly when not mandated by the legislature.[63] It has been applied in a variety of suits ranging from actions for the cancellation of instruments[64] to requests for relief from the sale of realty.[65] As exemplified by the exceptions for fraud and fraudulent concealment, equity is the basis upon which Texas courts generally justify the tolling of limitations.[66] The defrauding party, due to his reprehensible actions, should not have access to the statutorily created defense of a limitations bar.[67]

Closely akin to the fraud-based theories previously discussed is the discovery rule, which is a relatively new adoption by Texas courts.[68] The rule stipulates statutory limitations do not begin to run until the plaintiff learns, or by exercising reasonable diligence should have learned, of the injury from which his right of action accrues.[69] Since its initial pronouncement in *Hahn v. Claybrook*,[70] the discovery rule has been most frequently associated with medical malpractice cases.[71] In these situa-

---

(Tex. Civ. App.—Waco 1970, writ ref'd n.r.e.).

63. *See* L.C.L. Theatres, Inc. v. Columbia Pictures Indus., Inc., 566 F.2d 494, 496 (5th Cir. 1978); McFaddin, Wiess, & Kyle Land Co. v. Texas Rice Land Co., 253 S.W. 916, 919 (Tex. Civ. App.—Beaumont 1923), *aff'd*, 265 S.W. 888 (Tex. Comm'n App. 1924, judgmt adopted).

64. *See, e.g.*, McMullen Oil & Royalty Co. v. Lyssy, 353 S.W.2d 311, 314-15 (Tex. Civ. App.—Austin 1962, no writ) (suit to cancel mineral deeds barred by limitations when grantor could have discovered grantee's fraud through exercise of due diligence); Hooks v. Brown, 348 S.W.2d 104, 119 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.) (suit to cancel bill of sale due to fraud not barred by four year statute); Rumfield v. Rumfield, 324 S.W.2d 304, 307 (Tex. Civ. App.—Amarillo 1959, writ ref'd n.r.e.) (fraudulent representation tolled limitations in action to cancel will).

65. *See* Stephenson v. O'Neal, 433 S.W.2d 804, 807 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.); Fleming v. Todd, 42 S.W.2d 123, 128 (Tex. Civ. App.— Beaumont 1931, writ dism'd).

66. *See, e.g.*, Wise v. Anderson, 163 Tex. 608, 612, 359 S.W.2d 876, 880 (1962); Blondeau v. Sommer, 139 S.W.2d 223, 225 (Tex. Civ. App.—Galveston 1940, writ ref'd); American Indem. Co. v. Ernst & Ernst, 106 S.W.2d 763, 765 (Tex. Civ. App.—Waco 1937, writ ref'd).

67. *See generally Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1217-19 (1950).

68. *See, e.g.*, Kelley v. Rinkle, 532 S.W.2d 947, 949 (Tex. 1976) (credit libel); Gaddis v. Smith, 417 S.W.2d 577, 580-81 (Tex. 1967) (medical malpractice); Atkins v. Crosland, 417 S.W.2d 150, 153-54 (Tex. 1967) (accounting negligence).

69. Gaddis v. Smith, 417 S.W.2d 577, 580-81 (Tex. 1967) (cause of action does not accrue, therefore limitations do not run until discovery of the harm).

70. 100 A. 83 (Md. 1917) (excessive doses of prescribed drug produced skin discoloration; however, no relief as complainant could have discovered injury within statutory period).

71. *See, e.g.*, Billings v. Sisters of Mercy, 389 P.2d 224, 232 (Idaho 1964); Waldman v. Rohrbaugh, 215 A.2d 825, 828-29 (Md. 1966); Johnson v. Caldwell, 123 N.W.2d 785, 791

tions, the rule provides that a cause of action against the physician accrues only when the patient discovers, or through reasonable care should have discovered, the negligent act.[72] The doctrine is gaining increased acceptance and has been codified by several states.[73] In the 1967 case of *Gaddis v. Smith*,[74] the Texas Supreme Court sanctioned use of the discovery rule in professional malpractice cases.[75] The court in *Gaddis* reasoned the contrary rule, which barred the claimant from recovery, would circumvent the policy reasons supporting the statute of limitations and perpetuate an unconscionable injustice on the plaintiff.[76] It was noted that under certain conditions it is nearly impossible for a victim to discover he has been the object of an intentional or negligent wrong.[77] The court reasoned the discovery rule embodies an equitable approach obviating the harsh results of traditional applications of statutes of limitation.[78]

In *Estate of Stonecipher v. Estate of Butts*[79] the Texas Supreme Court considered whether fraud would preserve a judgment by tolling the pertinent limitations period.[80] The court initially held any wrongful interference with property encumbered by a judgment lien will stand as the basis for an action of conspiracy[81] when such interference serves to prevent collection of the lien.[82] The court determined that a debtor's fraudulent con-

---

(Mich. 1963).

72. *See* Gaddis v. Smith, 417 S.W.2d 577, 580-81 (Tex. 1967). *See generally* Comment, *Discovery Rule: Accrual of Cause of Action For Medical Malpractice*, 25 WASH. & LEE L. REV. 78 (1968).

73. *See* ALA. CODE § 6-5-482 (1977) (actions must be brought within six months after discovery or time negligence should have been discovered but in no event may an action be brought more than four years after commission of negligent act); CONN. GEN. STAT. ANN. § 52-584 (West Supp. 1979) (limit of three years after negligent act allowed for party to bring action); MO. ANN. STAT. § 516.105 (Vernon Supp. 1980) (general adoption of discovery principles).

74. 417 S.W.2d 577 (Tex. 1967) (physician negligently left surgical sponge inside claimant's body after performing a caesarean section).

75. *See id.* at 581. The discovery rule was also applied in 1967 to a suit based on the negligence of an accountant. *See* Atkins v. Crosland, 417 S.W.2d 150, 153-54 (Tex. 1967).

76. *See* Gaddis v. Smith, 417 S.W.2d 577, 581 (Tex. 1967).

77. *See id.* at 581. *See also* McFarland v. Connally, 252 S.W.2d 486, 488 (Tex. Civ. App.—Fort Worth 1952, no writ).

78. *See* Gaddis v. Smith, 417 S.W.2d 577, 581 (Tex. 1967).

79. 591 S.W.2d 806 (Tex. 1979).

80. *See id.* at 807.

81. *See id.* at 808. To maintain an action for conspiracy a claimant must demonstrate that defendents "have been guilty of the commission of a wrongful act in violation of some right of the complainants, and that damage has resulted as a proximate consequence of the wrongful act complained of." *Id.* at 807-08. *See also* Annot., 2 A.L.R. 287 (1919).

82. *See* Estate of Stonecipher v. Estate of Butts, 591 S.W.2d 806, 808 (Tex. 1979). In this instance the property forming the basis of the claimant's suit was located in Louisiana. Stonecipher's judgment, however, was only abstracted in Orange County, Texas; so, it was

cealment of assets will toll limitations governing the validity of a judgment lien until the creditor discovers he had been defrauded, so long as reasonable diligence has been exercised to discover the fraud.[83] In reaching this conclusion the court noted that a number of prior decisions have reached the same conclusion, but denied relief because the creditor failed to show sufficient diligence to discover the debtor's assets.[84] Reaffirming the court's traditional abhorrence of fraud,[85] Justice Campbell reasoned that although Texas has statutory provisions that contain measures enabling one to extend the life of judgments, these methods are not exclusive.[86] In limited instances, the court may apply exceptions to statutes of limitations, especially in a case in which fraud has prevented one from asserting his rights.[87] The court declared the Butts' actions in fraudulently conveying their property to Newman suspended limitations until such time as Stonecipher might reasonably acquire notice of his right to execute on the lien.[88] The resultant decision by the court served to contravene the prevailing rule as expressed by the lower court and grant the judgment creditor a measure of relief.[89]

The decision enunciated by the *Stonecipher* court parallels the rationale of cases in which the discovery rule has been applied.[90] *Gaddis v. Smith*,[91] the leading Texas case wherein discovery principles were invoked to redress a medical malpractice claim, may be favorably compared with *Stonecipher*. The Texas Supreme Court declared in *Gaddis* that a cause of action for a physician's negligence does not accrue until the pa-

---

effective only as to realty in that county. Therefore, the Louisiana land owned by the debtor was not within the scope of Stonecipher's lien, and an action for conspiracy would fail. For these reasons, the case was not decided on this point. *Id.* at 808.

83. *Id.* at 809.

84. *Id.* at 808; *see* Wood v. Carpenter, 101 U.S. 135, 139-40 (1879) (no showing of diligence by claimant); Dole v. Wilson, 40 N.W. 161, 162 (Minn. 1888) (plaintiff's neglect will preclude extending statutory limitations).

85. Estate of Stonecipher v. Estate of Butts, 591 S.W.2d 806, 809 (Tex. 1979). The court followed Morris v. House, 32 Tex. 492 (1870), stating "that fraud vitiates whatever it touches." *Id.* at 809.

86. *Id.* at 809.

87. *See id.* at 809.

88. *See id.* at 810.

89. *See id.* at 810.

90. *See, e.g.*, Wise v. Anderson, 163 Tex. 608, 611, 359 S.W.2d 876, 879 (1962) (fraud); Atlas Chem. Indus. v. Anderson, 514 S.W.2d 309, 317 (Tex. Civ. App.—Texarkana 1974) (action for property damage), *aff'd*, 524 S.W.2d 681 (Tex. 1975); Barker v. Levy, 507 S.W.2d 613, 619 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (suit for reformation of a deed). *See generally* Harper, *Texas Adopts the Discovery Rule for Limitations in Medical Malpractice Actions*, 1 ST. MARY'S L.J. 77 (1969).

91. 417 S.W.2d 577 (Tex. 1967).

tient might reasonably discover the resulting harm.[92] In essence, the decision in *Stonecipher* mirrors the policy reasons underlying the approach adopted in *Gaddis*.[93] In both instances, the court recognized limitation statutes are generally designed to bar stale and fraudulent claims, and by its ultimate decision intimated that neither case is particularly susceptible to contrived prosecutions.[94] Moreover, any hardship imposed on the defendant is counter-balanced by the inequitable results of a contrary rule denying the plaintiff, innocent of any intentional or negligent delay, the right to assert his claim.[95] Absent judicial relief, the aggrieved party is without a remedy because of the negligence of a physician in performing surgery or the fraudulent concealment of assets by a debtor.[96] In either case, it would represent a grave injustice to concur in the defendant's assertion that the claimant has been "sitting on his rights"[97] in dereliction of his duty to bring suit promptly,[98] especially considering the claimant was unaware of such rights until limitations had expired.[99]

The Texas Supreme Court's opinion in *Stonecipher* may be viewed as indicative of a course adopted to accomplish needed changes the state's legislature has been slow in providing.[100] As a rule, courts are reluctant to

---

92. *See id.* at 580.

93. *Compare id.* at 581 (limitations commence only when plaintiff knows or has reason to know of foreign object negligently left in body) *with* Estate of Stonecipher v. Estate of Butts, 591 S.W.2d 806, 809 (Tex. 1979) (fraudulent concealment by judgment debtor tolls limitations).

94. *See* Estate of Stonecipher v. Estate of Butts, 591 S.W.2d 806, 809 (Tex. 1979); Gaddis v. Smith, 417 S.W.2d 577, 581 (Tex. 1967). In *Fernandi v. Strully* the court stated, "It must be born in mind that Mrs. Fernandi's claim does not raise questions as to her credibility. . . . Here the lapse of time does not entail the danger of a false or frivolous claim . . . ." Fernandi v. Strully, 173 A.2d 277, 286 (N.J. 1961).

95. *Cf.* Gaddis v. Smith, 417 S.W.2d 577, 581 (Tex. 1967) (often impossible to discover physician's negligence within statutory period).

96. *See* Carrell v. Denton, 138 Tex. 145, 147-48, 157 S.W.2d 878, 878-79 (1942); Stewart v. Janes, 393 S.W.2d 428, 428-29 (Tex. Civ. App.—Amarillo 1965, writ ref'd). Since statutory relief is inadequate, courts have resorted to a number of transparent remedies of their own design. *See* Morrison v. Acton, 198 P.2d 590, 595-96 (Ariz. 1948) (statute is tolled when doctor has probable knowledge of negligence but remains silent); Schmit v. Esser, 236 N.W. 622, 624-25 (Minn. 1931) (limitations do not commence until physician/patient relationship concludes).

97. *See* Comment, *Discovery Rule: Accrual of Cause of Action For Medical Malpractice*, 25 WASH. & LEE L. REV. 78, 83 (1968).

98. *See generally Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

99. *See* Berry v. Branner, 421 P.2d 996, 999-1000 (Or. 1966); Morgan v. Grace Hosp., Inc., 144 S.E.2d 156, 161-62 (W. Va. 1965).

100. *See* Estate of Stonecipher v. Estate of Butts, 591 S.W.2d 806, 809 (Tex. 1979); Gaddis v. Smith, 417 S.W.2d 577, 581 (Tex. 1967) (discovery rule adopted as exception to applicable limitations statute as legislature has not enacted such an exception).

engraft exceptions upon limitation statutes however reasonable and equitable such variances may seem.[101] It has generally been held that existent statutes applicable to the revival of judgments contain complete and comprehensive means for perpetuating the force of such judgments.[102] The consequences of this policy were brought to bear on a sizeable number of meritorious claims arising from a debtor's fraud, which were barred in accordance with this strict statutory construction.[103] As previously noted, when the gist of an action is fraud, or fraudulent concealment, many courts have seen fit to imply an exception to the applicable limitations period.[104] Prior to *Stonecipher,* however, Texas courts had not employed this practice in aid of a judgment creditor whose lien had expired due to the debtor's concealment of realty which properly should have been the subject of execution.[105] The court in *Stonecipher* determined the most equitable means of avoiding injustice in that instance required judicial legislation,[106] an available, although seldom used, means for avoiding a rigid limitations statute.[107] As solidly established in every jurisdiction as are statutes of limitation,[108] it is no wonder they are often overlooked as subjects of legislative reform; even less surprising is that most changes, as in the instant case, have been effectuated through the judicial system.[109]

The *Stonecipher* pronouncement will undoubtedly impact significantly on litigation involving judgment liens in Texas. Creditors who have been victimized by fraudulent actions of their debtors are now afforded a much

---

101. *See* State v. Williamson-Dickie Mfg. Co., 399 S.W.2d 568, 571 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.); Southern Pac. Transp. Co. v. State, 380 S.W.2d 123, 127-28 (Tex. Civ. App.—Houston 1964, writ ref'd); Continental Supply Co. v. Hutchings, 267 S.W.2d 914, 915 (Tex. Civ. App.—Dallas 1954, writ ref'd).

102. *See* Thomas v. Murray, 49 P.2d 1080, 1083 (Okla. 1935) (no exceptions to pertinent statutes allowed); General Am. Life Ins. Co. v. Ramp, 135 Tex. 84, 93, 138 S.W.2d 531, 536 (1940) (relevant statutes should be strictly construed); TEX. REV. CIV. STAT. ANN. art. 3773 (Vernon 1966) & art. 5532 (Vernon 1958).

103. *See* Thomas v. Murray, 49 P.2d 1080, 1083 (Okla. 1935); General Am. Life Ins. Co. v. Ramp, 135 Tex. 84, 93-94, 138 S.W.2d 531, 536 (1933); Estate of Stonecipher v. Estate of Butts, 579 S.W.2d 27, 29 (Tex. Civ. App.—Beaumont), *rev'd,* 591 S.W.2d 806 (Tex. 1979).

104. *See* Ramos v. Levingston, 536 S.W.2d 273, 276 (Tex. Civ. App.—Corpus Christi 1976, no writ); Featherlax Corp. v. Chandler, 412 S.W.2d 783, 791 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.); Polk Terrace, Inc. v. Harper, 386 S.W.2d 588, 591 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.).

105. Estate of Stonecipher v. Estate of Butts, 591 S.W.2d 806, 808 (Tex. 1979).

106. *Id.* at 809.

107. *Cf.* McNeill v. Simpson, 39 S.W.2d 835, 836 (Tex. Comm'n App. 1931, judgmt adopted) (court avoids limitations bar by implying agreement between parties); Fidelity Union Cas. Co. v. Texas Power & Light Co., 35 S.W.2d 782, 784 (Tex. Civ. App.—Dallas 1931, writ ref'd) (limitations suspended in tort action while compensation claim was litigated).

108. *See* 30 Sw. L.J. 950, 957 (1976).

109. *See id.* at 957.

needed remedy.[110] The possibility exists, however, that a considerable number of legitimate, and not so legitimate, defrauded creditors will seek to litigate claims previously thought to be barred. Therefore, a clearer delineation of the *Stonecipher* decision should be considered by the state's lawmakers. In certain instances courts have been forced to devise various transparent exceptions to limitation statutes in order to do justice.[111] To avoid such a predicament, the legislature should enact an amendment to article 5532[112] detailing an exception to limitations in cases of fraud. Through adoption of a variation of the discovery rule, modified to fit these circumstances and with restrictions plainly described, unwarranted and ill-advised interpretations of the statute may be avoided. The effect of a suit by a bona fide creditor after stated limitations have lapsed would be comparable to a bill of review proceeding after a default judgment.[113] No time limit on bringing such an action would be expressly set forth, but it would lie within the court's discretion to bar a claim when conditions required as much.[114] For his burden of proof, the claimant should be required to demonstrate that extrinsic fraud[115] of a specified nature prevented the assertion of his claim and that his own negligence or lack of diligence in no way contributed to his belated discovery of the preexisting fraud.[116] Although many meritorius claims will assuredly benefit from the *Stonecipher* decision, an indiscriminant appli-

---

110. *Cf.* Hays v. Hall, 488 S.W.2d 412, 414 (Tex. 1972) (in a vasectomy case, discovery rule provides most effective relief for injured party when impossible to discover negligence within statutory time period).

111. *See, e.g.,* Sellers v. Noah, 95 So. 167, 167-68 (Ala. 1923) (plaintiff treats malpractice action as one based on contract in order to use longer limitations period); Huysman v. Kirsch, 57 P.2d 908, 912 (Cal. 1936) (when foreign object is left in patient's body, doctor's "continuing negligence" tolls statute until object is discovered); Lakeman v. La France, 156 A.2d 123, 126 (N.H. 1959) (fraudulent concealment of cause of action by physician prevents limitations from running).

112. TEX. REV. CIV. STAT. ANN. art. 5532 (Vernon 1958).

113. *See* TEX. R. CIV. P. 329b. The bill of review is an equitable proceeding used when a party's legal remedy is inadequate. Often it provides the only relief available to a defendent when another's fraud has prevented him from asserting his rights. *See, e.g.,* Hanks v. Rosser, 378 S.W.2d 31, 33-34 (Tex. 1964); Alexander v. Hagedorn, 148 Tex. 565, 569, 226 S.W.2d 996, 998 (Tex. 1950); Lyons v. Paul, 321 S.W.2d 944, 949 (Tex. Civ. App.—Waco 1958, writ ref'd n.r.e.).

114. *See* Johnson v. Potter, 384 S.W.2d 747, 751 (Tex. Civ. App.—Tyler 1964, no writ) (bill of review failed due to lack of diligence by appellant to set aside prior judgment); American Spiritualist Ass'n v. Dallas, 366 S.W.2d 97, 100 (Tex. Civ. App.—Dallas 1963, no writ) (no evidence introduced by proponent to support allegations). Extrinsic fraud is a wrong committed "by the other party to the suit which has prevented the losing party . . . from knowing about his rights . . . ." Crouch v. Panama Ref. Co., 134 Tex. 633, 639, 138 S.W.2d 94, 97 (1940).

115. *Id.* at 638, 138 S.W.2d at 97.

116. *See* Gracey v. West, 422 S.W.2d 913, 915 (Tex. 1968).

cation of the exception would be inappropriate and unwise.[117] The statutes relating to judgment liens provide an easily understood and convenient means of preserving those liens. Courts, prior to granting relief, should strive to ensure creditors have not been negligent in failing to avail themselves of the available methods of lien extension. Although due diligence is a question of fact,[118] a strict interpretation of that requirement should alleviate somewhat the potential for abuse of the *Stonecipher* exception to the statute of limitations. In addition, courts ought not forget there must eventually be a point at which all claims are barred.[119] Therefore, the merits of each case must necessarily weigh heavily in the ultimate verdict.

Although the court's finding in *Stonecipher* is one of first impression in Texas,[120] it is sustained by settled axioms derived from analogous areas of the law. It recognizes the deficiencies of those statutes that govern the validity of judgment liens[121] and resolves the concealment of assets question in a most equitable fashion.[122] Through prudent administration of the precepts enunciated by the majority, or preferably by an amendment to the current statute, the courts of Texas now have the opportunity to apply justice equitably to defrauded judgment creditors.

J. Randall Grimes

---

117. *See* 46 TEXAS L. REV. 119, 123 (1967). The discovery rule should have been employed "whenever this approach would not subvert the statutory purpose of preventing stale and fraudulent claims." *Id.*

118. *E.g.*, Ruebeck v. Hunt, 142 Tex. 167, 171, 176 S.W.2d 738, 740 (1943); Hines v. Wilson, 197 S.W.2d 840, 842 (Tex. Civ. App.—Amarillo 1946, writ ref'd n.r.e.); Ray v. Barrington, 297 S.W. 781, 785-86 (Tex. Civ. App.—Waco 1927, no writ).

119. *See* Owen v. White, 380 F.2d 310, 315 (9th Cir. 1967) (medical malpractice action for mistaken diagnosis and treatment barred by two year statute); Pico v. Cohn, 25 P. 970, 971 (Cal. 1891). "Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice." Pico v. Cohn, 25 P. 970, 971 (Cal. 1891). *See also* 1 H. WOOD, LIMITATION OF ACTIONS § 2 (4th ed. 1916).

120. Estate of Stonecipher v. Estate of Butts, 591 S.W.2d 806, 809 (Tex. 1979).

121. *See* TEX. REV. CIV. STAT. ANN. art. 3773 (Vernon 1966) & art. 5532 (Vernon 1958).

122. *See* Estate of Stonecipher v. Estate of Butts, 591 S.W.2d 806, 809 (Tex. 1979).