



1956

## Recent Case Notes

David M. Woolley

Don M. Dean

Geo. R. Alexander Jr.

Ivan Irwin Jr.

Follow this and additional works at: <https://scholar.smu.edu/smulr>

---

### Recommended Citation

David M. Woolley, et al., *Recent Case Notes*, 10 Sw L.J. 435 (1956)  
<https://scholar.smu.edu/smulr/vol10/iss4/7>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## RECENT CASE NOTES

### CONSTITUTIONAL LAW — FULL FAITH AND CREDIT — FOREIGN DIVORCES

*H* and *W* were domiciled in New Jersey. *H* was guilty of marital offenses. *W*, for the purpose of securing a divorce, set up residence in Reno, Nevada, for the six weeks period necessary to the bringing of a divorce action in that state. She then filed suit alleging her domicile in Nevada, and so testified in court. *H* appeared and filed a counterclaim but did not contest the jurisdiction of the court. The court awarded an absolute divorce to *H* on his counterclaim after having found that it had jurisdiction. Both *H* and *W* returned immediately to New Jersey. Later, *W* brought an action in New Jersey for maintainence and sought to set aside the Nevada divorce decree as having been procured by the perpetration of a fraud on the Nevada court. *Held*: Where a divorce decree issues from an adversary proceeding in which both parties are represented by independent counsel and have full opportunity to contest all the issues therein, it must be given full faith and credit in the courts of a sister state. *Nappe v. Nappe*, —N. J. —, 120 A.2d 31 (1956).

An action for divorce is today characterized as an action quasi in rem. *Williams v. North Carolina*, 317 U.S. 226 (1942). Therefore, full faith and credit must be given to the divorce decree rendered in another state, even though in an ex parte hearing, if jurisdiction based on the domicile of one of the parties exists and service of process on the absent party is in conformity with procedural due process. *Williams v. North Carolina, supra*. A common method of service on defendants outside the jurisdiction, that of an order of publication and substituted service, has been held to comply with procedural due process. *Williams v. North Carolina, supra*. However, the defendant of an ex parte hearing is not precluded from collaterally attacking on jurisdictional grounds the judgment rendered in that hearing, when that judgment is sought to be enforced in the sister state. *Williams v. North Carolina*, 325 U.S. 266 (1945). There is a strong presumption that the decree is valid, and the burden is upon the party attacking the decree. *Esenwein v. Esenwein*, 325 U.S. 279 (1945).

Even if jurisdiction does not exist, if the defendant enters a general appearance in the trial, full faith and credit must be given to a divorce decree rendered in such a proceeding. *Sherrer v. Sherrer*, 334 U.S. 343 (1947). This is also true where the defendant makes a special appearance to contest jurisdiction. *Hendricks v. Hendricks*, 275 App. Div. 642, 92 N.Y.S.2d 338 (1949). The finding of jurisdiction by the court becomes *res judicata* and binds all other courts, whether the defendant has contested or admitted the court's jurisdiction. *Sherrer v. Sherrer*, *supra*; *Coe v. Coe*, 334 U.S. 378 (1947). The defendant may enter a valid appearance through counsel. *Johnson v. Muelberger*, 340 U.S. 581 (1951). However, the defendant or his authorized attorney must make an *actual* appearance, for it has been held that a signed entry of appearance presented to the court by one spouse for the other does not preclude the absent spouse from making a later collateral attack on jurisdictional grounds. *Eaton v. Eaton*, 227 La. 992, 81 So.2d 371 (1955). A third person not a party to the divorce action is also barred from collaterally attacking a divorce decree in which both parties thereto were present and each had full opportunity to contest the jurisdictional issues, when such collateral attack is not allowed in the state rendering the decree. *Johnson v. Muelberger*, *supra*; *Cook v. Cook*, 342 U.S. 126 (1951). Generally, if a pre-existing right of such third person is prejudiced by the divorce, then the third person may make a collateral attack on the decree. *Tallentine v. Burkhardt*, 153 Fla. 278, 14 So.2d 395 (1943).

In a New Jersey case decided subsequent to the decisions in the *Sherrer* and *Coe* cases, a proviso was created to the rule enunciated in those cases. It was held that a wife was not barred from collaterally attacking a Florida divorce awarded to her husband although she had made an appearance, when she adduced evidence to show that her husband had organized a conspiracy to defraud the Florida court, and that she had been induced to support him in his actions by an agreement between them conditioned upon her support, thus negating the concept of an adversary proceeding. *Staedler v. Staedler*, 6 N.J. 380, 78 A.2d 896 (1951). It was held that the rule of the *Sherrer* and *Coe* cases applied only to cases of true adversary proceedings where both parties had the complete

opportunity to contest any of the issues involved. Vanderbilt, C. J., in his dissent in the present case, points up several facts which would tend to show "... that the husband dominated the entire situation from beginning to end..." Principally, these facts relate to (1) an agreement between the spouses regarding the divorce while both were still in New Jersey, (2) the unusual conduct of the wife's Nevada attorney at the trial, and (3) the husband's paying the wife's attorney fee. Despite these facts, the majority is able to find an adversary proceeding which bars the wife's later attack. It seems evident that the majority is attempting to stem any extension of the doctrine of the *Staedler* case and is perhaps confining that rule to its facts.

There is certainly no unity in the current views taken of the modern trend on this topic by the text writers. Many are appalled that a dissolution of the marriage bonds may today be accomplished in effect by the consent of the spouses. Reference is commonly made to the "quickie divorce" states, and it is pointed out that Supreme Court decisions have virtually repealed the conservative laws of many states on the subject. Advocates of the modern trend point out that today the relationship between the parties is more firmly established and more uniform among several jurisdictions. The likelihood of a later child's legitimacy being impeached today is much less than before. Regardless of the controversial nature of this trend, it seems to be relatively well established, and later cases will probably only add refinements to the present rules.

*David M. Woolley*

#### CONSTITUTIONAL LAW — PRE-EMPTION BY FEDERAL LAW — ANTI-SEDITION LEGISLATION

Defendant, an acknowledged member of the Communist Party, was convicted for violating the Pennsylvania Sedition Act which punishes the advocacy of the overthrow of the national government by force and violence. The conviction was based solely upon acts of sedition directed toward the federal government. Since the Smith Act, as amended by Congress in 1948, embodies substantially the same prohibitions as the Pennsylvania Act, the Supreme

Court of that state held that the Smith Act had superseded the state act. The United States Supreme Court granted certiorari. *Held*: The scheme of federal regulation in the field of anti-sedition legislation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. *Commonwealth of Pennsylvania v. Steve Nelson*, 350 U.S. 497 (1955).

In the past, various states have enacted criminal anarchy statutes and statutes prohibiting membership in organizations dedicated to the overthrow of the national government; such statutes have been held not to violate the due process clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 252 (1925); *Whitney v. California*, 274 U.S. 357 (1927). Although such enactments are an unquestioned exercise of police power by the states, when Congress enacts legislation covering the same area the questions of the instant case arise: May Congress constitutionally exercise *exclusive* control over threats to national security and, if it may, did it intend to do so?

It was early recognized, with regard to the commerce power of the federal government, that Congress should have the exclusive right to legislate in those subjects which are national in scope and require uniform regulation; in those fields that are local in scope, the states may legislate until such a time as Congress should choose to occupy the field. *Cooley v. Port Wardens*, 19 U.S. (12 How.) 143 (1851). More recently, in the field of alien registration, the Supreme Court has indicated that where the federal government has enacted a complete scheme of regulation, states may not enact laws which either conflict with or complement the national legislation. *Hines v. Davidowitz*, 312 U.S. 52 (1940). On other occasions the Court has seen fit to allow state action even in the face of comprehensive congressional legislation. The dissent in the instant case relies heavily upon *U. S. v. Lanza*, 260 U.S. 377 (1922), in which a violation of the Eighteenth Amendment was considered to be an offense against the sovereignty of both the state and national government. A pacifist movement obstructing enlistments during World War I was also considered such a dual offense, though the acts were aimed solely at the federal government and Congress had enacted legislation covering such acts. *Gilbert v. Minnesota*, 254 U.S. 327 (1920).

Neither the Smith Act nor its legislative history expressly indicates whether Congress intended to exercise its federal powers to the exclusion of the states. Congress, recognizing the nature and purpose of the Communist Party and its relation to the international "cold war," has formulated a complete legislative system to cope with the problem. Provision is made to combat communist front and communist action organizations as well as the individual. Registration of all communists is required and sanctions are imposed against communist-infiltrated organizations. Observing the completeness of the national legislation and the dominant interest of the national government, it would seem inescapable that Congress intended to occupy the field to the exclusion of the state governments. Further, if the states are allowed to legislate concurrently against the same act of sedition toward the national government, only conflicting and incompatible adjudications can result from the different penalties and criteria of substantive offenses. In the instant case the Pennsylvania Sedition Act bore greater penalties than did the federal statute, yet the state prosecution could be begun on a mere information by a private citizen rather than indictment by a grand jury as required by the Smith Act. In the absence of strong evidence to the contrary, it would seem reasonable that Congress did not wish to impose the form of dual punishment which results from concurrent state legislation.

It is submitted that the principal case is well reasoned upon the principles established in such cases as *Cooley v. Port Wardens* and *Hines v. Davidowitz*. It should be remembered that the case is not without its limitations. The instant decision does not prevent the states from protecting themselves from acts of violence and sabotage, nor does it preclude state action when the same act constitutes a crime against both the state and the national government. And, of course, Congress may expressly give concurrent powers of legislation and enforcement to the states as it did under the Eighteenth Amendment.

*Don M. Dean*

#### INSURANCE — CONTRACTS — CONSTRUCTION

*P's* deceased husband, the insured, applied for a life insurance policy from *D* through *D's* soliciting agent. After the policy was

rejected by the insured because it contained two aviation exclusion riders, *D's* officer, with knowledge that insured was on flying status as an Air Force gunner and that insured objected to any aviation restrictions, removed one of the riders but allowed the other to remain in the policy. *D's* agent returned the policy to the insured and told him that the aviation rider had been removed and that his flying status was now covered by the policy. The insured accepted the policy without reading it, relying on the agent's statements. The insured was later killed while on a training flight and *D* refused to pay because the risk was excluded under the rider remaining in the policy. *Held*: Where insured rejects a policy containing two aviation risk riders and an officer of an insurance company, with knowledge of insured's occupation, removes only one rider and returns the policy to the insured for acceptance, the policy is of doubtful meaning and will be construed strictly against the insurer. *Trahan v. Southland Life Ins. Co.*, — Tex. —, 289 S.W.2d 753 (1956).

The general rule of construction of contracts is that the contract will be construed strictly against the party whose words it is and liberally in favor of the other party. *McClenathan v. Davis*, 243 Ill. 87, 90 N.E. 265 (1909). This rule is based on the theory that the party who uses the words has his choice of words and should be able to make his intention clear. However, this rule of construction is never to be invoked unless there is ambiguity present in the contract itself. *Griffin v. Fairmont Coal Co.*, 59 W. Va. 480, 53 S.E. 24 (1905); *Reynolds v. McMan Oil & Gas Co.*, 11 S.W.2d 778 (Tex. Comm. App. 1928); *Wood Motor Co. v. Nebel*, 150 Tex. 86, 238 S.W.2d 181 (1951). If the contract itself is unambiguous, then extrinsic evidence cannot be admitted to create an ambiguity. *Kahn v. Kahn*, 94 Tex. 114, 58 S.W. 825 (1900); *Lewis v. East Texas Finance*, 136 Tex. 149, 146 S.W.2d 977 (1941). The theory underlying this rule is that the parties, in reducing the contract to writing, are attempting to make certain that which is uncertain and this attempt would be futile if extrinsic evidence were permitted to vary, contradict, or make the contract ambiguous. *San Antonio Machine and Supply v. Allan*, 284 S.W. 542 (Tex. Comm. App. 1926); *Ross & Sensibaugh v. McLelland*, 262 S.W.2d 205 (Tex. Civ. App.

1953) *ref. n.r.e.* There is some authority that extrinsic evidence can be considered even when there is no ambiguity in the contract itself. *Ryan v. Kent*, 36 S.W.2d 1007 (Tex. Comm. App. 1931). This appears to have been limited by later authorities. *Lone Star Gas Co. v. X Ray Gas Co.*, 139 Tex. 546, 164 S.W.2d 503 (1942).

Insurance contracts are subject to the same general rules of law, and the limitations to these rules, which are applied to other contracts. *Brown v. Palatine Ins. Co.*, 89 Tex. 590, 35 S.W. 1060 (1896). The rule of construction of insurance contracts is that they should be construed strictly against the insurer and liberally in favor of the insured. *Lloyds Cas. Insurer v. McCrary*, 149 Tex. 172, 229 S.W.2d 605 (1950); *Providence Washington Ins. Co. v. Proffitt*, 150 Tex. 207, 239 S.W.2d 379 (1951). It has been said that this is an exception to the general contract rule, but when it is realized that in almost all cases the insurer has written the policy with the help of competent legal advice and the insured has had little, if any, choice in the wording of the contract, it is readily seen that the general rule is being applied. *Burns v. American Nat'l. Ins. Co.*, 280 S.W. 762 (Tex. Comm. App. 1926). The insurance rule of construction is also subject to the limitation that it is not to be applied unless there is an ambiguity in the policy itself which calls for construction. *General American Life Ins. Co. v. Rios*, 139 Tex. 554, 164 S.W. 2d 521 (1942). Likewise, the court cannot create an ambiguity just to give room for construction in order that a harsh result might be avoided. *Bridge v. Mass. Bonding & Ins. Co.*, 302 Ill. App. 1, 23 N.E.2d 367 (1939). The policy must be enforced as made by the parties if it is unambiguous in itself. *East Texas Fire Ins. Co. v. Kempner*, 87 Tex. 229, 27 S.W. 122 (1894); *Home Ins. Co. v. Rose*, 152 Tex. 222, 255 S.W.2d 861 (1953).

In the principal case it was recognized that the policy with only one rider attached was unambiguous in itself; however, the court allowed evidence of the fact that there were two different aviation exclusion riders attached to the policy before it was accepted to raise an ambiguity in an otherwise unambiguous policy. The court has applied the rule of construction that the insurance policy will be construed strictly against the insurer and liberally in favor of the insured to a fact situation where there



is nothing itself calling for construction. Possibly the court has reached a just result, but in so doing it is submitted that a dangerous precedent has been created for the proposition that, under analogous facts, extrinsic evidence will be admitted to bear on the contract and create an ambiguity where none existed before.

*Geo. R. Alexander, Jr.*

#### INSURANCE — DOUBLE INDEMNITY — RELEASE

A life insurance policy provided for payment of \$1,000 to the beneficiary upon the death of the insured, and an additional \$1,000 in the event of accidental death. When the insured died, the insurer paid the beneficiary \$1,000, and she executed a release of claim for the additional \$1,000. Upon discovering that the insured's death may have been accidental, she sued to recover the double indemnity benefits, and the jury found that the death was accidental. The insurer defended upon its release. *Held*: A double indemnity policy creates two separate and independent demands and, therefore, payment of \$1,000 by the insurer to the beneficiary on the death of the insured is not consideration for the beneficiary's release of claim for the additional \$1,000. *Hallmark v. United Fidelity Life Ins. Co.*, — Tex. —, 286 S.W.2d 133 (1956).

It is well settled that the mere payment of a lesser sum is not satisfaction for the whole of a liquidated or undisputed claim, and such payment is not consideration for the release of the balance which is due and owing. *National Mut. Benefit Ass'n. v. Butler*, 72 S.W.2d 659 (Tex. Civ. App. 1934) *error dismissed*, approved in *People's Mut. Life Ass'n. v. Martindale*, 80 S.W.2d 484 (Tex. Civ. App. 1935). Where the beneficiary has only one claim, part of which is disputed and part of which is undisputed, there is a conflict in Texas as to whether payment of the conceded part is sufficient consideration for the discharge of the disputed balance. One line of cases suggests that payment by a debtor of what he admits to be due is no consideration for any promise of the creditor. *Woodall v. Pacific Mut. Life Ins. Co.*, 79 S.W. 1090 (Tex. Civ. App. 1904); *Chicago Fraternal Life Ins. Ass'n. v. Herring*, 104 S.W.2d 901 (Tex. Civ. App. 1937). Other cases

have held that a dispute as to a part of the debt makes the whole debt a disputed one, so as to come within the general rule that the payment of a sum less than that claimed as due in full discharge of an unliquidated or disputed claim is a good accord and satisfaction, and is consideration for a release of the balance due and owing. *Fennell v. Troell*, 226 S.W. 442 (Tex. Civ. App. 1920); *Great Southern Life Ins. Co. v. Heavin*, 39 S.W.2d 851 (Tex. Civ. App. 1931); *Inter-Ocean Cas. Co. v. Johnston*, 123 Tex. 592, 72 S.W.2d 583 (1934). The Court of Appeals in the principal case supported the latter cases, after deciding that a double indemnity policy gives the beneficiary a single, partly disputed claim. *United Fidelity Life Ins. Co. v. Hallmark*, 278 S.W.2d 173 (Tex. Civ. App. 1955).

Where a creditor holds two distinct and independent claims, payment by the debtor of one of the claims is not consideration for the release of the other distinct and independent claim. *Fidelity and Cas. Ins. Co. v. Mountcastle*, 200 S.W. 862 (Tex. Civ. App. 1918); *Machicek v. Renger*, 185 S.W.2d 486 (Tex. Civ. App. 1945) *error ref.*

In order for the Court to determine the proper rule of consideration in the principal case, it was necessary to decide whether the beneficiary had one or two separate claims. In avoiding the conflict of opinion which the Court of Appeals had attempted to settle, the Court relied heavily upon the leading double indemnity cases of *Woodmen of the World Ins. Soc'y. v. Smauley*, 153 S.W.2d 608 (Tex. Civ. App. 1941); approved in *Woodmen of the World Ins. Soc'y. v. Brown*, 164 S.W.2d 190 (Tex. Civ. App. 1942), holding that a double indemnity policy affords the beneficiary two separate claims. The principal case and the *Smauley* case are almost identical in their fact situations, but in the *Smauley* case the Court did not directly state that the beneficiary had two separate and independent claims under the double indemnity policy, distinguishing the holding there from the *Heavin* and *Johnston* cases, *supra*, although it seems apparent that the Court did not consider a double indemnity claim to be a disputed part of a single claim.

The Supreme Court in the principal case did distinguish the *Heavin* and *Johnston* cases, however, by reasoning that they in-

volved alternative claims and not independent claims. The *Heavin* case, for example, involved a dispute over whether the insured died by suicide or by other means. If the death was by suicide, the beneficiary was entitled to collect only the amount of the premiums paid under the policy. If the death was by other means, the beneficiary was entitled to the full proceeds under the policy. Since in no event can the beneficiary collect both demands, the claim was a single one. In the double indemnity cases, however, as the Court pointed out, there is a possibility that the beneficiary can collect both demands, and thus the claims are not alternative but separate and independent. There are decisions in other jurisdictions which sustain this argument and apply, consequently, the same rule of consideration. See *Buel v. Kansas City Life Ins. Co.*, 32 N.M. 34, 250 Pac. 635 (1926); *Amer. Nat. Ins. Co. v. Reed*, 26 Ala. App. 350, 160 So. 543 (1934); *Matthews v. Gulf Life Ins. Co.*, 64 Ga. App. 112, 12 S.E.2d 202 (1941). *Contra: Painter v. Nat. Life and Acc. Ins. Co.*, 158 Kan. 715, 150 P.2d 171 (1944).

It is submitted that the reasoning of the Court on both the insurance and the consideration points is sound. The insurance company, by the terms of its contract, had promised to pay a certain amount upon the death of the insured, and to pay an additional amount in the event of an accidental death. As a result there were two separate and independent claims which the beneficiary could pursue, and under well settled rules of consideration, payment of one could not be consideration for the release of the other.

Ivan Irwin, Jr.

#### LIENS—STATUTORY ATTORNEYS' LIENS—DISCHARGE BY CLIENT

*P* recovered a judgment against *D*. *P*'s discharged attorney, who did not participate in the trial of the case, intervened in the action and sought to recover part of the *D*'s impounded judgment settlement from *P* for his contingent fee, under the Illinois Attorney's Lien Act. *Held*: An attorney may recover against a successful plaintiff the *entire amount* contracted for on a contingent fee basis when such attorney is discharged without cause before the

case is tried. *Peresipka v. Elgin, Joliet & Eastern Ry. Co.*, 231 F.2d 268 (7th Cir. 1956).

At common law an attorney had no lien on a cause of action before final judgment. *Sandburg v. Victor Gold and Silver Mining Co.*, 18 Utah 66, 55 Pac. 74 (1898). Attorney's statutory liens today create a property right in the attorney either in accordance with the common law rule, 2 BURNS' ANNO. IND. STATS. Sec. 4-3619, or from the time statutory notice is served. 13 ILL. REV. STAT. Ch. 13, Sec. 14; 5 R. C. WASH. 60.40.10. These statutory liens were created to protect attorneys from a client's discharge in bad faith or settlement out of court without the attorney's consent. *Northrup v. Hayward*, 102 Minn. 307, 113 N.W. 701 (1907); 34 NEB. L. REV. 703. If the attorney consents to settlement then the lien does not attach. *Gardner v. Atchison, Topeka and Santa Fe Ry. Co.*, 226 F.2d 109 (7th Cir. 1955). Most such statutes have been upheld as constitutional, *Catherwood v. Morris*, 360 Ill. 473, 196 N.E. 519 (1935); *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 97 S.W. 150 (1906); but in one instance such a statute has been held invalid. *Laplace v. Philadelphia Rapid Transit Co.*, 265 Pa. 304, 108 Atl. 612 (1919). These liens are, in effect, assignments of an interest in any judgment rendered or in the proceeds of any settlement made by the client. *Baker v. Baker*, 258 Ill. 418, 101 N.E. 587 (1913). The attorney is considered a "joint claimant" with the client. *McArdle v. Great American Indemnity Co.*, 314 Ill. App. 455, 41 N.E.2d 964 (1942).

Although, in the case at bar, the court found the discharge to be without cause, the relationship of reliance, trust, and confidence was destroyed and hence the plaintiff was entitled to dismiss the attorney. Nevertheless a majority of courts hold that the lien is valid, and the attorney is entitled to recover. *White v. American Law Book Co.*, 106 Okla. 166, 233 Pac. 426 (1924). The attorney's lien attaches to the judgment when he is discharged, *Goldberg v. Perlmutter*, 308 Ill. App. 84, 31 N.E.2d 333 (1941); *Cohen v. Kirchheimer*, 285 Ill. App. 583, 2 N.E.2d 592 (1936); and the recovery is held to be the contract amount. *McGlynn & McGlynn v. Louisville and N.R. Co.*, 313 Ill. App. 396, 40 N.E.2d 539 (1942). The requirement of statutory notice to the

defendant must be met in order for such lien to be valid. *Emerson v. Underwood*, 184 Okla. 358, 87 P.2d 977 (1939); *Orr v. Mutual Benefit Health and Accident Assn.*, 240 Mo. App. 236, 207 S.W.2d 511 (1947).

Some cases, however, uphold the lien on the theory that the efforts of the attorney produce the judgment, indicating that participation of the attorney in the trial is necessary. *Young v. Levine*, 326 Mo. 593, 31 S.W.2d 978 (1930). There has been dicta to the effect that the lien on the proceeds of litigation should be declared in favor of an attorney in a cause where "equitable" considerations require that the lien be recognized. *Debit v. Howard*, 107 Colo. 51, 108 P.2d 1053 (1941). This reasoning seems to favor quantum meruit as the proper measure of recovery. A well-reasoned case on this point asserts that because of the unique relationship, the client may terminate the contract at any time *without* cause, and no damages are assessed because of the discharge before trial. *Martin v. Camp*, 219 N.Y. 170, 114 N.E. 46 (1916); and see *Thompson v. Smith*, 248 S. W. 1070 (Tex. Comm. App. 1923). The majority favors the recovery of the contract amount on the theory that the advice given before trial is the most valuable service rendered. *Kikuchi v. Ritchie*, 202 Fed. 857 (9th Cir. 1913).

The principal case follows the majority view that an attorney discharged without cause before the trial of the case is entitled to recover his full fee as if he had actually procured the judgment. Although there is merit in the minority view that the attorney should be compensated only for the amount of pre-trial work done, it is submitted that, because of the contractual relationship, the rule of the principal case produces the more satisfactory result. If this rule were not applied, the attorney would be inequitably burdened with proof of consequential damages and proof of an attempt to mitigate damages, a burden which could often allow the client to profit from his wrongful act.

*Mac McCrea*

#### MUNICIPAL CORPORATIONS — TORT LIABILITY — NUISANCE

A small child drowned in a deep excavation used as a city dump. The excavation was filled with water, and debris had

formed across the top, giving it the appearance of solid ground, while in fact it consisted only of a thin layer of trash covering deep stagnant water, incapable of supporting any weight. *Held*: A municipal corporation is liable in damages for maintaining a nuisance, it being no defense that the operation of a dump is an exercise of a governmental function. *Lehmkuhl v. Junction City*, — Kan. —, 294 P.2d 621 (1956).

It is generally stated that municipal liability in tort depends upon the nature of the function involved. If the function is "corporate," there is liability; but if the function is "governmental," there is immunity. *Dilley v. Houston*, 148 Tex. 191, 222 S.W.2d 992 (1949); *City of Hazard v. Duff*, 287 Ky. 426, 154 S.W.2d 28 (1941). This categorical classification of municipal acts as a basis for determining liability dates back to the eighteenth century, *Russell v. Men of Devon*, 2 Term Rep. 667, 100 Eng. Rep. 259 (1789), and constantly changing views concerning proper governmental responsibility have demonstrated the inability of such a rule to do justice in all cases. Note, *Extension of Municipal Tort Liability*, 1 BROOKLYN L. REV. 85 (1932); Annot., 120 A.L.R. 1376 (1939).

Although the courts have tenaciously held to the majority rule in principle, in keeping with the modern tendency toward eliminating municipal immunity, many decisions have reduced the immunity so long enjoyed by municipalities by straining to hold as a corporate function what might be expected to be governmental. *McLeod v. Duluth*, 174 Minn. 181, 218 N.W. 892 (1928); Annot., 156 A.L.R. 693 (1945); Cf. *Autry v. Augusta*, 33 Ga. App. 757, 127 S.E. 796 (1925). There is no uniform holding among the states as to what is a corporate and what is a governmental function. Note, *Inroads Upon Municipal Immunity in Tort*, 46 HARV. L. REV. 305 (1932-33). Other courts have developed exceptions to the general rule. These exceptions include active wrongdoing chargeable to the corporation, *Fartillo v. Newark*, 133 N.J.L. 19, 42 A.2d 260 (1945), dangerous conditions of a street, *Wichita Falls v. Crummer*, 71 S.W.2d 583 (Tex. Civ. App. 1934) *error dismissed*, and nuisance, *Barker v. Santa Fe*, 47 N.M. 85, 136 P.2d 480 (1943).

In the principal case, the city was held liable because it main-

tained a governmental function which constituted a nuisance. Between non-liability for negligence and liability for nuisance there is considerable confusion. Some courts have held a city liable for its negligent trespass to land and yet, not liable for trespasses to persons. *Robertson v. Wyoming Township*, 312 Mich. 14, 19 N.W.2d 469 (1945); *Connally v. Waco*, 53 S.W.2d 313, (Tex. Civ. App. 1932) *error ref.* These unexplainable distinctions are merely examples of the method by which the courts are retreating from the doctrine of municipal non-liability.

A similar conflict exists in Texas. The majority doctrine of non-liability for negligence is firmly established, *Scroggings v. Harlingen*, 131 Tex. 236, 112 S.W.2d 1035, *aff'd.* 114 S.W. 2d 853 (1938); *Dallas v. Smith*, 130 Tex. 225, 107 S.W.2d 872 (1937), with an equally strong exception in cases of nuisance. *Parson v. Texas City*, 259 S.W.2d 333, (Tex. Civ. App. 1953) *error ref.*; *Bates v. Houston*, 189 S.W.2d 17 (Tex. Civ. App. 1945) *ref. w.o.m.*; *Fort Worth v. Crawford*, 74 Tex. 404, 12 S.W. 52 (1889).

In view of the inroads made upon municipal immunity, and the occasional holdings that a city is liable for negligence, *Kaufman v. Tallahassee*, 84 Fla. 634, 94 So. 697 (1923), *Fowler v. Cleveland*, 100 Ohio 158, 126 N.E. 72 (1919), should there be a distinction in liability for a corporate act as compared to one that is governmental? Mr. Justice Cardozo felt that there was neither reason nor justice in the distinction. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS, p. 57 (1930). A city is liable in contract whether governmental or proprietary. *United States Fidelity and Guaranty Co. v. Asheville, N. C.*, 85 F.2d 966 (4th Cir. 1936); *McCollum v. Richardson*, 121 S.W.2d 423 (Tex. Civ. App. 1938). Admiralty proceedings also make no distinction between governmental and corporate functions. *Workmen v. New York, Mayor, Aldermen and Commonalty*, 179 U.S. 552 (1900). In Civil Law jurisdictions there is no question of municipal liability where a city was negligent or has maintained a nuisance, and though liability may be limited, there is no absolute denial of liability by reason of sovereign immunity. 2 GOODMAN, COMPARATIVE ADMINISTRATIVE LAW, 161.

It is submitted that there is no logical reasoning behind these

differences. But until the various state legislatures take steps to remedy the confusion, the courts will continue to follow the exceptions that have developed, rather than judicially eliminating the distinction between nuisance and negligence as applied to municipal corporations.

*Robert A. Watson*

OIL AND GAS — MINES AND MINERALS — OPEN MINE DOCTRINE  
APPLICABLE TO MERE LEASE

Husband and wife executed an oil and gas lease upon their homestead. No oil wells had been drilled when the husband died. Thereafter, lessee acting under the lease drilled producing wells. *Held*: The widow, whose homestead estate until the homestead is abandoned is equivalent in nature to a life estate, is entitled under the open mine doctrine to the use and enjoyment of the royalty and not merely the interest thereon. *Youngman v. Shular*, — Tex. —, 288 S.W.2d 495 (1956) (6-3 decision).

The open mine doctrine authorizes a life tenant to continue to work or have operated, even to exhaustion, a mine or well opened at the time the life estate commenced, or to receive the proceeds (royalties) of such operation. 3 SUMMERS, OIL AND GAS 548, §613 (2d ed. 1938). The doctrine, which had long been well established at common law, may be considered an exception to the rule that a life tenant is liable to the remainderman for permanent injury to the inheritance, inasmuch as it is not waste to work an open mine. Co. LITT., p. 54(p). "If the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use; for it is now become the mere annual profit of the land." 2 BL. COMM. 282. See 2 TIFFANY, REAL PROP. 635, §633 (3rd ed. 1939).

Although a life tenant may continue to work an open mine, where there is no open mine he has no right, as against the remainderman, to open mines and commit waste after the commencement of the life estate unless, in the case of a conventional life estate, that right was granted to him by the previous owner (the unopened mine rule). *Davis v. Bond*, 138 Tex. 206, 158 S.W.2d 297 (1942); *Swayne v. Lone Acre Oil Co.*, 98 Tex. 597, 86 S.W. 740, 742 (1905); 3 SUMMERS, OIL AND GAS 547, 551-52, §613



(2d ed. 1938). A mineral lease executed by the prior landowner authorizing the opening of mines is itself in effect an open mine, though no mine is actually open and there is no production until after commencement of the life estate. *Priddy v. Griffith*, 150 Ill. 560, 37 N.E. 999 (1894); *Koen v. Bartlett*, 41 W. Va. 559, 23 S.E. 664 (1895); *Warren v. Martin*, 168 Ark. 682, 272 S.W. 367 (1925). Whether there is an actually open mine or a mere lease, production ensues from the act or authorization of the previous landowner. *Lawley v. Richardson*, 101 Okl. 40, 223 Pac. 156 (1924). This rule, which is controlling in the principal case, is announced with authorities cited in 3 SUMMERS, OIL AND GAS 548-49, §613 (2d ed. 1938); 2 THORNTON, OIL AND GAS 722, §416 (5th ed. 1932); SULLIVAN, OIL AND GAS LAW 128, §63 (1955). See also, anticipating the holding in the principal case, Guittard, *Rights of a Life Tenant*, 4 TEXAS BAR JOURNAL 265 (June, 1941); *Barton v. Warner*, 142 S.W.2d 303 (Tex. Civ. App. 1940) (dictum); 30 TEXAS L. REV. 134, 136 (1951).

The dissenting opinion, emphasizing the homestead character of the particular estate, states that the intention of the previous owner is of no consequence where the life or homestead estate is created by operation of law (by statute in this case). But this feature is present whether the situation is an actually open mine or a mere lease. The dissent also stresses the nature of the homestead as a statutory provision for security of shelter rather than for income. But for the purposes of the open mine doctrine no distinction is made in other jurisdictions between a conventional life estate and a life estate by operation of law, and it is established in this State that, until abandoned, a homestead estate is the equivalent of a life estate, and the open mine doctrine is equally applicable. *Thompson v. Thompson*, 149 Tex. 632, 236 S.W.2d 779, 786-88 (1951); *White v. Blackman*, 168 S.W.2d 531 (Tex. Civ. App. 1942) *error ref. w.o.m.*; *Petrus v. Cage Bros.*, 128 S.W.2d 537 (Tex. Civ. App. 1939) *error ref.* In this case of first impression in this State, the dissent contends that the authorities in other jurisdictions should not be followed and that, in any event, the legislature should act to achieve a fair relationship between life tenant and remainderman and to redefine the interest of the homestead occupant.

What are the ramifications of *Youngman v. Shular*? Some problems suggested by the dissent are significant. First, if the lease expires without production *prior* to the death of the husband, does the open mine doctrine apply so as to entitle the widow to mine or to lease and receive all the royalties? Is there any difference between such an expired lease and a mine that is open but no longer worked? If at the time of the husband's death there is no open mine and no lease, a lease having expired without production prior to the husband's death, it is submitted that the open mine doctrine should not apply. The issue may turn on whether the expired lease is to be considered the same in legal effect as a mine open but no longer worked, in which case the doctrine would apply, or as a mine that has been abandoned as such with an intention permanently to refrain from mining, in which case the doctrine is not applicable. See *Bagot v. Bagot*, 32 Beav. 509, 55 Eng. Rep. 200, 203 (Ch. 1863); 2 TIFFANY, REAL PROP. 636, §633 (3rd ed. 1939); 2 THORNTON, OIL AND GAS 722, §416 (5th ed. 1932). A lease having expired without production during the previous landowner's lifetime, there remains nothing from which to infer an intention further to exploit the land for minerals. Thus the expiration of the lease during the husband's lifetime seems more analogous to an abandoned mine than to an open mine that is merely no longer being worked. Further, this analogy to abandonment seems unnecessary to attain the same result. The very fact that nothing remains from which to infer an intention to mine or to have mined is sufficient to make the open mine doctrine inapplicable.

Second, where the lease expires without production *after* the husband's death, what is the effect upon the open mine doctrine? That the life tenant is confined to royalties from the particular lease in existence at the time of commencement of the life estate with no actually open mines has been indicated. *Barton v. Warner*, 142 S.W.2d 303 (Tex. Civ. App. 1940); *Re Shailer's Estate*, — Okl. —, 266 P.2d 613 (1954); *Lawley v. Richardson*, *supra*. See also SULLIVAN, OIL AND GAS LAW 128, §63 ("royalty from wells which are drilled under the existing lease"). Where mines are actually open when the life estate commences, the law conclusively infers that the previous owner intended the existing use

to continue (in the absence of a contrary manifestation, if the life estate is created by act of the parties). In the case of a mere lease, what is the extent of this conclusive inference? Logically it can be argued that the intention is referable only to the particular lease in existence, or that it is not so limited; hence, a decision in such a case should be based on what is the better policy, considering the more extreme consequences when the doctrine is applied to a mere lease and in favor of an estate created by law, as pointed out by the dissent.

*John Bailey*

#### PROCEDURE — JURISDICTION — MODIFICATION OF SUPPORT DECREES

In a proceeding in District Court A of Harris County, realtor was awarded a divorce from his wife and ordered to pay towards the support of his children, the custody of whom was given to his wife. Later the wife brought suit in District Court B of Harris County to have the support decree modified. *Held*: District courts of counties coming under Rule 330, TEX. RULES CIV. PRO. (1941), have no jurisdiction to modify support decrees originally granted from another district court of the same county absent a valid transfer order. *Ex parte Goldsmith*, — Tex. —, 290 S.W. 2d 502 (1956).

All district courts of the county of a plaintiff's domicile have jurisdiction over divorce and support suits. TEX. REV. CIV. STAT. (1925), art. 4631. By the interpretations of Art. 4639a, TEX. REV. CIV. STAT. (1925), the jurisdiction of the court granting the original support decree has been held to be continuing and exclusive. *Williams v. Williams*, 183 S.W.2d 260 (Tex. Civ. App. 1944); *Yeagle v. Bull*, 235 S.W.2d 226 (Tex. Civ. App. 1950); *Ex parte Webb*, 153 Tex. 234, 266 S.W.2d 855 (1954). The court rendering the support decree would be, therefore, the only court having the power to modify such decree. If a court is without the power to acquire jurisdiction, its acts and proceedings are void. *Cline v. Niblo*, 117 Tex. 474, 2 S.W.2d 633 (1928); *Ex parte Armstrong*, 110 Tex. Cr. R. 362, 8 S.W.2d 674 (1928); *Smith v. Little*, 217 S.W.2d 881 (Tex. Civ. App. 1949) *error ref. n.r.e.*

In the principal case, two different analyses of the problem of

whether Court B should act were presented. The majority of the court treated the problem as one of jurisdiction, while the minority treated the problem as one of procedure. In applying Art. 4639a to the facts of the case, the majority treated each court as being separate and distinct, regardless of the fact that the courts acted under Rule 330e which provides for transfers of cases between the district courts of the same county and for the informal transfer of cases by allowing idle judges to sit as judges of other courts. Thus the attempted modification of the support decree had been in a court other than the one issuing the original decree, and its proceedings were void. Since the proceedings and judgment were void, no question of procedure could arise.

The theory of the dissent was that in counties whose courts operate under Rule 330 there is actually one large district court with several judges. Therefore since Court A and Court B are the same court, the provision of Art. 4639a which says the support decree can be modified only by the court that originally issued the decree is not violated. It is submitted that the fallacy of the dissent's reasoning lies in its basic premise, viz., that where the courts of a county are operating under Rule 330 there is only one court with several judges. While Rule 330e provides a flexible system for the exchange of cases between the district courts of the same county when the county comes within its provisions, there is no indication that it was intended to make a change as drastic as that of completely unifying the district courts within one county. Moreover, it would seem impossible that Rules of Procedure promulgated by the Supreme Court could combine judicial district which have been created as separate entities by the legislature.

The only other ground on which the dissent might be justified is by reasoning that Rule 330e provides for the exchange of cases between district courts of the same county, and that Rule 1 provides that the Rules are to be construed liberally to obtain a just and expeditious adjudication of the substantive rights of the parties. The argument is applicable to this case since the point of substantive law was decided against the realtor. If Court B had had jurisdiction over the subject matter of the case, then there would have been a procedural problem concerning the lack

of strict compliance with the transfer provisions of Rule 330e. However, since the proceedings and judgment were complete nullities due to Court B's lack of jurisdiction, there was no judgment to be given validity by a liberal construction of the Rules.

There are two cases from Courts of Civil Appeals that tend to support the view of the dissenting opinion. In *Boyles v. Gohen*, 230 S.W.2d 604 (Tex. Civ. App. 1950) *error ref. n.r.e.*, and *Ross v. Drouilhet*, 80 S.W. 241 (Tex. Civ. App. 1904) *writ ref.*, it was argued that an attack on a certain judgment was collateral rather than direct, since it was not brought in the same district court of the county. This argument was rejected since the suit attacking the judgment was in the second district court by virtue of the method of assigning cases contained in Art. 199, district 11, TEX. REV. CIV. STAT. (1925), providing that cases be assigned to the courts in rotation. If the suit for modification of the support decree in the principal case came to be in District Court B in this manner, then the *Boyles* and *Ross* cases and the principal case are in direct conflict. It is not clear from the facts presented in the principal case by what means the case was put on the docket of Court B, except that it was not by a valid transfer order, so the cases may well be distinguishable. It seems likely that if it had been put on Court B's docket by the regular method of assigning cases provided in Art. 199, the jurisdiction of Court B would have been upheld.

Under the present law the majority opinion seems sound. Policywise, the result of the dissent seems preferable since the goal of the judicial process is the determination of the substantive rights of the litigants, and therefore cases should not be reversed on procedural technicalities when the substantive rights have been properly determined. To this end it is submitted that express legislative unification of the courts operating under Rule 330 is desirable.

*William T. Blackburn*

#### REAL PROPERTY — TENANCY BY THE ENTIRETIES — MURDER OF ONE SPOUSE BY THE OTHER

Property was owned by a husband and wife as tenants by the entireties. The husband murdered the wife and then committed

suicide. The representative of the wife's estate brought an action against the husband's estate for determination of title. *Held*: Property owned by the entireties remains vested in the surviving spouse regardless of the survivor's felonious method of terminating the tenancy. *National City Bank of Evansville v. Bledsoe*, — Ind. —, 133 N.E.2d 887 (1956) (4-2 decision).

Tenancy by the entireties is a common law estate, based upon the fiction of unity of the husband and wife, in which each have a vested interest in the whole estate subject to the interest of the other. 2 TIFFANY, REAL PROPERTY §418 (3d ed. 1939). The surviving tenant takes the entire estate by virtue of the original grant and not as a survivor. *Sharpe v. Baker*, 51 Ind. App. 547, 96 N.E. 627 (1911); 4 THOMPSON, REAL PROPERTY §1803 (Perm. ed. 1940). Thus when one spouse is murdered by the other, some courts have refused to deprive the survivor of any rights in the tenancy, reasoning that it would work an unconstitutional forfeiture of a vested interest. *Beddingfield v. Estill & Newman*, 118 Tenn. 39, 100 S.W. 108 (1907); *Welsh v. James*, 408 Ill. 18, 95 N.E.2d 872 (1951); *Schuman v. Schick*, 950 Ohio App. 413, 95 N.E.2d 330 (1953). But other courts have ruled that one should not be permitted to profit by his own crime and that the wrongdoer should take nothing. *Van Alstyne v. Tuffy*, 103 Misc. 455, 169 N.Y.S. 173 (Sup. Ct. 1918).

No uniform rule has been formulated in murder cases because the courts have vacillated, in varying degrees, between application of the strict rules of survivorship and the equitable doctrine that one should not profit by his own wrong. A number of compromises have been reached; e.g., giving a legal life estate to the survivor and imposing on him a constructive trust for the benefit of the heirs of the victim, *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188 (1927); giving the heirs of the victim the net income of one-half of the property for the victim's life expectancy, *Sherman v. Weber*, 113 N.J. Eq. 451, 167 Atl. 517 (1933); changing a tenancy by the entireties into a constructive tenancy in common, *Ashwood v. Patterson*, 49 So.2d 848 (Fla. 1951); *Barnett v. Cowey*, 224 Mo. App. 913, 27 S.W.2d 757 (1930); awarding the heirs of the victim full title to the property, *Vesy v. Vesy*, 237 Minn. 295, 54 N.W.2d 385 (1952). For other cases see 32 A.L.R.

2d 1099 (1953). The problem has not arisen in Texas because of its adherence to the Spanish property law which does not merge the individuality of the husband and wife. *Dickson v. Strickland*, 114 Tex. 176, 265 S.W. 1012 (1924). See also TEX. REV. CIV. STAT. (1925), art. 2580, abolishing survivorship.

Statutes precluding acquisition of property through murder are generally held inapplicable because the survivor takes nothing new. *Wenker v. Landon*, 161 Or. 265, 88 P.2d 971 (1939). But see *Wade, Acquisition of Property by Wilfully Killing Another — A Statutory Solution*, 49 HARV. L. REV. 715 (1936). The courts are, therefore, without statutory guidance, having only a choice between an application of the strict rules of survivorship and varieties of equitable relief for the victim's heirs. Some believe that an exception to the rules of survivorship would be an invasion of the legislative function and the sanctity of vested property interests. *Oleff v. Hodapp*, 129 Ohio St. 432, 195 N.E. 838 (1935). Those favoring a departure from survivorship principles insist that the murderer must not be allowed any benefit from his own wrong. 3 BOGERT, TRUSTS AND TRUSTEES § 487 (1946). This conclusion is sometimes reached by entertaining a presumption that, in the natural course of events, the victim would have survived the wrongdoer. 3 SCOTT, TRUSTS § 493.2 (1946).

Despite the common law fiction that the survivor does not acquire any new interest, the practical result is a genuine benefit to the murderer because he no longer needs to share profits and the possibility of divestiture is removed. Although the majority in the principal case rightly holds that vested interests should not be disrupted, neither should the murderer receive any additional rights in the property. Considering the equities of the case, it is submitted that the fiction of complete ownership in the entirety of the property should give way when equitable principles intervene. But the matter is really one to be settled by legislative or constitutional provision.

*John H. McElhany*

#### TORTS — NEGLIGENCE — ASSUMPTION OF RISK

*P* was a fare paying passenger of *D* airline. While passing through rough and turbulent weather, *P* asked *D*'s stewardess for

permission to go to the lavatory, which permission was given. While in the lavatory the plane hit a downdraft, throwing *P* to the floor, resulting in a broken ankle. *D* airline invoked assumption of risk as a defense. *Held*: A passenger on a modern commercial airline does not voluntarily assume a risk with respect to the plane itself or its operation, for airlines are subject to the usual rules regarding common carriers which require exercise of the highest degree of care consistent with practical operation of the plane. *Urban v. Frontier Air Lines*, 139 F. Supp. 288 (D.C. Wyo. 1956).

Assumption of risk, or the maxim *volenti non fit injuria*, is a defense to an action in negligence which arises when the plaintiff voluntarily consents to expose himself to known dangers created by the negligence of the defendant. *Walsh v. West Coast Coal Mines*, 31 Wash.2d 396, 197 P.2d 233 (1948). A number of jurisdictions, Texas included, distinguish the terminology used, so that "assumption of risk" is applied to employer-employee relationships or where the parties are in privity of contract, and *volenti non fit injuria* is utilized in other negligence situations. The practical effect of the two is now identical and the same rules apply. *Levlon v. Dallas Ry. & Terminal Co.*, 117 S.W.2d 876 (Tex. Civ. App. 1938) *error ref.*; *Watterlund v. Billings*, 112 Vt. 256, 23 A.2d 540 (1942). Although the plaintiff may expressly consent to assume the risk, more often the consent is found by implication from the facts. Several factual elements must be proved before consent will be implied: (1) voluntary entry into a dangerous situation, (2) full *knowledge* of the danger and risk involved, and (3) full *appreciation* of the consequences which might result from the known danger. *Triangle Motors of Dallas v. Richmond*, 152 Tex. 354, 258 S.W.2d 60 (1953); *Kirby Lumber Co. v. Murphy*, 271 S.W.2d 672 (Tex. Civ. App. 1954). But in all cases an objective standard is applied and if a reasonably prudent person would have known of the danger, the plaintiff will be charged with knowledge. PROSSER, TORTS, p. 310, sec. 55 (2d. ed. 1955).

The defense is not limited to any particular situation, but covers the entire field of negligence. It is available to common carriers.



*Fred Harvey Corp. v. Mateas*, 170 F.2d 612 (9th Cir. 1948); *Bull S.S. Line v. Fisher*, 196 Md. 519, 77 A.2d 142 (1950); *Bruce v. O'Neal Flying Service*, 231 N.C. 181, 56 S.E.2d 560 (1949). Commercial airlines found it particularly appealing in the early days of air travel and it is still available. It is, however, unavailable where the negligence is in operation or servicing of the plane. For a collection of cases see 83 A.L.R. 372; 12 A.L.R. 2d 666. It is now well established that the passenger assumes no risk that the plane may be negligently maintained or operated. *Wilson v. Colonial Air Transport*, 278 Mass. 420, 180 N.E. 212 (1932); *Law v. Transcontinental Air Transport, Inc.*, 1931 U.S. Av. Rep. 205 (D.C. E.D. Pa.); *Bruce v. O'Neal Flying Service*, *supra*. Passengers have the right to expect that the plane itself will be safe and that it will be operated with the highest degree of care. They assume only perils attendant to air travel; thus, passengers must assume risks of injury caused by adverse weather and other unpredictable circumstances which commonly are foreseen by reasonably prudent passengers *before* boarding the plane. 20 J. AIR L. & Com. 102, 107 (1953).

Although the principal case recognizes these general rules, it is believed that the court erred in applying them to the facts of this case. It was found that the only negligence involved was that of the stewardess in giving the plaintiff permission to go to the lavatory during very rough weather. This was a negligent act *not* in respect to the operation and maintenance of the plane, but was merely an act incidental to passenger comfort. No case has been found which denies an airline this defense as a matter of law if the negligence giving rise to the injury was not directly related to the aircraft, its maintenance or operation. The plaintiff voluntarily left her seat in the face of known and appreciated danger of injury from a fall due to the violently pitching aircraft. All necessary elements to imply plaintiff's assumption of the risk are present, and as the negligent act was independent of the safe continuance of the flight, the rules denying the defense as against negligent operation of the plane logically should not apply.

Morton L. Susman

## TRADE NAMES—ADMINISTRATIVE RULINGS—C.A.B. AUTHORITY

North American was chartered as an irregular air carrier under the name "Twentieth Century Airlines" in 1946. In 1951 it abruptly began to operate under the name of "North American Airlines." A year later, it requested the Civil Aeronautics Board to re-issue its letter of registration under the new name. American Airlines asked the Board to deny the request, stating that use of the new name would be an infringement upon American's long established trade name. The Board instituted hearings to determine whether North American's action constituted unfair competition and a violation of the Civil Aeronautics Act. *Held*: The air transportation industry is a field in which Congress wishes to protect the public interest, and a finding that substantial public confusion is a result of the use of similar trade name is sufficient evidence to justify the issuance of a cease and desist order, as it is an unfair or deceptive practice in violation of § 411 of the Civil Aeronautics Act, 52 Stat. 1003 (1938), as amended, 49 U.S.C. § 491 (1940). *American Airlines v. North American Airlines*, 351 U.S. 79 (1956).

The right to protection against infringement of a trade mark has frequently been sustained by equity courts in the United States. *Hanover Star Milling Co. v. Allen Wheeler Co.*, 240 U.S. 403 (1916). The law as to trade marks and trade names is similar, but a trade name is distinguishable, as it need not be affixed to the goods and involves the individuality of the maker, not only for protection in trade and to avoid confusion in business, but also to secure the advantages of a good reputation. *Amer. Steel Foundries v. Robertson*, 269 U.S. 372 (1925). Equity courts have frequently seen fit to protect a manufacturer's use of a geographical trade name, but the test has most often been whether such use had been sufficient to give the name a secondary significance, or association with a particular manufacturer or vendor. *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U.S. 665 (1901); *Amer. Waltham Watch Co. v. U.S. Watch Co.*, 173 Mass. 85, 53 N.E. 141 (1899). In the latter case, long continued use of the geographical name "Waltham" had caused it to acquire such a secondary meaning and the defendant was enjoined from placing the word "Waltham" on the faces of its watches. It is

well established, therefore, that a manufacturer or vendor, even though he has no proprietary interest in a geographical trade name, may enjoin another's use of such trade name if the effect of such use is to deceive the public and divert the original user's business. *Shaver v. Heller & Merz Co.*, 108 Fed. 821 (8th Cir. 1901).

The law relating to unfair competition in the form of trade name infringement was broadened by the passage of the Federal Trade Commission Act, wherein Section 5 prohibited "unfair methods of competition" and "unfair or deceptive acts or practices" in commerce. 38 Stat 719 (1914), as amended, 15 U.S.C. § 45 (1938). The Act provided that the Commission cannot assume jurisdiction without determining that the public interest is involved and that such interest is specific and substantial. *Federal Trade Com. v. Klesner*, 288 U.S. 212 (1929). Further, the Commission has wide discretion in determining what constitutes the public interest. *Ford Motor Co. v. Federal Trade Com.*, 120 F.2d 175 (6th Cir. 1941), *cert. denied*, 314 U.S. 664 (1941). It has been established that the use of a trade name similar to a competitor's is unfair competition within the meaning of Section 5. *Federal Trade Com. v. Algoma Lbr. Co.*, 291 U.S. 67 (1934). No damages to a competitor need be shown to establish the public interest. *Koch v. Federal Trade Com.*, 206 F.2d 311 (6th Cir. 1953).

The principal case was the first instance of construction of Section 411 and, as the wording was nearly identical to that of Section 5 of the Federal Trade Commission Act, the Court construed the provisions in *pari materia*, relying upon F.T.C. cases for precedent. The holding that the C.A.B. has authority to issue a cease and desist order only on a finding that the similarity of names caused substantial public confusion is an extension of the holdings of the F.T.C. cases decided by the Supreme Court, but it is in line with the holding in *Ford Motor Co. v. Federal Trade Com.*, *supra*, where the lack of evidence of damages to the public was deemed immaterial. It follows the equitable rule with the exception that no intent to deceive the public is necessary to the board's action as was essential at common law. *Coats v. Merrick Thread Co.*, 149 U.S. 562 (1892).

It is submitted that although the holding in the principal case is within the law as generally established by the Federal Trade Commission cases, this result should cause Congress to re-direct its attention to this field. The broad power given the Civil Aeronautics Board here should be delegated to another administrative agency better equipped to handle such disputes or else it should be more clearly defined. The logical course would be to remove any such controversies from the C.A.B.'s jurisdiction and allow the F.T.C. to handle all similar cases that might arise in the future. The F.T.C., with its great experience in trade name disputes, would be able to dispose of the cases with more efficiency than the C.A.B., which has machinery that is better geared to solve other problems. Corrective legislation making the F.T.C. the sole arbiter of trade name disputes in which the public interest is involved would be a reasonable course to follow.

*Eugene L. Smith*