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Recent Case Notes

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RECENT CASE NOTES

CONSTITUTIONAL LAW—COURT-MARTIAL— JURISDICTION OF MILITARY COURTS

Toth, recently honorably discharged from the U.S. Air Force, was arrested in the United States by military police and sent to Korea to be tried by a court-martial for a murder alleged to have been committed while he was in the service there. This procedure was carried out under 64 Stat. 1.09, 50 U.S.C. §553, art. 3a (1950), which provides that if a person commits a serious crime while in the service, the courts-martial will retain jurisdiction even after that person has been discharged, if the civilian courts can not establish jurisdiction to try the crime. *Held:* (in a 6-3 decision) The statute extending the jurisdiction of the military courts to ex-servicemen is unconstitutional in that it violates the right to indictment by grand jury provided by U.S. CONST. Amend. V. *United States ex rel Toth v. Quarles*, 350 U.S. 11 (1955).

The statute was enacted because of the decision in *U.S. v. Cooke*, 336 U.S. 210 (1949) which held that a person who committed a crime while in the service could not be tried by a court-martial once he was discharged. This holding allowed criminals to escape justice since many crimes committed in the military are not discovered until after discharge. There was a desire in Congress to alleviate the situation by statute. The obvious thing to do would be to extend the jurisdiction of the federal civilian courts to cover such crimes. However, many crimes by servicemen are committed abroad, and Congress was not sure that they had the power to extend federal jurisdiction to cover acts committed outside of the territorial limits of the United States, *Hearings Before House Subcommittee on Armed Services*, 81st Cong., 1st Sess., p. 822 (1949). As a result they worded the statute so that the court-martial would retain jurisdiction of any crime committed in the service if the civilian courts could not establish jurisdiction.

The Judge Advocate General of the Army warned Congress that any extension of military jurisdiction to ex-servicemen would violate the fifth amendment of the United States Constitution,

Hearings Before the Subcommittee of the Senate Committee on Armed Services, 81st Cong., 1st Sess., p. 256 (1949). See also WINTHROP, MILITARY LAW AND PRECEDENTS (2nd ed. p. 105); 31 OP. ATTY. GEN. 521.

The majority of the court agreed with the Judge Advocate. The fifth amendment provides for indictment by grand jury "except in cases arising in the land or naval forces." It was held that no case had arisen against Toth while he was in the service because he had not been indicted until he was discharged. See *In re Pacific Railway Commission*, 32 Fed. 241, 255 (C.C.N.D. Cal. 1887).

The dissent felt that the statute was a reasonable extension of Congress's power to govern the land and naval forces provided by U.S. Const. art. I. This view was taken in the case of *In re Bogart*, 3 Fed. Cas. 796, No. 1,596 (C.C. Cal. 1873) which interpreted a statute similar to the one now in question. The problem of violation of the fifth amendment was disposed of by saying that "cases arising in the land and naval forces," as used in the amendment, meant simply that the *cause of action* arose there, and not that an *indictment* on the cause had been brought.

Both the majority and minority assumed, almost without discussion, that Congress could extend federal jurisdiction to offenses against the United States, no matter where committed. There is some authority for this, *Cook v. U.S.*, 138 U.S. 157 (1891); *U.S. v. Bowman*, 260 U.S. 94 (1922).

The decision in the principal case settled two problems which have been in dispute for many years. First, it is now clear that the word "case," as used in the fifth amendment, means that an indictment has been brought on evidentiary facts. Second, it is now apparently settled that Congress is in no way limited by territory in prescribing the jurisdiction of the federal courts to try offenses against the laws of the United States.

The far-reaching effect of the decision is hobbled somewhat by the fact that most criminal laws of the United States are limited to acts done "within the special maritime and territorial jurisdiction. . . ." 18 U.S.C. §2031 (rape); 18 U.S.C. §1111 (murder). It does no good to have jurisdiction potentially unlimited by territory when the statutes defining crimes within that jurisdiction

are limited by territory. See 18 U.S.C. §7, defining "maritime and territorial jurisdiction," and see Beal, Conflict of Laws, §426.1 (1935). Evidently, therefore, the problem of trying ex-servicemen still exists, at least as to those crimes committed *outside* the United States. It could be argued that the Uniform Code of Military Justice, 64 Stat. 145, 50 U.S.C. §551-741 (1950), which does not put a territorial limit on the crimes defined, is a law passed by Congress, and thus a violation of it would be a "case arising under the . . . laws . . . of the United States" within the jurisdiction of federal courts as provided in U.S. Const. art. III § 2. Under this reasoning when a person is discharged he is still subject to indictment for violating military law, but the indictment may be brought in a civilian court.

Walter W. Steele, Jr.

CONSTITUTIONAL LAW—DUE PROCESS—WAIVER OF RIGHTS

D, a Negro, was indicted for rape while he was absent from the state. Upon his arraignment, two years after the indictment he filed a motion to quash the indictment because of the systematic exclusion of Negroes from the grand jury. The trial court refused the motion, relying on a state statute. This statute required such motions to be filed within three days after the term of the grand jury, or upon arraignment, whichever was sooner. The court said that since the motion had not been filed during this period the right was waived. *Held: D* waived his constitutional right because of his voluntary act of fleeing the state. *Poret v. State of Louisiana*, 350 U.S. 91 (1955).

Waiver is the intentional relinquishment of a known right *Johnson v. Zerbst*, 304 U.S. 458 (1938). It applies to *all* rights intended solely for the individual's benefit. *Sartin v. Hudson*, 142 S.W.2d 817, 823 (Tex. Civ. App. 1940). As stated in *Shutte v. Thompson*, 82 U.S. 151 (1873), a party may waive any provision of a statute or constitution intended for his benefit.

There is conflict as to which of the rights guaranteed by the Fourteenth Amendment to the United States Constitution may be waived. Most jurisdictions say that the right to trial by jury *Jones v. State*, 52 Tex. Crim. Rep. 303, 106 S.W. 435 (1907)

and the right to be present for pronouncement of judgment, *Ball v. U.S.*, 140 U.S. 118 (1891) can not be waived in capital cases. *Contra: People v. Bradner*, 107 N.Y. 1, 13 N.E. 87 (1887).

The constitutional right to contest the composition of the grand jury from which members of your race have been systematically excluded has been upheld since *Strauder v. West Virginia*, 100 U.S. 303 (1880). For an annotation on this right see, 1 A.L.R. 2d 1286 (1948). This right became more secure with *Norris v. Alabama*, 294 U.S. 587 (1935). See 39 KY. L. J. 65 (1950) for a comment on this right. No authority that it can be waived has been found, except the broad statement that "a constitutional right may be forfeited . . . by the failure to make timely assertion of the right." *Yakus v. U.S.*, 321 U.S. 414, 444 (1944); *Whitney v. California*, 274 U.S. 357, 362 (1926).

The majority opinion relies on *Yakus, supra*, stating that the defendant's voluntary absence was the cause of the failure to timely assert his right. Apparently there was an assumption that the defendant had notice of the indictment against him before he fled since the dissent states that the record shows a lack of such notice. This assumption on the part of the majority would destroy the well established maxim that "waiver presupposes knowledge," and lead to disastrous decisions. Without knowledge as a necessary counterpart of waiver, a person visiting out of state during the statutory period for asserting the right could be indicted for a crime of which he knows nothing. Under this decision, he would waive his right to contest the grand jury which had maliciously indicted him, although he never had an opportunity to assert his right. The above problem was presented in *Carter v. Texas*, 177 U.S. 442 (1899), cited by the dissent. The court in the *Carter* case recognized that the defendant could not be held to have waived this right since, in reality, he had had no opportunity to comply with the state statutory requirement.

The dissent points out that the flight of the defendant was a federal crime, under 62 Stat. 755, 18 U.S.C. sec. 1073 (1948), and should be punished. But to use this flight so as to cause a waiver of a right in another case is a dangerous doctrine. The right to raise defenses permitted others, despite one's guilt or

innocence in another case, has been strongly protected. *Hovey v. Elliott*, 167 U.S. 409 (1896).

It seems that the majority opinion is a very precarious and dangerous precedent to establish, considering the fact that this question appears to be one of first impression. The court could have reached the same result by basing its decision on a much safer and a less controversial ground. The defendant in the present case pleaded not guilty, filed a motion for severance, and then for the first time made his motion to quash. Clearly, this was an untimely assertion of a constitutional right, under the doctrine of *O'Neill v. Vermont*, 144 U.S. 324 (1891), and he thereby forfeited his right to claim it. The court could have used the well established rule that unless the motion to quash is made before arraignment it is considered waived. *State v. Sandiford*, 149 La. 933, 90 So. 261 (1921). By deciding a constitutional question which it need not have decided, the court seems to have promulgated a dangerous precedent for future decisions.

Malcolm E. Dorman.

Constitutional Law—Illegal Searches and Seizures—Admissibility of Evidence

Appellant and others were charged with conspiring to engage in horse-race bookmaking. Appellant pleaded not guilty but was convicted on the basis of evidence obtained from wire tapping, microphone installations, and forcible entries and seizures. This evidence was admitted over the objections of appellant. *Held:* Conviction set aside; the illegally obtained evidence was inadmissible. *People of California v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955, 4-3 decision).

The problem involved in the principal case is whether or not evidence which has been obtained in violation of both federal and state constitutions and laws is admissible to secure the conviction of a defendant in a criminal suit. This case reversed the prevailing California rule, see *People v. Le Doux*, 155 Cal. 535, 102 Pac. 517 (1909), and *People v. Mayen*, 188 Cal. 237, 205 Pac. 435 (1922), and adopted the exclusionary rule over the arguments of stare decisis. A distinction which was not discussed

by the court in this case has been drawn between evidence obtained in violation of the federal constitution and evidence obtained in violation of federal statutes not involving an illegal search or seizure, *e.g.*, wire tapping evidence obtained in violation of the Federal Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. § 151, § 605 1934). See *Olmstead v. United States*, 277 U.S. 438 (1928); *Nardone v. United States*, 302 U.S. 379 (1937); *Weiss v. United States*, 308 U.S. 321 (1939).

The Bill of Rights has long been recognized as limiting only the federal government. *Barron v. Mayor and Council of the City of Baltimore*, 7 Pet. 243 (U.S. Sup. Ct. 1833). However, the fourteenth amendment has been held to give protection from state action to some, but not to all, of the "fundamental rights" under the due process clause of that amendment. See *Palko v. Connecticut*, 302 U.S. 319 (1937). The right to be free from unreasonable searches and seizures has been given such protection, but it has been held that the constitutional sanctions against illegal searches and seizures do not prevent the use of evidence obtained thereby in state courts, a distinction having been drawn between the illegality of the search or seizure and the probative value of the evidence. See *Wolf v. Colorado*, 338 U.S. 25 (1949).

The federal courts and some of the state courts have adopted the rule that such evidence is inadmissible. *Boyd v. United States*, 116 U.S. 616 (1885); *Weeks v. United States*, 232 U.S. 383 (1914). However, the majority of the state courts and all of the British Commonwealth countries hold that even though the evidence is illegally obtained, it can be admitted to secure the conviction of criminals. For a listing of the jurisdictions following each of these rules and the leading cases on this point, see the appendices to the *Wolf* case, *supra*, 338 U.S. 25, 33-39.

Texas may be numbered among the followers of the doctrine of the *Weeks* case, for this state adopted the exclusionary rule in its broadest form by statute. TEX. CODE CRIM. PRO. art. 727a. For a discussion of the development and present status of Texas and federal law on this subject, see Ray, *Restrictions on the Use of Illegally Obained Evidence*, 9 Sw. L. J. 434 (1955).

The opposing considerations are: First, criminals should be apprehended and punished. They should not be allowed to break

the law and go free on technicalities. Second, and possibly more important, the public as a whole should be protected from illegal searches and seizures.

There appear to be only three sanctions to prevent illegal searches and seizures: (1) exclusion of the evidence which is secured by unreasonable and illegal means, (2) criminal prosecutions against those responsible for the illegal searches and seizures, and (3) civil liability. The majority opinion in the principal case and those against the admission of such evidence argue that the exclusionary rule is the only effective sanction. See also, the dissenting opinions in the *Wolf* case, *supra*. Those for the admission of such evidence argue that criminal and civil liability should be increased and enforced. But, they argue, the evidence once obtained should be admissible, for the illegality of the search or seizure does not affect the truth of the evidence. Therefore, they contend that the fact that such evidence was illegally obtained should, at most, be for the consideration of the jury in weighing the evidence. Exponents of this view would punish both wrongdoers, the accused and those responsible for the illegal search and seizure.

The dissenters in the principal case also argued that change such as this should come through legislation, not through court action. They felt that there were no such compelling reasons presented as would justify this departure from stare decisis.

The present status of the law on this point is: (1) Illegally obtained evidence is inadmissible in federal courts when timely objection is made. *Weeks v. United States, supra.* (2) Each state can determine the admissibility of such evidence by judicial decision or legislation. *Wolf v. Colorado, supra.* (3) California has followed the recent trend, adopting the exclusionary rule, as shown by the principal case. (4) It seems to be an open question as to whether Congress can abrogate the federal exclusionary rule by statute. It is also undecided as to whether or not Congress can extend the exclusionary rule and make it applicable to proceedings in state courts under the authority of the fourteenth amendment. For a discussion of these two possibilities, see Mr. Justice Frankfurter's majority opinion in the *Wolf* case at 338 U.S. 25, 33.

Bob Dickenson.

EVIDENCE—HEARSAY—ADMISSIBILITY OF CONFESSION OF CO-CONSPIRATOR

D and others were prosecuted for conspiring to sell, and for selling illicit alcohol. The trial court admitted a confession of one of defendants, which mentioned names of other co-defendants, the confession being made after the conspiracy had ended. *D* claimed such confession was hearsay as to him, and that the court's admission thereof was an abuse of its discretion. *Held:* Admission of hearsay evidence is not an abuse of the court's discretion, if accompanied by an instruction to the jury to disregard the confession when considering the guilt of other co-defendants. *United States v. Paoli*, 229 F.2d 319 (1956).

It has frequently been held that if evidence in the form of a confession of one conspirator is given, after the conspiracy has ended, it is hearsay as to the other conspirators. *Tofanelli v. United States*, 28 F.2d 581 (1928). For such evidence to be permitted if there are co-defendants, it must be clearly confined to the conspirator who confessed. *Nash v. United States*, 54 F.2d 1006 (1932). If a confession or statement of a conspirator is to be used against his co-conspirators the hearsay rule exception requires such statement to have been made before the conspiracy was abandoned. Otherwise the statement or confession is beyond this exception to the hearsay rule and not admissible as to any parties but the person making it. *D* claims in the principal case that since his co-defendant made the confession after the conspiracy had ended that the confession could not be introduced because it would prejudice his rights with the jury.

While it has been recognized that such evidence is hearsay as to co-defendants, the cases have fashioned a rule which allows such confessions to be put before the jury, if the judge clearly instructs the jury not to consider the confession in determining the guilt of persons not making them. *Campanelli v. United States*, 13 F.2d 750 (1926); *United States v. Gottfried*, 165 F.2d 360 (1948); *Skiskowski v. United States*, 158 F.2d 177 (1946); *Metzler v. United States*, 64 F.2d 203 (1933). To contradict this authority *D* relied on *Krulewitch v. United States*, 336 U.S. 440 (1949) which held, following the general rule, that if the state-

ment is made after the conspiracy has been abandoned, it is hearsay when used against a co-conspirator. In the *Krulewitch* case however, the defendant was being tried alone, the statements were not those of a co-defendant, but were extraneous statements of a co-conspirator brought in to be used against the defendant. The dissent in the principal case feels these differences "have no practical significance," and yet in the first case the testimony which is hearsay is being introduced against the defendant himself, while in the case at bar it is being used against the person who spoke it, and not in determining *D's* guilt.

The principal point of conflict comes with regard to the effect of the court's instruction to the jury to disregard the confession in determining the guilt of those not making it. This is undoubtedly why the dissent feels there is no difference between the two cases given above. The dissent claims that the cautionary admonition had no effect on the jury, and that in fact it considered the confession in determining the guilt of the other parties. There is much truth to this claim, as the majority admits on p. 321. However, the majority goes on to say that it is a matter for the discretion of the trial judge as to whether the evidence was prejudicial. The court then decided that in light of the facts in this case that there was no abuse of discretion. The concurring judge felt that juries can and do usually follow the court's admonition, and merely said that when considering all the facts of the trial that it did not appear that there was any abuse of the lower court's discretion. The problem raised by the dissent, although it may be true, seems without reasonable remedy if we are to continue our present jury system, for it is common to any situation where inadmissable evidence is tendered to the jury, and then disallowed by the court.

Perhaps the best solution would be to provide for separate trials, in which case, under the *Krulewitch* rule, *supra*, the confession would not be admissable at the trial of the other defendants. However, this was not done, and the confession was admitted into evidence as part of the case against the specific defendant who made the confession, and not against any others. It must be decided if this was error. When accompanied by an instruction to the jury not to use it for any other reason, it is clear that the authority says this will not be *legally* prejudicial as to the other

co-defendants. While in fact it may be prejudicial, it seems too late for the courts to so hold, and if a different rule requiring severance in such cases is needed, the addition of such a severance rule should be done by legislation, not a reversal of previous court rulings.

Thomas H. Davis.

NEGLIGENCE—ATTRACTIVE NUISANCE—LIABILITY OF INDEPENDENT CONTRACTOR AND HIS SUPPLIER

Action for injuries sustained by a minor child when a lumber pile upon which he was playing collapsed. The lumber had been stacked upon the premises by defendant lumber company. An independent contractor was in possession of the land and in the process of building a home for the landowner. The lumber had been stacked in accordance with the custom of the trade and there was no evidence that such a custom constituted a negligent manner of stacking. *Held:* The builder was found liable on the basis of maintaining an attractive nuisance which caused the injury; the supplier was found liable on principles of ordinary negligence. *Kahn v. James Burton Co.* 5 Ill. 2d 614, 126 N.E. 2d 836 (1955).

The doctrine of attractive nuisance has been recognized as a means of enforcing a strong social policy to protect child trespassers, since the common law allowed no recovery against the possessor of the land for injuries suffered by a trespasser on the land. *City of Pekin v. McMahon*, 154 Ill. 141, 39 N.E. 485 (1895). The Courts have reasoned that there is an "implied invitation" resulting from the attraction the instrumentality on the land has for children, giving the child a status of an invitee rather than a trespasser. *Moore v. N. Chicago Ref. & Smelters*, 346 Ill. App. 530, 105 N.E.2d 553 (1947). The better authorities now agree however, that the element of attraction is important only insofar as the trespass can be anticipated and that the real basis of liability is one of simple negligence based on the fact of foreseeable harm and subsequent failure to take precautions to protect the child trespasser from the harm. *Banker v. McLaughlin*, 146 Tex. 434, 208 S.W.2d 843 (1948); PROSSER, TORTS, 619 (1941).

Lumber piles have provided prolific sources of lawsuits for injuries to children, some courts as a matter of law regarding them not to be within the attractive nuisance doctrine. *Morris v. Lewis Mfg. Co.*, 331 Mich. 252, 49 N.W.2d 164 (1951). The better view, however, seems to be that a lumber pile may be of such a nature and in such a location as to attract children, and it is for the jury to determine this fact. *Gimmestad v. Rose Bros. Co.*, 194 Minn. 531, 261 N.W. 194 (1935). In the present case, the court followed the view of allowing the jury to determine the attractiveness of the lumber pile. In view of the builder's knowledge of children in the area and his failure to take precautionary action to prevent the trespass, the imposition of liability upon him is justified.

The basis of the supplier's liability, however, presents a different question. The court states that the supplier breached a common law duty owed the child trespasser. This duty is based upon constructive knowledge of children in the area specifically charged to him as a matter of law, plus further knowledge of the children's likely trespass due to the implied invitation of the premises. Despite the fact that the Court speaks of the presence of these children in the neighborhood and of their tendencies as a matter of common knowledge charged to everyone, this seems to be a highly unreasonable extension of duty. Especially in light of the fact that the supplier was on the premises only for the short time necessary to stack the lumber. It also seems unjustified inasmuch as there was no evidence that the lumber had been stacked negligently.

This rationale by the court has imposed a standard of forseeability of harm solely from the placing of a lumber pile on the land. This reasoning overlooks the basic rule of negligence that *general* forseeability of possible harm is not always coincidental with a *specific* duty to the injured person. *Palsgraf v. Long Island Ry. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). It is true that duty has been extended to unforseeable plaintiffs in certain instances, contrary to the *Palsgraf* case, but those cases are limited to situations where a single factor caused the injury, and that factor was exclusively in the control of the defendant. *Jackson v. Lowenstein & Bros.* 175 Tenn. 535, 136 S.W.2d 495 (1940). *Miss. Pac. R. Co. v. Johnson*, 198 Ark. 1134, 133 S.W.2d 33 (1939). In

the instant case, there was no specific factor causing injury; rather a combination of conditions caused it.

When certain conditions are created, responsibility for taking affirmative action may shift from the defendant to a subsequent party, such as the contractor in the instant case, and the defendant is free to assume that the party will act reasonably. *Pearson v. Cauldwell Wingate Co.*, 187 F.2d 832 (2nd Cir. 1951). It seems logical, therefore, that the supplier's negligence can only be predicated on his leaving the lumber with an intervening responsible agency, when he has actual knowledge that such agency will not act reasonably in maintaining the lumber pile. *Ill. Cent. Ry. v. Oswald*, 338 Ill. 270, 170 N.E. 247 (1930). It is illogical, under these facts, however, to charge the supplier with constructive knowledge that his customer will not act reasonably in the maintenance of the lumber.

The social aspect of balancing the risk against the reasonableness of the conduct creating the risk should be examined. The supplier did everything he reasonably could have done to prevent any injury. The decision stands for a broad extension of duty—so broad as to prevent legal delineation.

Perhaps it is a mere coincidence that the duty of the supplier enunciated by the court is the same as that of the land possessor. It might be practical to assume that the court has arbitrarily charged the supplier with a duty customarily attributed to an occupier of land. If so, then the attractive nuisance doctrine has once again put itself at odds with sound tort liability, and a person not in possession of land is hereby charged with a duty to maintain the land in a condition safe for children.

John R. Vandevoort.

NEGLIGENCE—LAST CLEAR CHANCE—NEGLIGENTLY INATTENTIVE PLAINTIFF

Plaintiff was negligently struck by defendant's truck while standing on the shoulder of a highway. The driver of defendant's truck saw plaintiff from a distance of about a quarter of a mile, and although he had the opportunity to avoid the accident, he failed to do so. The evidence showed that plaintiff negligently

placed himself in this position of peril, from which he was able to remove himself, but that he was unaware of the approaching truck. *Held:* the doctrine of last clear chance is recognized in Virginia, and is applicable in this type of case because, although the plaintiff's peril was the result of his own negligent inattentiveness, the defendant not only actually saw the plaintiff but also realized or should have realized his peril. *Greear v. Noland Company,* —— Va. ——, 89 S.E.2d 49 (1955).

At common law contributory negligence of the plaintiff was a complete defense when this was a factor in causing the injury complained of. Even though the defendant's negligence was much more severe than that of the plaintiff, the plaintiff was denied any recovery because of his relatively minor negligence. This unfair result has caused exceptions to the rule to be formulated by most courts. One such exception, called the comparative negligence doctrine, is a method used in maritime law, *Lindgren v. United States,* 281 U.S. 114 (1930), and has been adopted by statute in a few states. See WIS. STATS. (1953) section 331.045; MISS. CODE ANN. 1930, sections 511, 512. The method employed by this doctrine is a determination of the degree of negligence of each party, with damages being apportioned accordingly. The last clear chance doctrine is another exception which seeks to give relief to a plaintiff, who though negligent, still deserves compensation. Liability is determined under this doctrine by inquiry as to who had the last chance to avoid the accident.

A distinction is drawn under the last clear chance doctrine in the majority of jurisdictions, between whether the plaintiff's failure to remove himself from peril resulted from helplessness or merely from his inattentiveness. PROSSER, TORTS, § 52 (1955). Where the plaintiff is in a helpless situation defendant would be liable for any injury he caused if he saw plaintiff, or if he should have seen him in the exercise of due care. *Leinbach v. Pickwick Greyhound Lines,* 138 Kans. 50, 23 P.2d 449 (1933); RESTATEMENT, TORTS, § 479. In this situation defendant is under a high standard of care, and he will be held liable whether he actually realized plaintiff's danger or not. Where the plaintiff is merely inattentive and could escape except for this inattention, a lesser standard of care is imposed on the defendant. He must have seen

the plaintiff and realized or should have realized the plaintiff's situation. *Indianapolis Traction & Terminal Co. v. Croly*, 54 Ind. App. 566, 96 N.E. 973 (1911).

Most states have adopted the doctrine with certain modifications. In Texas it is called the discovered peril doctrine, and the modification has been to impose a lesser standard of care upon the defendant. To hold the defendant liable under this doctrine he must have actually discovered plaintiff's perilous position and realize that the plaintiff cannot remove himself in time to have avoided the injury by use of all prudent means at his disposal. *Turner v. Texas Co.*, 138 Tex. 380, 159 S.W.2d 112 (1942). Furthermore it is immaterial that defendant should have seen the plaintiff, if in fact he did not. *Thompson v. Creech*, 284 S.W.2d 256 (Tex. Civ. App. 1955).

In the principal case the problem presented was of the negligently inattentive plaintiff. The Virginia court adopted the general majority rule, stating that if it was found, upon retrial, that the plaintiff negligently placed himself in a situation of peril from which he was able to remove himself, but that he was unaware of this peril, and that defendant saw him and realized or should have realized plaintiff's danger in time to avoid striking him, then under last clear chance plaintiff should be entitled to recover. This changed the previous line of holdings in Virginia, which based recovery on whether or not plaintiff's negligence was the proximate cause or the remote cause, but had not recognized the doctrine of last clear chance as such, and this change cleared up much uncertainty in the case of the negligently inattentive plaintiff. *Anderson v. Payne*, 189 Va. 712, 54 S.E.2d 82 (1949).

The effect of relieving the defendant from as great a standard of care when dealing with a negligently inattentive plaintiff, is to effect a more equal balance between the two negligent parties. This seems a desirable refinement of the last clear chance doctrine because, although it is against the doctrine's original intent of protecting the plaintiff from the harshness of contributory negligence, it seems to be a desirable departure in order to keep the harshness from merely swinging from the plaintiff to the defendant.

Thomas H. Davis.

PERSONAL PROPERTY—FINDING LOST GOODS—TREASURE TROVE

P, an employee of *D*, found $1000 in currency buried in a fruit jar while digging in the dirt floor of *D's* garage. *P* claimed possession as the finder of treasure trove. *D* asserted rightful possession as owner of the locus in quo. *Held:* Treasure trove is not recognized as a doctrine of Texas law; therefore, buried money constitutes either lost or mislaid property. Here the money was buried intentionally and thus, as a matter of law, could not be lost property. As mislaid property, its possession is in the landowner. *Schley v. Couch*, ...Tex....., 284 S.W.2d 333 (1955).

In a concurring opinion, Judge Calvert would award possession to the landowner on the basis that the property is neither lost, mislaid, nor treasure trove, but that it is personal property attached to the soil and a finder thereof acquires no right of possession. Judge Wilson in a concurring opinion would abrogate all distinctions as to whether buried property is lost or mislaid, and award possession to the landowner as a matter of law, thereby eliminating speculation as to intent of the true owner, since it is never certain that the true owner buried them.

The common law recognized all property as either lost, mislaid, abandoned, treasure trove, or personal property attached to the soil. Lost property has been defined as that which the owner has involuntarily suffered to pass from his possession. *Jackson v. Steinberg*, 186 Or. 129, 200 P.2d 376 (1948). Mislaid property is that which the owner has voluntarily laid in a place where he can resort to it again, and has forgotten where he placed it. *Kincaid v. Eaton*, 98 Mass. 139, 93 Am. Dec. 142 (1867). At comcon law, property was determined to be lost or mislaid according to the circumstances which caused the property to be where it was found. *McAvoy v. Medina*, 11 Allen 548 (Mass. 1866). The English view was that property found on public land was lost property, *Bridges v. Hawkesworth*, 21 L.J.Q.B. 75 (1851), but that goods found imbedded in private grounds were mislaid. *S. Staffordshire Water Co. v. Sharman*, 2 Q.B. 44 (1896). Countless distinctions were presented by the courts as determinative of whether the property should be lost or mislaid, such as nature of the article, its location, and the finder's relationship to land-

owner—all difficult questions of fact which usually added up to judicial speculation and probabilities. Aigler, *Rights of Finders*, 21 MICH. L. R. 664 (1923).

The American courts accepted the distinction as to lost and mislaid property, awarding possession of mislaid property to the owner of the "locus in quo," *Foulk v. N.Y. Con. Ry. Co.*, 228 N.Y. 269 (1920), and the finder was given possession of lost articles. *Bowen v. Sullivan*, 62 Ind. 281 (1878).

Treasure trove must be either gold or silver coin, bullion or plate, but it also has been held to include paper representatives of gold or silver. *Zornes v. Bowen*, 223 Ia. 1141, 274 N.W. 877 (1937). Treasure trove is considered lost property and the finder acquires the right of possession. *Danielson v. Roberts*, 44 Or. 108, 74 Pac. 913 (1904).

Property which is classed as goods attached to the soil is distinguished from treasure trove inasmuch as the historical definition of treasure trove does not include all chattels. Such chattels which are intentionally buried in the soil are held to be part of the realty, and therefore their possession is awarded to the owner of the locus in quo rather than to the finder. *Burdick v. Chesebrough*, 88 N.Y.S. 13, 94 App. Div. 532 (1904).

In the present case, which is one of first impression in Texas, since the court rejects the doctrine of treasure trove, it would seem that the property in question must therefore fall into the category of "property attached to the soil." The court rejects this classification and arbitrarily classifies all property in Texas as either lost or mislaid, sweeping aside all the other classifications. The majority opinion reasons that the buried chattel is either lost or mislaid depending upon the jury's determination. Whether or not the issue is to be submitted to the jury depends upon the length of time the chattel has rested in the soil. This reasoning is based upon the strained presumption that the true owner has intentionally buried something and the passage of time, if long enough, will preclude the owner from remembering his act, or in the alternative, if the time element is short, the jury may very well find the property to be mislaid since the owner is presumed to recall his act of burial.

As a result of this decision, it is evident that the landowner

has prior rights of possession as against a finder of buried money. However, the decision, in its classification of personal property has created problems. Courts in the future will be faced with the problem of how to determine a time criteria which the buried chattel must meet before the issue is submitted to the jury, or in what instances will the time of burial make it a question of law. It will also be difficult to give a jury a proper yardstick with which to weigh the issue.

The decision in favor of the landowner would be on a much sounder basis if the property were more narrowly defined. It is anamolous, in view of the common law, to allow a mislaid chattel to become a lost chattel by the mere passage of time. The only type of goods which could ever conceivably change its nature, so to speak, was treasure trove, which at one time was obviously mislaid property, but its ancient character gives it the present status of lost property, as far as the rights of the finder are concerned. Since Texas has rejected the doctrine of treasure trove, this requirement of time in the soil seems out of place in the Court's reasoning.

John R. Vandevoort.

PUBLIC OFFICERS—INVALID STATUTE—TORT LIABILITY

The defendant, an Idaho game conservation officer, shot two dogs owned by the plaintiffs, acting under authority of a state statute, which was later held unconstitutional, in that it deprived plaintiffs of their property without due process of law. The plaintiffs contend that because the statute is unconstitutional the defendant is personally liable to them for the value of the dogs. *Held:* The conservation officer is liable, because the statute permitting the shooting, being unconstitutional, can offer the defendant no protection. *Smith v. Costello,* —— Idaho ——, 290 P.2d 742 (1955). (3-2 decision).

An invalid statute, i.e. one that is unconstitutional, is not law. It is inoperative, a mere scrap of paper that confers no rights and imposes no duties. The invalid act is of no more effect than if no act had been passed. *Norton v. Shelby County,* 118 U.S. 425 (1886); *Chicago I. & L. Ry. Co. v. Hackett,* 228 U.S. 559 (1913).

However, the actual existence of a statute which has not yet been declared unconstitutional is an operative fact which cannot justly be ignored. The question of the effect of its unconstitutionality cannot be disposed of by merely applying a principle of absolute retroactive invalidity. *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1939). Where a statute is found to be unconstitutional and hence void *ab initio*, its existence before it was declared unconstitutional will not be ignored. *NLRB v. Rockway News Supply Co.*, 345 U.S. 71 (1953); *cf. State v. Village of Garden City*, 74 Idaho 513, 265 P.2d 328 (1953).

With regard to officers acting under an unconstitutional statute, as in the instant case, the mere recent tendency of the courts is to take the view that the officer cannot be required to determine legal questions which would perplex a court, and that if he has acted in good faith he should not be liable. *Henke v. McCord*, 55 Iowa 378, 7 N.W. 623 (1880); *Golden v. Thompson*, 194 Miss. 241, 11 So.2d 906 (1943). This view has been expressed as follows: "The rule that an unconstitutional statute is a nullity cannot be applied to work hardship and impose liability on a public officer who in performance of his duty has acted in good faith in reliance on the validity of the statute before any court has declared it invalid." *Allen v. Holbrook*, 103 Utah 319, 135 P.2d 242 (1943); *Cudahy Packing Co. v. Harrison*, 18 F. Supp. 250 (N.D. Ill. 1937). However, there is a substantial following behind the contrary view, i.e. that, since an unconstitutional statute is a nullity, it can offer no protection to the officer who acts in reliance upon it. This view was followed in the principal case and, because of the number of early cases adopting it, would seem to be the majority rule. *Kelly v. Bemis*, 4 Gray 83, 64 Am.Dec. 50 (Mass 1855); *Campbell v. Sherman*, 35 Wis. 103 (1874); *Dennison Mfg. Co. v. Wright*, 156 Ga. 789, 120 S.E. 120 (1923); and see the collection of cases in 53 A.L.R. 268. A recent Washington case in accord with the principal case, has adopted this "majority" rule. *State v. Brotherhood of Friends*, 41 Wash. 133, 247 P.2d 787 (1952); and see *People v. Berner*, 10 N.Y.S.2d 339 (1939). However, the decided trend of recent authority has been opposed to liability on the part of the officer who acted in good faith. *Gordon v. Connor*, 183 Okla. 82, 80 P.2d 322 (1938); *Texas Co. v. State*, 31 Ariz.

485, 254 Pac. 1060, 53 A.L.R. 258 (1927); and see PROSSER, TORTS (1941 ed.) 153-154.

Texas cases have followed both rules. The Texas Supreme Court was one of the first to take a stand favoring non-liability. *Sessums v. Botts,* 34 Tex. 335 (1870), wherein it was stated that "[i]t is advisable for every good citizen to obey whatever the lawmaking power promulgates as law, until it be adjudicated by the courts not to be law; and the rights of citizens are not to be prejudiced by reason of such obedience." A later Texas case held that an unconstitutional local option law did not protect those acting under it from civil liability for the destruction of confiscated liquor. *Cartwright v. Canode,* 106 Tex. 502, 171 S.W. 696 (1914). In 1954 this conflict was resolved by a Texas Supreme Court decision which clearly adopts the "good faith" rule quoted above. *Wichita County v. Robinson,* —— Tex. ——, 276 S.W.2d 509 (1954).

It seems obvious that the better rule is contra to that of the principal case. To arrive at this opposite result in view of the invalidity ab initio of the statute has taken some adroit legal juggling. Some courts have arrived at the desired result of non-liability by holding that there is a presumption that a statute passed by the legislature is valid, and that an officer is entitled to act in reliance on the statute by virtue of this presumption. *Dexter v. Alfred,* 64 Hun. 636, 46 N.Y.S.R. 789, 19 N.Y. Supp. 770 (1892); *Board of Commissioners v. A. C. Davis & Sons,* 184 Okla. 258, 86 P.2d 782 (1939). Tennessee courts have reached the same result by the somewhat unconventional holding that an unconstitutional statute is not void, but is only voidable, and thus public officers are authorized to treat every act of the legislature as prima facie valid and are not liable for any acts committed under an unconstitutional statute on account of its unconstitutionality. *Bricker v. Sims,* 195 Tenn. Rep. 361, 259 S.W.2d 661 (1953); *Roberts v. Roane County,* 160 Tenn. Rep. 109, 23 S.W. 2d 239 (1929).

The same result can be and often is reached on the basis of public policy, as in *Sessums v. Botts, supra,* and *Henke v. McCord, supra.* See also Field, *The Effect of an Unconstitutional Statute in the Law of Public Officers,* 77 U.PA.L.REV. 155 (1928). Inferior

officers of the administrative and judicial branches should not be forced to pay for the mistakes of the legislature. Liability in such cases puts a terribly unfair burden on public officers where those officers have done their duty in good faith. On the other hand, it seems equally unjust for the private citizen to be forced to bear the loss resulting from enforcement of an unconstitutional statute. Logically it would seem that the loss should fall on the legislature which directed the unconstitutional activity. But, since all suits against the state to enforce such liability are barred by the principle of sovereign immunity, it would seem that the only proper solution to the problem would be through legislation waiving sovereign immunity and providing for indemnity for officers acting under unconstitutional acts of the legislature.

Robert N. Best.

SALES—IMPLIED WARRANTY—PRIVITY OF CONTRACT

Plaintiffs purchased a can of apricot juice from a retailer. The plaintiffs sought recovery from the wholesaler as agent or representative of the packer in a suit based on contract on the ground that there was a breach of an implied warranty that the contents of the can were fit for human consumption. The defendant's demurrer was sustained. *Held:* Privity of contract is necessary to state a cause of action for breach of implied warranty. *Lombardi v. California Packing Sales Co.*, —— R.I. ——, 112 A.2d 701 (1955).

Most jurisdictions recognize an implied warranty in the food and drink cases, but generally privity of contract with the vendor is required before there can be recovery for its breach. *Newhall v. Ward Baking Co.*, 240 Mass. 434, 134 N.E. 625 (1922), *Vaccarino v. Cozzubo*, 181 Md. 614, 31 A.2d 316 (1943), 1 WILLISTON, SALES 242. Privity of contract is required because most courts consider the action on the warranty contractual in nature. *Torpey v. Red Owl Stores*, 129 F. Supp. 404 (D. Minn. 1955). There is considerable authority for the proposition that an action on a warranty historically sounds in tort, however, and it seems that the common law recognized two distinct warranty actions, one imposed by operation of law as a matter of public policy, and one

growing out of an action in special assumpsit. The requirement of privity of contract was applicable only to the latter action, which furnished the fundamental rules of modern contract law, for the warranty imposed by law was in the nature of an action on the case for deceit, although it was not necessary to plead or prove scienter. 1 WILLISTON, SALES 368. Furthermore, only food merchants were subject to this extraordinary liability. *Roswel v. Vaughan*, Cro. Jac. 196, 97 Eng. Rep. 196 (1607), *Burnby v. Bollett*, 16 M. & W. 646, 153 Eng. Rep. 1348 (1847). Also see the statute of Rillory and Tumbrel (1266), assize of bread and ale (51 Hen. III, stat. 6), and Keilway's Rep. 91 (22 Hen. 7), 72 Eng. Rep. 254. This warranty law originated a century before the action of special assumpsit, 1 WILLISTON, SALES 368, but grew unpopular because by bringing a warranty action in assumpsit litigants were allowed to include more money counts in their petitions, although it was also necessary to plead and prove privity of contract in these suits. See Lord Ellenborough's opinion in *Williamson v. Allison*, 2 East 446, 102 Eng. Rep. 439 (1802). Thus the action on the warranty imposed by law upon food vendors fell into disuse, and was not even recognized in later English cases, *Emmerton v. Mathews*, 7 H. & N. 587, 158 Eng. Rep. 604 (1862), although it was carried to this country as part of the common law and recognized in early decisions. *Van Brocklin v. Fonda*, 12 Johns. N.Y. 468, 7 Am. Dec. 339 (1815).

With the growth of assumpsit the necessity of privity of contract in an action on a warranty has been assumed to a large extent, and only through the employment of various legal fictions have the courts been able to give relief to an injured person who has purchased deliterious foods from a retailer and brought suit against a manufacturer or wholesaler. In some jurisdictions the courts have followed a theory that the manufacturer, wholesaler, and retailer dealt with each other and entered into a contract for the benefit of the public, the ultimate consumer. *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928). The courts which oppose this theory maintain that any benefit accruing to a third party would be only incidental since the contract was not intended to create any obligation to a third party. *Colonial Discount Co. v. Avon Motors*, 137 Conn. 196, 75 A. 2d 507 (1950).

Other jurisdictions have held that the warranty runs with the goods as a covenant runs with the land, and inures to the ultimate consumer regardless of the lack of privity of contract. *Vaccarezza v. Sanquinetti,* 71 Cal. App. 2d 687, 163 P.2d 470 (1945). Still other courts insist that public policy demands strict liability in food and drink cases, and that privity should be implied in conscience so that the injured customer will have a remedy. This view represents the modern trend, and in point of legal theory is very close to the old warranty action rising out of deceit. *Southwest Ice and Dairy Products Co. v. Faulkenberry,* 203 Okla. 279, 220 P.2d 257 (1951), *Heinsoth v. Falstaff Brewing Co.,* 1 Ill. App. 2d 28, 116 N.E.2d 193 (1954), *Burr v. Sherwin Williams Co.,* 42 Cal. 2d 682, 268 P.2d 1041 (1954).

It is submitted that if the privity requirement is to be done away with, and thus strict liability imposed upon the food vendor, it should be accomplished through legislation, and not through the creation of various legal fictions designed to circumvent the privity requirements. Although the courts in Missouri and Texas have recognized that warranty law does exist independently of contract law, and, consequently, that privity of contract is not essential to bringing an action in the food and drink cases, *Worley v. Proctor & Gamble Mfg. Co.,* 241 M.A. 1114, 253 S.W.2d 532 (1953), *Jacob E. Decker & Sons v. Capps,* 139 Tex. 609, 164 S.W. 2d 150 (1942), it is unlikely that such a re-examination and reform will be widespread. The passage of the Uniform Sales Act, now adopted in 34 states, provided for only contractual warranties, although one state has held that it was legislative intent to remove the necessity of alleging and proving privity of contract where an action is brought against a vendor of food which is unfit for human consumption. *Klein v. Duchess Sandwich Co.,* 14 Cal. 2d 272, 93 P. 2d 799 (1939).

Legislation could allow the retailer to join his wholesaler or manufacturer as a third party defendant where the retailer has been sued by the ultimate consumer on the warranty. This procedure is a progressive one for it eases the privity limitation, avoids multiplicity of lawsuits, and protects consumers from judgment proof retailers. In at least one state the courts have seen fit to allow such a joinder. *Davis v. Radford,* 233 N.C. 283, 63 S. E.

2d 822 (1951). If legislation were to go even further, it could impose strict liability upon the food vendor upon the theory that modern retail merchandising and advertising project representations to the consuming public apart from any contractual obligations between the manufacturer, wholesaler, and retailer, and that the seller should thus be held strictly liable for a breach of those representations. Justification for strict liability can be found in another manner also, in that the losses could thus be spread among the consuming public by liability insurance carried by the vendor of commodities intended for human consumption.

Ivan Irwin, Jr.

TORTS—NEGLIGENCE—PHYSICAL INJURY FROM MENTAL ANGUISH

D, telegraph company, through the company's messenger sent word to *P*, that a telegram marked "death message" had arrived for *P*, when in fact the interstate telegram stated the arrival of *P's* daughter. In *P's* action against *D*, it was alleged that *P* had suffered both mental anguish and physical injury as the result of *D's* negligence in the transmission of the telegram. The federal district court granted summary judgment for *D*. *Held:* Allegations of mental anguish resulting from the negligent transmission of a death message by a telegraph company states a cause of action for the physical injury resulting from the mental anguish. *Kaufman v. Western Union Company*, 224 F.2d 723 (5th Cir. 1955), *certiorari denied*, 350 U.S. 947 (1956).

The allegations necessary to constitute a cause of action for negligence are: that an act of the defendant has breached a duty owed by the defendant to the plaintiff and that such act is the proximate cause of the damages suffered by the plaintiff. The common law recognized no recovery where the alleged damages were mental anguish alone. *Victorian Ry. Commr. v. Coultas*, 13 A.C. 222 (1888). Where the negligent act was established, the courts disallowed recovery on the theory that mental anguish alone was not an item of damages for which the law could allow recovery. *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 47 N.E. 88 (1897). Fear was frequently expressed that to allow such recovery would flood the courts with litigation of this type, and the courts could

not determine which claims were genuine and which were frivolous. *Spade v. Lynn & Boston R.R., supra; Mitchell v. Rochester Ry. Co.,* 151 N.Y. 107, 45 N.E. 354 (1896). Even if it were apparent that the claim was genuine and some mental anguish had resulted, recovery was still disallowed on the theory that the mental suffering was a break in the chain of causation. *Mitchell v. Rochester Ry. Co., supra.* This latter theory has also been used by the courts as a basis for denying recovery when there has been consequential physical injury after the mental suffering has occurred. These cases denying recovery should be distinguished from two other situations where recovery has been allowed. First, where a physical injury or impact has occurred, the courts have allowed recovery, reasoning that the physical injury is the result of the impact and not of the mental suffering. *Homas v. Boston Elevated Ry.,* 180 Mass. 456, 62 N.E. 737 (1902); Goodrich, *Emotional Disturbance as Legal Damage,* 20 MICH. L. REV. 497, 504 (1922). Second, where there has been an intentional or wilfully negligent act which produced mental anguish and resulting physical injury, the courts have sometimes allowed recovery. *Preiser v. Weilandt,* 48 A.D. 569, 62 N.Y.S. 890 (1900).

In a case construing sections 206 and 207 of the Federal Communication Act of 1934, 48 Stat. 1064, 47 U.S.C. § 151, 206 and 207 (1934), it is stated that the law applicable to interstate telegrams is federal statute and federal case law, notwithstanding *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938). *O'Brian v. Western Union Telegram Co.,* 113 F.2d 539, 541 (1st Cir. 1940); *Western Union Telegraph Co. v. Junker,* 153 S.W.2d 210 (Tex. Civ. App. 1941) *error refused.* Although it is beyond the scope of this note, there might be some doubt that sections of 206 and 207 of 49 U.S.C. 151 are broad enough to allow tort suits on interstate telegrams to be decided under federal case law and not state law as contemplated by *Erie R.R. v. Tompkins, supra;* but the cases, such as the *O'Brian* case, *supra,* have given a broad interpretation to these two sections and have decided such suits under federal law.

The Supreme Court has held that mental pain and anguish resulting from an ordinary negligent act is too vague an injury to allow legal recovery. *Southern Express v. Byers,* 240 U.S. 612 (1916); *Western Union Telegraph Company v. Speight,* 254 U.S.

17 (1920). The federal district courts have held that there can be no recovery for a physical injury resulting from mental suffering where no physical impact has occurred. *Jones v. Western Union Telegraph Co.*, 233 Fed. 301 (N.D. Cal. 1916); *Ey v. Western Union Telegraph Co.*, 298 Fed. 357 (N.D. Cal. 1924). The reasoning in these cases is that the physical injury resulting from mental suffering is only a form of mental suffering and by the *Byers* case, *supra*, no recovery is allowed for either mental suffering or any of its forms. Following the *Jones* case, *supra*, it has been that the mental injury is a break in the chain of causation, and therefore the negligent act cannot be the promixate cause of the physical injury resulting from the mental suffering. *Mees v. Western Union Telegram Co.*, 55 F.2d 691 (N.D. Florida 1932).

The principal case held that the mental anguish can be the proximate cause of the resulting physical injury, and that recovery should be allowed for such physical injury. The reasoning illustrated by this holding is that the result rather than the nature of the tortious act should be scrutinized to determine liability, and therefore any physical injury occurring after mental suffering is a legal injury for which damages are allowed. As a precedent for the accepted reasoning, the court in the principal case relied on two federal appellate court cases, which cases were decided under state law and not federal law. *Baltimore & Ohio v. McBride*, 36 F.2d 841 (6th Cir. 1930); *Belt v. St. Louis-San Francisco Ry. Co.*, 195 F.2d 241 (10th Cir. 1952). The effect of the principal case was to impliedly overrule the holding of the Jones case, *supra*, and the other federal district court opinions advocating the impact theory. Therefore, the present decision also limits the *Byers* case, *supra*, to a situation where mental suffering alone is the basis of the cause of action.

The result of the principal case is a step in the direction of the modern trend in the tort field to allow recovery for any actual physical injury suffered. This result has long been advocated by text writers. The denial of recovery for the reason that there may be frivolous claims does not seem to be a justified reason for denying recovery where a physical injury has been proximately caused by the negligent act of another. The states which allow recovery in a similar situation seem to have found sufficient safe-

guards against non-meritorious litigation. Although the decision in the principal case is restricted to situations involving interstate telegrams, the decision should be a guide for the states which deny recovery.

Jere Hayes.

TORTS—THE GUEST STATUTE—AMBULANCE PASSENGERS

A young lady summoned an ambulance of the defendant to take her to the hospital; she requested the plaintiff, her finance, to accompany her. The plaintiff told the driver and the attendant that he was going, and they replied that it would be all right. The defendant's customary charge was $5.00 for each patient; it was the practice of the funeral chapel within reasonable limits to let relatives and friends accompany the patient without charge. En route to the hospital the ambulance struck another vehicle. The plaintiff proved ordinary negligence only. *Held:* The Texas Guest Statute, TEX. REV. CIV. STAT., (1925) art. 6701 b, sec. 1, is not applicable because the plaintiff is a guest of the patient, not a guest of the ambulance owner. The majority of the court felt the motivating influence for the transportation was the hiring of the vehicle, which gave the patient, the right to ask the plaintiff to accompany her. The three dissenting judges felt there was no right for the plaintiff to ride, and that he was therefore a guest within the statute. *Cedziwoda v. Crane Longley Funeral Chapel,* .....Tex....., 283 S.W.2d 217 (1955).

Common law courts have treated the gratuitous rider in an automobile as a licensee. *Plummen v. Dill,* 156 Mass. 426, 31 N.E. 128 (1892); compare *Baines v. Collins,* 310 Mass. 523, 38 N.E.2d 626 (1942), with *Coffey v. Ouachita River Lbr. Co.,* 191 So. 561 (La. App. 1939). Corish, *The Automobile Guest,* 14 BOSTON U. L. REV. 728 (1934); Campbell, *Host-Guest Rules in Wisconsin,* 18 WIS. L. REV. 180 (1943). As a licensee, the guest assumes the ordinary risks of defects in the car, but the driver is under an obligation to exercise reasonable care in operating the car. *Dashiell v. Moore,* 177 Md. 657, 11 A.2d 640 (1940). If the rider pays or otherwise confers a benefit, he is an invitee, corresponding to a paying passenger, and not a guest. *Gage v. Chapin,*

115 Conn. 546, 162 Atl. 17 (1932); *cf. Raub v. Rowe*, 119 S.W.2d 190 (Tex. Civ. App. 1938); note, 51 HARV. L. REV. 545 (1937). Following Connecticut, most states have covered the point by statute. These statutes were passed for two principal purposes: (1) to alleviate the likelihood of collusion between the insured owner of the vehicle and the gratuitous rider; *Ward v. George*, 195 Ark. 216, 112 S.W.2d 30 (1937); and (2) to satisfy the common feeling that a guest in an automobile should assume the risks of the driver's ordinary negligence. Hodges, *The Automobile Guest Statutes*, 12 TEX. L. REV. 303 (1933). Under these statutes, a guest may recover only if the host is grossly negligent, or demonstrates reckless or intentional disregard for the guest's safety.

A guest is the recipient of voluntary hospitality; he does not confer benefit on the owner. *Linn v. Nared*, 133 S.W.2d 234 (Tex. Civ. App. 1939); *Gledhill v. Connecticut Co.*, 121 Conn. 102, 183 Atl. 379 (1936); *Drea v. Drea*, 198 N.E. 743 (1935); *cf. Fairman v. Mars*, 130 P.2d 448, 55 Cal. App.2d 216 (1942). To distinguish a guest from a passenger who does not come within the guest statute, the courts have resorted to several guideposts, none of which is completely satisfactory. *Prager v. Isreal*, 15 Cal.2d 89, 87 P.2d 870 (1939); *Thomas v. Currin Lbr. Co.*, 283 Mich. 134, 277 N.W. 857 (1938); *Henry v. Henson*, 174 S.W.2d 270 (Tex. Civ. App. 1943) (no compensation paid); *cf. Engel v. Int. Transit Co.*, 9 Wash.2d 590, 115 P.2d 681 (1941); *Connet v. Winget*, 374 Ill. 531, 30 N.E.2d 1 (1940), conformed to 34 N.E.2d 878, 310 Ill. App. 533 (1941) (intent). *Aucker v. Stechley's Hybrid Seed Corn Co.*, 143 Neb. 24, 8 N.W.2d 451 (1943) (fact question). Where a wife accompanying the patient in an ambulance agreed to pay his charges, the Washington Supreme Court left the question of her guest status to the jury. *Vogreg v. Shepard Ambulance Service, Inc.*, 44 Wash.2d 528, 268 P.2d 642; see also, *Rushing v. Mulhearn Funeral Home*, 200 So. 52 (La. App. 1941); *Morales v. Employer's Liability Ins. Co.*, 202 La. 755, 12 S.2d 804 (1943).

A rider is not a guest if he bears a contractual relation to the host or confers some benefit on him, *Agnew v. Wenstrand*, 33 Cal. App.2d 21, 90 P.2d 813 (1939); compare *Sproll v. Burkett Motor*

Co., 228 Iowa 902, 274 N.W. 63 (1937), with *Wittrock v. Newen*, 224 Iowa 925, 277 N.W. 286 (1938). See *Burt v. Lochausen*, 151 Tex. 289, 249 S.W.2d 194 (1952). In *Perrine v. Charles T. Bisch & Son*, 246 Ill. App. 321, 105 N.E.2d 543 (1952), the court held that a wife's assistance in caring for her patient husband tended to promote the mutual benefit of herself and the ambulance owner, and she was not a guest. *Cf. Sheehan v. North Country Hospital*, 273 N.Y. 580, 7 N.E.2d 701 (1937) memo dec.; *Duran v. Mission Mortuary*, 174 Kan. 565, 258 P.2d 241 (1953); *Robertson v. Holden*, 297 S.W. 327 (Tex. Civ. App. 1927) (by implication); *rev'd on other grounds*, 1 S.W.2d 570 (Tex. Com. App. 1928). *Contra, Vogreg v. Shepard Ambulance Service, supra.* Apparently, in these cases the plaintiff gave some benefit or consideration in exchange for the right to ride. In the noted case, where the plaintiff gave nothing, the majority assumed his right to ride existed as an incident to the hiring of the ambulance. The dissent flatly refused to make this inference. In other cases considered, the allegation of a right was pertinent to the plaintiff's recovery. *Rushing v. Mulhearn Funeral Home, supra.*

The majority of courts have indicated that under some circumstances the friend of the patient may be a guest within the statute, but have held in specific cases that those circumstances were not present. In this case of first impression the Texas court establishes a novel approach to the ambulance problem. By holding that the friend of the patient is not a guest of the ambulance owner because he is a guest of the patient, the court implies that the friend of the patient is never a guest within the statute, regardless of the circumstances. Since there is little likelihood of collusion between the funeral company the patient's friend, perhaps the statute should not be applied in this particular class of cases. However, since TEX. REV. CIV. STATS., (1925) art. 6701 b, sec. 2 expressly exempts public carriers and the owners of motor vehicles being demonstrated for sale from inclusion within the guest statute, by application of the doctrine of *expressio unius est exclusio alterius*, it would seem that the general rule stated in art. 6701 b, sec. 1 should be applicable in all other cases. It would also have been helpful if the court had cited some authority for its decision.

Neil J. O'Brien.

TRUSTS -EXECUTION—DISTINCTION BETWEEN CAPITAL AND INCOME

It is here presented for the first time in Texas the question whether profits resulting from the foreclosure of a lien comprising part of a trust estate and the purchase of the foreclosed property by the trustee should be apportioned between the life beneficiary of the trust and the remaindermen. The trust involved in this case merely provided that the entire income of all property was to go to the life tenant, and upon her death, to be divided among the remaindermen. The trust property included a note for $1,300 which was secured by liens on a tract of land. Unpaid interest upon the note amounted to $1,257.83 when judgment for the sum of the principal and interest was entered in 1937. The judgment stipulated that no personal liability was rendered, and that the lien on the land was foreclosed. At the ensuing sheriff's sale, the Trustee bid in the property. Afterwards the Trustee executed oil and gas leases on the land receiving $9,770 in bonus payments. This action was brought after the life tenant's death in 1952 to determine if the heirs of the life tenant were entitled to a portion of the land and the bonus payments. *Held:* The land and the bonus payments should be apportioned between life tenant's heirs and the remaindermen in the proportion that the accumulated interest bore to the principal of the note upon foreclosure. (One justice dissenting.) *San Antonio Loan and Trust Co. v. Hamilton,* ..... Tex....., 283 S.W.2d 19 (1955).

Generally, gains or losses in the value of the trust estate accrue to or fall upon the corpus. A universal exception is found in the case where a loss is caused by the foreclosure of a mortgage investment where accrued interest income is due and payable upon foreclosure. Here the loss is apportioned between the life beneficiary and the remainderman in the ratio of the accrued interest to the face value of the investment. See cases collected in 103 A.L.R. 1271 and 129 A.L.R. 1314. The philosophy of this exception, as announced in *Cox. v. Cox,* L.R. 8 Eq. 343, 344 (1869), is that "... neither the tenant for life nor the remainderman is to gain an advantage over the other—neither is to suffer

more damage in proportion to his estate and interest than the other suffers—from the default of the obligor."

A conflict is apparent in jurisdictions which have decided upon the applicability of the apportionment exception to include cases in which the foreclosure resulted in a profit. Accepting the philosophy that the apportionment doctrine is to maintain equality between the interests of the life tenant and the remainderman, *Parker v. Seeley,* 56 N.J. Eq. 110, 38 Atl. 280 (1897) held that the same principle should apply to the case where a profit, instead of a loss, arises.

The majority decision is well supported by an imposing array of case law. Not only does the opinion trace the development and extension of the apportionment doctrine but it also carefully distinguishes numerous cases apparently contra to the applicability of the doctrine to foreclosure cases in which a profit arises. A significant aspect of the case is the heavy reliance placed by the current Supreme Court upon holdings outside their jurisdiction in deciding a case of first impression. The lawyer seeking an initial decision in Texas on his point of law should be encouraged by the noted case to devote more liberal amounts of his time and his brief to outside holdings than in the past.

Although the case provides an outstanding resume of the case law on the subject of apportionment with relation to trusts, it is difficult to account for the omission of any reference to the Texas Trust Act, Vernon's Civ. Stats., Art. 7425 b. Even more troubling is the fact that the holding seems opposed to the provisions of the act relating to apportionment. Sec. 26 states that "this Act shall govern the ascertainment of income and principal. . . ." Sec. 27 (b) states "All receipts of money or other property paid or delivered . . . as a repayment of a loan . . . or otherwise as a refund or replacement or change in the form of principal shall be deemed principal. . . . Any profit or loss resulting upon any change in form of principal shall enure to or fall upon the principal." Sec. 35 provides for allocation between principal and income upon conversion of unproductive property. Sec. 35A provides specifically that the value of property acquired through foreclosure shall consist of all moneys invested and advanced. Sec. 35B provides specifically that income shall be based upon the difference between

the net proceeds received from the property and the amount which, if placed at a 4% simple interest rate, would have produced the net proceeds.

The retroactive application of the Trust Act to interpret trusts executed prior to its enactment is questionable. In fact, *Garcia v. Garcia DeOrtez*, 257 S.W.2d 804 (Tex. Civ. App. 1953), held that the Texas Trust Act enacted in 1943 was not applicable to a 1936 transaction. On the other hand, the applicability of Sections 19 and 24, dealing respectively with the trustee's contracts and the power of the courts, is expressly held not affected by the fact that the trust was created before the Trust Act was enacted in *American National Bank of Beaumont v. Biggs*, 274 S.W.2d 209 (Tex. Civ. App. 1954) *error refused, n.r.e.* Regardless of the applicability of the statutory provisions of the act to such prior trusts, it would seem that the pertinent portions of the act would provide excellent grounds for interpreting a point upon which the trust is silent, particularly where the point also represents a case of first impression.

The applicability of Sec. 35 dealing with apportionment of the proceeds from the conversion of unproductive property to the facts of this case is also questionable—in that Sec. 35B apparently contemplates such proceeds to arise at the time of conversion, whereas in the principal case no cash proceeds were obtained at the foreclosure sale nor for a substanial period thereafter. But these questions emphasize the need for a comprehensive discussion of these uninterpreted aspects of the Trust Act by the Supreme Court. The apportionment provisions of the act were designed to resolve issues such as that presented by the noted case. The establishment of a judicial principle seemingly in sharp conflict with the legislative will expressed in the act could lead to regrettable confusion on a subject destined to become more important in the future.

Granville Dutton.

TRUSTS—SPENDTHRIFT TRUSTS—RIGHT OF MINOR CHILDREN TO ATTACH FOR SUPPORT

The plaintiff, holding a judgment against her husband for the support and maintenance of their minor children, sought to enforce

the judgment by writ of attachment against the husband's interest as beneficiary of a spendthrift trust. The trustees contended that the trust assets were not amenable to attachment by the plaintiff, since the trust estate was a spendthrift thrust "with the usual restrictive provisions incident to that kind of trust. . . ." *Held:* The public policy of the District of Columbia requires that the interest of a father in a spendthrift trust may be invaded for the support of minor children. *Seidenberg v. Seidenberg*, 225 F.2d 545 (D.C. Cir. 1955).

Any discussion today of the arguments for and against spendthrift trusts would be largely academic, since their validity is recognized by the courts, and to a lesser extent the legislatures, of a majority of the American states. For a collection of cases see 119 A.L.R. 19 (1939), supplemented in 138 A.L.R. 1319 (1942). A few jurisdictions, adhering to the English view, deny the validity of spendthrift trusts to the extent that they restrain the voluntary and involuntary transfer of the beneficiary's interest. *Brahmey v. Rollins*, 87 N.H. 290, 179 Atl. 186 (1935); *Cecil's Trustee v. Robertson*, 32 Ky. L. Rep. 357, 105 S.W. 926 (1905). In the latter jurisdictions, the settlor who would prevent future alienation of trust income by the beneficiary is forced to adopt some form of indirect restraint, the usual device being a discretionary trust. *Thurber v. Thurber*, 43 R.I. 504, 112 Atl. 209 (1921).

Where the spendthrift trust is recognized, the general rule is that the interest of the beneficiary may not be reached by ordinary creditors and the decisions are usually grounded on a public policy which declares that the settlor has a right to condition his bounty as suits himself, so long as no law is violated in so doing. *Canfield v. Security-First Nat. Bank*, 13 Cal. App. 2d, 87 P.2d 830 (1939); *Frensley v. Frensley*, 177 Okla. 221, 58 P.2d 307 (1936). Although thus immune to the claims of ordinary creditors, the courts have on occasions permitted certain classes of claimants to reach the interest of the spendthrift beneficiary. For example, the state has been permitted reimbursement for expenses incurred for the support of the beneficiary, *In re Walter*, 278 Pa. 421, 123 Atl. 408 (1924); claims for services rendered the beneficiary in the protection of his interest in the trust estate were permitted

an attorney in *In re Razall's Will*, 243 Wis. 152, 9 N.W.2d 639 (1943); and it is likely that the federal government will be able to reach the beneficiary's interest to satisfy claims for tax deficiencies. *United States v. Mercantile Trust Co.*, 62 F. Supp. 837 (D.Md. 1945). For other instances in which the courts have allowed the interest of the spendthrift beneficiary to be invaded, see Griswold, *Reaching the Interest of the Beneficiary of a Spendthrift Trust*, 43 Harv. L. R. 63, 68-78 (1929).

Where the plaintiff asserts a claim against the interest of the spendthrift beneficiary the court must weigh and choose between conflicting public policies. In the principal case, the policy that the settlor has a right to dispose of his property as he pleases collided with the countervailing interest of minor children in receiving support from a father under a duty to furnish it. There has been a considerable amount of litigation in regard to the right of a dependent to reach the beneficiary's interest, and the cases have not always reached the same result. Louisiana, Missouri, Oklahoma, Pennsylvania and a number of other states have enacted statutes which specifically permit the beneficiary's income to be diverted to the support of the beneficiary's wife and minor children. The Restatement of the Law of Trusts, Section 157 (a), supports this view. The Restatement rule has been cited with approval in *Buchanan v. National Savings & Trust Co.*, 146 F.2d 13 (D.C. Cir. 1944); *Safe Deposit & Trust Co. v. Robertson*, 192 Md. 653, 65 A.2d 292 (1949); *Dillon v. Dillon*, 244 Wis. 122, 11 N.W.2d 628 (1943). Other courts, perhaps the majority of those that have considered the problem, seek to ascertain the intention of the testator with respect to the beneficiary's dependents. Where, from a construction of the instrument itself or from the surrounding circumstances, no expression of the testator's intent can be found the dependents almost uniformly have no trouble in satisfying their claims. *Eaton v. Lovering*, 81 N.H. 275, 125 Atl. 433 (1924); *England v. England*, 223 Ill. App. 549 (1922). However, where the testator has expressly manifested an intention to exclude the beneficiary's dependents from sharing in the trust benefits the courts of some jurisdictions automatically deny relief to the dependents. Thus in *Erickson v. Erickson*, 197 Minn. 71, 266 N.W. 161, 267 N.W. 426 (1936), the Minnesota Supreme

Court held that ". . . it is the intent of the donor, not the character of the donee's obligation, which controls the availability and disposition of his gift." Other courts have reached the same result by placing claims for alimony or maintenance on a par with ordinary debts. *San Diego Trust & Savings Bank v. Heuistis,* 121 Cal. App. 675, 10 P.2d 158 (1932); *Roorda v. Roorda,* 230 Iowa 1103, 300 N.W. 294 (1941).

The court in the principal case assumed that it was the testator's intention to exclude the beneficiary's children from the benefits of the trust. Notwithstanding that intention, it was held that the public policy of the District of Columbia required that the interest of the father may be invaded for the support of his minor children. In reaching this result the court is to be commended for its refusal to follow the dogmatism of those courts which treat the testator's intention as something inviolate and without limitation, even to the exclusion of those whose claims upon the beneficiary's interest are supported by moral right and common decency. Of course, the testator's intention does merit respectful consideration. But, it is submitted, this intention would be best subserved by providing certainty in this area of the law through legislation, rather than to base its recognition on judicial indulgence.

H. Wayne Wile.

WILLS—IMPLIED REVOCATION—SUBSEQUENT DEVISE INEFFECTIVE

Testatrix made a will in 1946 leaving all of her property to her niece. Subsequently the testatrix married and in 1951 executed a second will in which she left all of her property to her husband for life with remainder to her niece, which was an illegal conveyance under LSA—Civil Code, art. 1520. The husband contended that even though the second will did not effectively dispose of the property, it was a tacit revocation of the previous will. *Held:* If two wills have incompatible devices, the more recent will revokes the former, provided it is regular as *to form,* and it is not necessary that it actually operate as a devise. *Matter of Ryan,* 228 La. 447, 82 So.2d 759 (1955).

It is a settled proposition in the law that before a will can be

revoked it must be clear that the testator intended for it to be revoked. Where the method or revocation is by writing another will, the intention to revoke may be shown by an express statement to that effect or by making grants inconsistent with the first will. In the latter case the court implied the testator's intent to revoke from the fact that he has made a subsequent will which is wholly inconsistent with the first will. This is known as implied revocation. *Wagner v. Wagner,* 303 Ky. 140, 197 S.W.2d 86 (1946); *Succession of Pizzati,* 141 La. 645, 75 So. 498 (1917).

Some broad language can be found expressing the view that intention is not the controlling factor where the first will is revoked by a subsequent will. These cases hold that if the last will is to dispose of the property as the testator provided, then as a matter of course there is nothing left for the first will to act upon and so it is rendered useless. Only one case has been found making this rule absolutely clear, *Austin v. Oakes,* 23 N.E. 193, 197 (Ct. App. N.Y. 1890), see also *Swain v. Swain,* 48 S.E.2d 425 (Sp. Ct. App. W. Va. 1948). Obviously, this is not revocation at all, but merely a mechanical formula. See ATKINSON, WILLS 450 (2d ed. 1953).

Of course, when the second will disposes of the entire estate it makes no difference which theory is used, because the same result will be reached whether it is said that the testator showed an implied intent to revoke his previous inconsistent will or whether it is said that the first will is now useless, due to the fact that all of the estate has passed under the second will.

A problem arises, however, in fact situations like the principal case where the second will is in good statutory form, and purports to dispose of the entire estate, but fails to do so because of some outside rule of conveyancing. Most courts, following the theory of implied revocation, hold that the first will is revoked in light of the intent to revoke which is implied from the fact that the testator has drawn a second and inconsistent will. *Kearns v. Roush,* 146 S.E. 729 (Sp. Ct. App. W. Va. 1929); *In re Weppermann's Estate,* 300 N.Y.S. 344 (Surr. Ct. 1937) refusing to follow *Austin v. Oakes, supra; In re McClure's Estate,* 309 Pa. 370, 165 Atl. 24 (1933). Other courts insist on the rule that if the second will fails as a devise, it also fails as a revocation, and

the estate passes under the first will. This is apparently the rule in England, *Sidegreaves v. Brewer*, 15 Ch. D. 594,609 (1880). The American cases which follow this rule have failed to make their reasons clear. Some seemingly apply the doctrine of dependent relative revocation, and hold that the first will was only conditionally revoked, the condition being that the second will operate as a devisee, *In re Marx's Estate*, 174 Cal. 762, 164 Pac. 640 (1917); *Ewell v. Sneed*, 136 Tenn. 602, 191 S.W. 131,137 (1917) (dictum); while others seem to base their reasoning on the mechanical formula discussed earlier. *In re Brodersen's Estate*, 229 P.2d 38 (Cal. Dist. Ct. App. 1951); *Lee v. Wilson*, 138 Okla. 115, 280 Pac. 413 (1929) (dictum); *contra*, *Phillips v. Smith*, 186 Okla. 636, 100 P.2d 249 (1939).

The majority of the cases in the United States follow the principal case, and apply the theory of implied revocation in situations where the subsquent inconsistent will fails as a disposition because of some fact *dehors* the instrument. It is submitted that this theory is based on sound legal reasoning in that it looks to the intent of the testator which is the prime factor in a revocation. The mechanical theory as followed in England and a minority of the American jurisdictions is highly fictional and ignores the element of intent completely. This theory is mentioned by many authors, but an analysis of the cases cited for the proposition will reveal that most of them deal with subsequent inoperative *codicles*, which presents an altogether different problem since a codicle is usually integrated with the will and is prima facie a republication of it, and not a revocation.

As shown, some of the cases which follow the theory of implied revocation go one step further and apply the doctrine of dependent relative revocation, holding that not only did the testator intend a revocation, but that he intended the revocation to be conditional. However, it seems somewhat unrealistic to imply a conditional intent from no more than the fact that the testator made two wills with inconsistent dispositions. The court in the principal case did not consider this possibility and ostensibly Louisiana is one of the states that does not recognize the doctrine of dependent relative revocation.

Walter W. Steele, Jr.