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Recent Case Notes

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RECENT CASE NOTES

Constitutional Law—Commerce Clause—Labor Relations

An interstate railroad company entered into a union shop agreement with labor organizations which represented a majority of the railroad's employees, pursuant to the RAILWAY LABOR ACT, 44 STAT. 577 (1926), as amended, 45 U.S.C. § 152(11) (1951). A group of non-union employees brought suit in a state court and obtained an order enjoining the performance of the agreement as a violation of the right-to-work clause of the state constitution, which injunction was appealed to the United States Supreme Court. *Held*: Congress may authorize the union shop in order to stabilize labor relations, by virtue of its power to regulate interstate commerce and free it from obstructions. Thus financial support of the collective bargaining agency is required by all who receive benefit therefrom if the union shop agreement is made. *Railway Employees Dept. v. Hanson*, 351 U.S. 225 (1956).

Article I, Sec. 8, of the United States Constitution provides that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes. . . ." As of today, these few words grant Congress a broad regulatory Power. *Gibbons v. Ogden*, 6 U.S. (9 Wheat.) 1 (1824); *Caminetti v. United States*, 242 U.S. 470 (1916). However until the mid-1930's, Supreme Court interpretation of the commerce clause was often guided by the doctrine of "dual federalism," which had as its principal feature the idea ". . . that the purpose and scope of the delegated powers of Congress are impliedly limited by the existence of the reserved powers of the States, or, Congress may not use its delegated powers to accomplish legislative ends which fall within the reserved powers of the states." CUSHMAN, LEADING CONSTITUTIONAL DECISIONS 288 (9th. ed. 1950). See also CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 232 (11th. ed. 1954); SCHWARTZ, AMERICAN CONSTITUTIONAL LAW 42 (1955). It was the Supreme Court's duty to draw the line in each case between state and federal authority, *License Cases*, 16 U.S. (5 How.) 513 (1874), and from the earliest decisions, the consistent distinction was that interstate activities were subject to regulation by Congress while intrastate activities were wholly under state management. *Employers' Liability Cases*, 207 U.S. 463 (1908); *Hammer v. Dagenhart*, 247 U. S. 251 (1918) (Child Labor Case). One of the last cases to apply

"dual federalism" as such was *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), in which comprehensive federal legislation controlling wages and prices locally was held unconstitutional as an unwarranted interference with purely interstate activity. "Where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power." *Id.* at 546.

In later decisions the Supreme Court abandoned its philosophy of "dual federalism" in favor of greatly expanded federal control. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). It was held that activities wholly within a state which merely affected interstate commerce were subject to federal control under the commerce clause. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (1940). Operating under this altered philosophy, the Court expressly overruled the Child Labor Case, *supra*, in *United States v. Darby*, 312 U. S. 100 (1941). Congressional control was upheld regarding local maintenance employees of a building used by a company dealing in interstate commerce, *Kirschbaum v. Walling*, 316 U.S. 517 (1942); window cleaners who cleaned windows in a building used by a company dealing in interstate commerce, *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173 (1946); employees of a local newspaper with negligible interstate circulation, *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946); and housewives working for pay in their own homes, *Gemsco, Inc. v. Walling*, 324 U. S. 244 (1945). ". . . (E)ven if (the) . . . activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . ." *Wickard v. Filburn*, 317 U.S. 711 (1942).

A similar reversal of doctrine has occurred in federal regulation of labor relations in interstate industry. Congress originally exercised almost no power but gradually extended control until it now has almost an unlimited power to regulate. *Adair v. United States*, 208 U.S. 161 (1908), holding unconstitutional an act of Congress prohibiting the discharge of interstate railroad employees because of union membership, represented a rationale which left Congress with practically no control over interstate labor relations. The first real departure from the *Adair* case was based on Congress' power to ". . . facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation." *Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548

(1930). Congress may induce collective bargaining to settle labor disputes with "back shop" repair employees, for ". . . the danger exists . . . though possibly indefinable in its extent, of interruption of the transportation service." *Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937). Acts affecting interstate commerce are under Congressional control, ". . . and are not rendered immune because they grow out of labor disputes." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, *supra*. Congress has the power to *protect* interstate commerce from possible "political strikes" by requiring union officers to take non-Communist oaths. *American Comm. Ass'n. v. Douds*, 339 U. S. 382 (1950). In accordance with this line of thought, the decision in the principal case was anticipated when a federal district court held that § 152(11) of the RAILWAY LABOR ACT, which authorized the union shop, destroyed any cause of action non-union employees might have had under state law to enjoin enforcement of the union shop agreements. *Allen v. Southern Ry. Co.*, 114 F. Supp. 72 (D.N.C. 1953). The route travelled by the Supreme Court in this area of law is summarized by Mr. Justice Frankfurter, concurring with the decision in the principal case, at p. 241: "We have come full circle from the point of view in the Adair case."

Seventeen states guaranteeing the "right to work" by statute or constitutional provision are affected by this decision. The applicable Texas statute is Art. 5154g, TEX. REV. CIV. STAT. (1925). It should be noted that these state provisions are not totally vitiated by the decision in the principal case, but at present time are nullified only as they are in conflict with § 152(11) of the RAILWAY LABOR ACT. As the union shop clause is permitted rather than required, and since a private agreement is necessary to invoke its operation, state "right to work" laws still have a controlling and determinative influence of labor relations in all fields not affected by the federal act. It is a matter of speculation whether Congress will choose to extend this particular regulatory power to other industries, but from the rationale of the principal case it would seem that such legislation would be upheld as constitutional.

Morton L. Susman

Contracts — Restraint of Trade — Agreements Not to Compete Upon Termination of Employment

Defendant had agreed in his contract of employment as manager of plaintiff corporation that upon termination of employment he

would not be engaged in the same type of business in the same parish for five years. Following his resignation he began to compete with plaintiff, thereby violating his agreement, and to entice away plaintiff's customers. *Held*: By statute, an agreement by an employee not to engage in any competing business upon termination of employment is null and void. *Baton Rouge Cigarette Service v. Bloomenstiel*, 88 So.2d 742 (La.App. 1956).

Agreements in restraint of trade were void at early common law. See *Anonymous*, Y.B., 2 Hen. V, f.5, pl.26 (1415); 5 WILLISTON, CONTRACTS § 1634 (Rev.ed. 1937). With little mobility of labor there was danger of depriving a worker of his livelihood and the public of his services, in addition to the threat of monopoly. 5 WILLISTON, *op. cit. supra*. § 1635. Later a distinction was made between agreements of unlimited restraint and those of partial restraint limited in time and area; only the latter were enforced. *Mitchel v. Reynolds*, 1 P.Wms. 181, 24 Eng.Rep. 347 (Ch. 1711). Today, in the absence of statute, an agreement not to compete upon termination of employment is not contrary to public policy if the restraint is no greater in time and territory than is reasonably necessary for the protection of the employer. *Eureka Laundry Co. v. Long*, 146 Wis. 205, 131 N.W. 412 (1911); *Samuel Stores v. Abrams*, 94 Conn. 248, 108 Atl. 541 (1919); RESTATEMENT, CONTRACTS § 515 (1932). The hardship upon the employee, the public policy of free competition and the public interest in not being deprived of the individual's services are elements to be considered. *Herreshoff v. Boutineau*, 17, R.I. 7, 19 Atl. 712 (1890); *Duerling v. City Baking Co.*, 155 Md. 280, 141 Atl. 542 (1928); 5 WILLISTON, *op. cit. supra*, § 1636.

Statutes in several states generally provide that a contract is void to the extent that it restrains one from the exercise of his calling, with the exception of agreements ancillary to the sale of a business or the dissolution of a partnership. Annot., 3 A.L.R.2d 519 (1949). Thus agreements similar to the one in question have been held void. *Miller Laboratories v. Griffin*, 200 Okl. 398, 194 P.2nd 877 (1948); *Olson v. Swendiman*, 62, N.D. 649, 244 N.W. 870 (1932). As such contracts are now viewed with more liberality by the common law than formerly, these statutes cannot be said to be declaratory of the common law. *Miller Laboratories v. Griffin* and *Olson v. Swendiman*, *supra*. The Alabama statute, however, excludes from invalidation employee agreements not to engage in a similar business and not to solicit old customers of the employer; thus in *Hill v. Rice*, 259

Ala. 587, 67 So.2d 789 (1953), involving employee covenants not to compete, the common law was applicable. Although the Louisiana statute refers only to employee agreements, an agreement not to compete after severance of a partnership was held to violate the public policy expressed by the statute. *Cust v. Item Co.*, 200 La. 515, 8 So.2d 361 (1942); see *Nelson v. Associated Branch Pilots of Port of Lake Charles*, 63 So.2d 437 (La.App. 1953). The Michigan statute does not apply to agreements not to use trade secrets, *Glucol Mfg. Co. v. Schulist*, 239 Mich. 70, 214 N.W. 152 (1927), and use of lists of customers may be enjoined, *Grand Union Tea Co. v. Dodds*, 164 Mich. 50, 128 N.W. 1090 (1910) (involving no express agreement), the cases considering the trade secrets and customer lists to be property of the employer.

Covenants not to compete after employment are valid in Texas if the restraint is no greater in time and area than necessary for the protection of the employer, in accordance with the general doctrine of reasonableness of restraint. *City Ice Delivery Co. v. Evans*, 275 S. W. 87 (Tex.Civ.App. 1925); *Bettinger v. North Fort Worth Ice Co.*, 278 S.W. 466 (Tex.Civ.App. 1925). In the *Evans* case an agreement by an ice wagon driver not to engage in similar work for three years along the same route nor within "five adjacent squares" was enforced except as to the five adjacent squares, as the employee's influence was limited to his route. Where only part of a restraint is reasonable the traditional rule is that the contract is altogether void unless it is divisible in terms, *Trenton Potteries v. Olyphant*, 58 N.J. Eq. 507, 43 Atl. 723 (1899); RESTATEMENT, CONTRACTS § 518; but a recent trend is to partially enforce an agreement only part of which is reasonable even if it is not in terms divisible. *Lewis v. Krueger, Hutchinson and Overton Clinic*, 153 Tex. 363, 269 S.W.2d 798 (1954); *Edgecomb v. Edmonston*, 257 Mass. 12, 153 N.E. 99 (1926); *Fullerton Lumber Co. v. Torborg*, 270 Wis. 133, 70 N.W.2d 585 (1955). *Contra: Beit v. Beit*, 135 Conn. 195, 63 A.2d 161 (1948). In the *Lewis* case the Texas Supreme Court held that an agreement by a surgeon-employee not to practice his profession in Lubbock County was not invalid because unlimited in time, but the court limited the restraint to three years, a reasonable time. The burden is on the employer to establish the reasonableness of the restraint, *City Ice Delivery Co. v. Evans* and *Bettinger v. North Fort Worth Ice Co.*, *supra*; *Fullerton Lumber Co. v. Torborg*, 270 Wis. 133, 70 N.W.2d 585 (1955); and the question of reasonableness has

been held to be for the jury in Texas. *Southern Properties v. Carpenter*, 21 S.W.2d 372 (Tex. Civ. App. 1929) *error dismissed*.

The Louisiana statute, LA. REV. STAT. ANN. § 23. 921 (1950), declares invalid an agreement by an employee "not to engage in any competing business . . . upon the termination of employment." It is submitted that the statute is too extreme, as it nullifies such agreements without qualification as to their reasonableness and necessity. While it is not unreasonable for an employer to attempt to provide against the loss of trade and good will, it is hardly reasonable or fair for an employee to entice away his former employer's customers with whom he has come into contact solely through his employment, where he has contracted not to so injure his employer. It is conceivable, however, that an agreement merely to refrain from soliciting away the employer's customers would be valid under the statute, since it would not be a contract "not to engage in any competing business"; if so, a valuable measure of protection is available for employers. Such solicitation of customers of a former employer has been held to constitute unfair competition even in the absence of a negative covenant. *Colonial Laundries v. Henry*, 48 R.I. 332, 138 Atl. 47 (1927). *But cf. Continental Car-Na-Var Corp. v. Moseley*, 24 Cal. 104, 148 P. 2d 9, 12 (1944). The general doctrine of reasonableness of restraint, under which the agreement in the present case would probably have been upheld, appears preferable to unqualified nullification by statute of all contracts not to compete after employment. There should be an equilibrium between the conflicting public policies of freedom of trade and freedom of contract.

Apart from statute, it is suggested that a proper approach is to view a covenant not to compete after employment as enforceable only to the extent in time and space that is reasonably necessary for the protection of the employer, subject to a further limiting consideration, oppression of the employee. But it would not be equitable for a court to sever an indivisible contract unless the employer's complete good faith is manifest. It is further suggested that, at least where there is equality of bargaining power, it may be as sound to presume the agreed upon restraint to be valid as it is to place the burden upon the employer to establish its reasonableness.

John Bailey

Federal Courts—Trade Marks—Unfair Competition

Plaintiff, a corporation engaged in the retail merchandising of maternity apparel in the New York metropolitan area, had com-

menced doing business in October, 1945, as a partnership under the name "Maternally Yours." It filed an application for registration of the trade-mark "Maternally Yours" in December, 1945, and this trade-mark was duly registered in plaintiff's name in May, 1949. Defendant opened a maternity shop in New Rochelle, N. Y., in September, 1946, under the name "Your Maternity Shop," and in October, 1946, plaintiff served formal notice of trade-mark infringement by defendant. However, defendant continued to operate under the name "Your Maternity Shop," opened a store within two blocks of plaintiff's store and continued to expand its business until plaintiff brought this action for trade-mark infringement and unfair competition. *Held*: State law controls in questions of unfair competition, and a federal court has jurisdiction over the question of unfair competition when it is substantially related to a question of trade-mark infringement. *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538 (2nd Cir. 1956).

A federal court, having acquired jurisdiction by reason of the federal questions involved, has the right to decide all the questions in the case, even though it decides the federal questions adversely to the party raising them, or even though it omits to decide the federal questions at all, but decides on local or state questions only. *Siler v. Louisville & Nashville R.R. Co.*, 213 U. S. 175 (1909). However, the federal question must not be merely colorable or fraudulently set up for the purpose of endeavoring to give the court jurisdiction. *Penn Mutual Life Ins. Co. v. Austin*, 168 U.S. 685 (1898). Further, a non-federal claim might be joined with a federal claim if the non-federal count differs from the federal count only because it asserts a different ground for recovery upon substantially the same state of facts. *Hurn v. Oursler*, 289 U.S. 328 (1933). The *Hurn* case is the leading case establishing the doctrine that the federal court has jurisdiction over unfair competition when joined with a registered trade-mark question, and this doctrine has been incorporated into the United States Code. 28 U.S.C. § 1338 (b) (1948). However, the federal courts do not have jurisdiction over a claim for unfair competition resulting from acts committed prior to the date of registration of plaintiff's trade-mark. *Treasure Imports v. Henry Amdur & Sons*, 127 F.2d 3 (2nd Cir. 1942).

The Court in the instant case assumed that substantive law of the state is controlling on issues of unfair competition based on alleged trade-mark infringement, and in view of past decisions, such an assumption seems valid. *Artype, Inc. v. Zappulla*, 228 F.2d 695

(2nd Cir. 1956); *National Fruit Product Co. v. Dwinell-Wright Co.*, 47 F. Supp. 499 (D. Mass. 1942), *aff'd*, 140 F.2d 618 (1st Cir. 1944). These decisions are a direct result of the decision in *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938). Before that decision, the federal courts had been applying federal common law to claims for unfair competition. In spite of the doctrine of the *Erie* case, a federal district court has held that where a federal court has jurisdiction of an action for infringement of a registered trade-mark and for unfair competition because of the inter-relationship of the issues of unfair competition with those raised under the trade-mark act, federal law shall govern *both* aspects of the complaint, while the local law of unfair competition is restricted to those cases where federal jurisdiction is sustainable only on diversity. *Bulova Watch Co. v. Stolzberg*, 69 F. Supp. 543 (D. Mass. 1947).

The Lanham Trade-Mark Act, 15 U.S.C. § 1051-1127 (1946), has created a difficult problem which has resulted in a difference of opinion in the lower federal courts. The court in *Stauffer v. Exley*, 184 F.2d 962 (9th Cir. 1950), held that a federal cause of action is given by the Lanham Act for unfair competition in the use of an unregistered trade name in interstate commerce. This view was reaffirmed in *Pagliero v. Wallace China Co.*, 198 F.2d 339 (9th Cir. 1952). In *Time, Inc. v. T.I.M.E., Inc.*, 123 F. Supp. 446 (S.D. Cal. 1954), the court stated that the Lanham Act gives a federal cause of action for infringement of trade-marks registered under the act and for unfair competition in the use of registered trade-marks as well as trade and commercial names. The court was of the further opinion that state law may not be permitted to govern actions for unfair competition in the use of trade-names and trade-marks in commerce since a uniform national law has been created. Also see *Haeger Potteries, Inc. v. Gilner Potteries*, 123 F. Supp. 261 (S.D. Cal. 1954).

However, other federal courts have interpreted the Lanham Act in a different manner and held that it did not create a federal law of unfair competition available to United States citizens one against the other, nor did it grant the federal courts any new authority to hear such controversies between citizens. *L'Aiglon Apparel, Inc. v. Lana Labell, Inc.*, 214 F.2d 649 (3rd Cir. 1954); *Stewart Paint Mfg. Co. v. United Hardware Distributing Co.*, 141 F. Supp. 638 (D. Minn. 1956).

Whether the Lanham Act has created a federal law of unfair competition is a conflict which has not been resolved. If it does, the *Erie*

doctrine will have no bearing on unfair competition cases. If it does not, then the *Erie* doctrine would be applicable to unfair competition cases, and unfair competition would be a matter of state law. Until the Supreme Court decides the issue, it seems that each circuit may construe the Lanham Act as it sees fit.

Although it appears that the principal case is based on sound legal principles, it is submitted that a federal law or unfair competition would be preferable to requiring the federal courts to follow the state laws of unfair competition in a field such as trade-marks where uniformity would appear to be desirable.

R. W. Calloway

Procedure — Judicial Estoppel — Sworn Statements

A mineral deed was executed to Mrs. Knox with no recital that the interest conveyed was her separate property. Consideration for the mineral deed was paid out of community funds. There was no showing that Mr. Knox intended a gift of his interest in the property to Mrs. Knox. A creditor of Mr. Knox sought execution on the property. Mr. and Mrs. Knox joined in a suit to enjoin the creditor's execution, and in an application for a temporary restraining order Mr. and Mrs. Knox swore under oath that the property was the separate property of Mrs. Knox. The temporary restraining order was granted. The creditor ceased his efforts to execute on the property in question, and the suit to enjoin his execution was dismissed for want of prosecution. After the death of Mr. Knox, Mrs. Long, his child and sole heir and administratrix of his estate, brought a trespass to try title suit to recover her father's alleged community interest in the property. *Held*: Mrs. Long is judicially estopped from maintaining that the property is not the separate property of Mrs. Knox because of Mr. Knox's sworn statement in the earlier suit. *Long v. Knox*,—Tex.—, 291 S.W.2d 292 (1956).

The doctrine of judicial estoppel as adopted by the Supreme Court in the principal case is an innovation in Texas jurisprudence. Comment, 8 BAYLOR L. REV. 41, 44 (1956). Formerly, the Texas courts had applied another type of estoppel in similar situations. This was an equitable estoppel which prohibited a party from maintaining a position inconsistent with that made by him in a prior proceeding if certain elements were present. The former proceeding must have ended in final judgment, and the inconsistent position must have been successfully maintained. *Blackburn v. Blackburn*, 163 S.W.2d

251 (Tex. Civ. App. 1942). The party invoking the estoppel must have been an adverse party in the former suit. *Smith v. Chipley*, 118 Tex. 415, 16 S.W.2d 269 (1929). The party claiming the estoppel must have changed his position in reliance on the former position, *Koppelman v. Koppelman*, 94 Tex. 40, 57 S.W. 570 (1900), and to allow the inconsistent position must be unjust to that party. *Smith v. Chipley*, *supra*.

Judicial estoppel, applied in the principal case, differs essentially from equitable estoppel in that the elements of reliance and injury need not be present. *Sartain v. Dixie Coal & Iron Co.*, 150 Tenn. 633, 266 S.W. 313 (1921). The doctrine is based on considerations of justice and public policy and is designed to protect the sanctity of the oath. *Hamilton v. Zimmerman*, 5 Sneed 39 (Tenn. 1856). This doctrine of judicial estoppel was originated and developed in the courts of Tennessee and has not been followed in any other state, except Texas in this decision. So it is to the cases of Tennessee that we must look for application of this principle.

The essence of the doctrine of judicial estoppel is that a party will not be allowed to contradict in a later proceeding a statement he has made under oath in the course of a previous proceeding or earlier in the same proceeding. *Sartain v. Dixie Coal & Iron Co.*, *supra*. The later statement must amount to a categorical denial of the earlier. *Monroe County Motor Co. v. Tennessee Odin Ins. Co.*, 33 Tenn. App. 223, 231 S.W.2d 386 (1950). The statement giving rise to the estoppel may occur in sworn pleadings, depositions, or oral testimony. *Corder v. Sprouse*, 20 Tenn. App. 486, 100 S.W.2d 1001 (1936); *Williams v. Nottingham*, 19 Tenn. App. 162, 84 S.W.2d 114 (1935). However, it must be made in the course of a judicial proceeding, or no judicial estoppel will arise. *Helper v. Mutual Benefit Health & Accident Ass'n.*, 170 Tenn. 630, 96 S.W.2d 1103 (1936). The party invoking judicial estoppel need not have been a party to the earlier proceeding or have even known of the prior statement. *Sartain v. Dixie Coal & Iron Co.*, *supra*. The party against whom the estoppel is sought to be invoked may defeat the doctrine by showing that the earlier statement was made by mistake or accident, or through fraud or duress, or by any degree of negligence short of wilful lying, *D. M. Rose & Co. v. Snyder*, 185 Tenn. 499, 206 S.W.2d 897 (1947), and the burden of showing such excusing circumstances is on the party attempting to change his statement. *Warner v. Maroney*, 16 Tenn. App. 78, 66 S.W.2d 244 (1932). If such a showing is not made, the estoppel acts as an absolute bar

to a present inconsistent statement. *Sartain v. Dixie Coal & Iron Co.*, *supra*. When the party, if living, would be estopped, his heirs and privies in estate will likewise be estopped. *Melton v. Anderson*, 32 Tenn. App. 335, 222 S.W.2d 666 (1949).

Some Tennessee cases seem to have confused judicial estoppel with equitable estoppel. As a result, there is language to the effect that for a judicial estoppel to arise, someone must have acted in reliance on the statement to his prejudice. *Allen v. Westbrook*, 16 Lea 251 (Tenn. 1886). Also, it has been held that opinions of law will not give rise to judicial estoppel. *Tate v. Tate*, 126 Tenn. 169, 148 S.W. 1048 (1912). Some cases state that judicial estoppel will arise only from statements of fact and not from statements of opinion. *Schultz v. Bell*, 23 Tenn. App. 258, 130 S.W.2d 149 (1939). However, all of these qualifications seem unwarranted when considered in the light of the theory upon which the doctrine is based. As Anderson, J., in *Melton v. Anderson*, *supra*, states it, “. . . the rule rests not upon prejudice to the individual, but prejudice to the administration of justice and hence to society . . .” Therefore, the above rules, borrowed from equitable estoppel, may serve to defeat the very purpose behind the doctrine of judicial estoppel in given cases. Although opinions have used loose and confusing language at times, they have applied the doctrine in conformity with its basic idea — that when a person *willfully* swears under oath to one thing *in an attempt to gain an advantage*, he will not be allowed subsequently to maintain an inconsistent position. Although our court does not consider these problems in the principal case, no doubt there will be occasion in the future to consider them. In applying a doctrine altogether new, there may be a tendency on the part of those applying it to use inadvertently the formulas applied in an old and familiar doctrine resembling the new one. This avenue to confusion should certainly be avoided.

In the principal case the Court was undoubtedly struck by the apparent immorality of misuse of the judicial process. To combat this immorality the Court applied the doctrine of judicial estoppel. It could not apply equitable estoppel since the party invoking the estoppel had in no way changed her position in reliance on the previous statement and would suffer no injury from a change. Neither could it apply the rules concerning conveyances in fraud of creditors since there was no conveyance in this case. In finding a judicial estoppel the Court did not indicate that it was making new law. But for the Tennessee authorities cited, one might think that

this doctrine is well known in Texas from a reading of the opinion. The Court purported to distinguish a number of previous Texas cases to show that they are not contrary to the present decision. But in attempting to distinguish these cases, the Court seemed to use equitable estoppel as its frame of reference, which it had supposedly put to one side in applying judicial estoppel. This portion of the opinion was not necessary to the decision and makes for confusion in understanding judicial estoppel.

The two doctrines, one an equitable estoppel and the other a device of public policy, are not mutually repugnant. While equitable estoppel may apply to any sort of representation made in a judicial proceeding, it must be remembered that the new doctrine applies only to sworn statements made therein. Thus, both doctrines may apply to the same set of facts, as where a statement made under oath in a proceeding which ends in a final judgment is relied on by the adverse party so that he changes his position and would be injured by a denial in a later suit. Here the party who made the statement in the prior suit is both judicially and equitably estopped to deny the statement. Yet either doctrine may apply to a set of facts to which the other does not. In the principal case no equitable estoppel was applicable, but judicial estoppel arose because the statement was made under oath. Had that statement not been made under oath but the injunction suit had ended in a final judgment and the creditor had changed his position in reliance on the statement, Mrs. Long would not have been judicially estopped to deny the statement but would have been equitably estopped to do so to the detriment of the creditor. It would seem the Supreme Court has not changed existing Texas law by its decision in the principal case; it has simply made new law.

David M. Woolley

Procedure — Mandamus — Discretionary Acts

R, successor trustee under a testamentary trust, instituted an action to recover property left in trust for testator's three grandchildren. D, one of the grandchildren who had already reached the age when the proceeds were to be distributed, filed a cross action against R and a third party defendant, a bank. The bank filed an answer and a cross action against all other parties for a declaratory judgment as to the extent of its liability. D later applied for a stay of the proceedings under the Soldier's and Sailor's Civil Relief Act,

on the ground that he was then on active duty. *R* then filed a motion to have his suit against *D* dismissed with prejudice, and it seems, asked for severance which would result in two different law suits. After the court granted the stay requested by *D* and overruled the motion for a severance, *R* brought this original action in the Supreme Court for a writ of mandamus directing the trial court to grant the severance. *Held*: Trial Court erred in refusing the severance and this error could be corrected by mandamus. A writ of mandamus will issue in respect to a discretionary matter to correct a clear abuse of discretion. *Womack v. Berry*, — Tex. —, 291 S.W.2d 677 (1956) (7 - 2 decision).

Most jurisdictions follow the rule that mandamus will not issue to a public board, commission or judge when there is any other adequate remedy, but that when there is no such remedy it will issue to compel the performance of a ministerial duty or exercise of discretion. *Metcalf v. Howard*, 304 Ky. 498, 201 S.W.2d 197 (1947). However, mandamus will not issue to review or control a discretionary act once the official has acted. *Lissner v. Superior Court of Los Angeles County*, 23 Cal.2d 711, 146 P.2d 232 (1944). That mandamus will issue where there has been a clear abuse of discretion is the recognized exception to the general rule, *Green v. Superior Court of San Francisco*, 133 Cal.App. 35, 23 P.2d 785 (1933), and for there to be a clear abuse of discretion the official must have acted wholly through fraud, caprice, or by a purely arbitrary decision and without reason. *State ex rel. Beffa v. Superior Court for Whatcom County*, 3 Wash.2d 184, 100 P.2d 6 (1940).

The Texas Supreme Court has followed the general rule as to when mandamus will issue, *Sansom, Mayor v. Merceretal*, 68 Tex. 588, 5 S.W. 62 (1887); *Matthaei v. Clark*, 110 Tex. 114, 216 S.W. 856 (1919); but the principal case is the first Texas case to apply the exception thereto. The majority of the cases have unequivocally stated that mandamus will never issue in matters of a discretionary character, *Anchor v. Martin*, 116 Tex. 409, 292 S.W. 877 (1927); *Morton's Estate v. Chapman*, 124 Tex. 42, 75 S.W.2d 876 (1934); *Hunsinger v. Boyd*, 119 Tex. 182, 26 S.W.2d 905 (1930); although a few decisions have said by way of dictum that mandamus will issue where there has been a clear abuse of discretion. *City of San Antonio v. Zogbeib*, 129 Tex. 141, 101 S.W. 2d 539 (1937); *City of Houston v. Adams*, — Tex. —, 279 S.W.2d 308 (1955). It is interesting to note the fine distinction between what is ministerial and what is discretionary which have been made by the court in some of the cases

which flatly state that mandamus will never issue in discretionary matter. For example, it has been held that the rendering of judgment on a verdict is a ministerial duty when the verdict clearly entitles the party asking mandamus to judgment, *Gulf, C. & S. F. Ry. Co. v. Canty*, 115 Tex. 537, 285 S.W. 296 (1926), but the directing of a verdict on these same facts is a discretionary matter. *Cortimeglis v. Davis*, 116 Tex. 412, 292 S.W. 875 (1927); *Bussanetal v. Holland*, 235 S.W.2d 657 (Tex. Civ. App. 1951).

In the principal case, the court recognized that the granting of a severance is a discretionary matter but said that the judge had clearly abused his discretion in refusing a severance and that mandamus would issue to correct the abuse. Although not expressly, it would appear that the court has overruled, at least in part, the many earlier cases that have said without reservation that mandamus will not issue to control the exercise of judicial discretion. However, when the earlier cases are examined more closely, it would appear that in most instances the court was calling acts ministerial which were nothing but clear abuses of discretion by the trial judge.

It is submitted that the principal case might be criticized on the grounds that it appears doubtful, under the facts before the court, that there was an actual abuse of discretion on the judge's part, since it seems probable that *D* would be prejudiced in his counter suit.

It has been assumed in the foregoing discussion that the severance asked for was for all purposes. However, the opinion is not entirely clear on this. If the severance was only for convenience then nothing has been actually accomplished since there can be no final judgment until all issues have been disposed of.

Geo. R. Alexander, Jr.

Real Property — Landlord and Tenant — Tenant's Purchase of Tax Title

Lands belonging to *A* were sold to pay delinquent taxes thereon. *A* failed to redeem the lands within the statutory two year period, and *B*, who had been a tenant of *A*, remained on the land thereafter for three years as an adverse possessor. When the county treasurer delivered the tax deeds to the State Tax Commissioner, and the lands were offered for sale to the public, *B* purchased the land. He then conveyed the land to *C*, who brought an action to quiet title against *A*. *Held*: *A* tenant, who owes no duty to the landlord to pay taxes on the land, and who has not withheld rent due or lulled his land-

lord into tax delinquency in some other manner, may properly buy a tax title to the land and assert it. *Gore v. Cone*, 60 N.M. 29, 287 P.2d 229 (1955).

Under the common law a tenant could not deny the title of his landlord without first surrendering possession of the land, the basis being an equitable estoppel which precluded a tenant from attacking the title under which he entered upon the land. *Cooke v. Loxley*, 5 T.R. 4, 101 Eng. Rep. 2 (1792). There were certain exceptions under the common law rule, however, one of them being that a tenant may always show that his landlord has lost his title by judgment and operation of law. *Langford v. Selmes*, 3 K. & J. 220, 69 Eng. Rep. 1089 (1857). This exception has been adopted generally by the American courts, *Woods v. Woods*, 216 Ark. 639, 226 S.W.2d 961 (1950), unless the tenant has lulled the landlord into the tax delinquency. Where the tenant is in arrears in his rental, most courts hold that he cannot purchase a tax title and assert it against his landlord. *Eckert v. Miller*, 57 Ariz. 94, 111 P.2d 60 (1941); *contra: Manning v. Oakes*, 80 Neb. 471, 114 N.W. 604 (1908). Where the tenant has a statutory or contractual duty to pay the taxes on the land, the courts unanimously invoke the estoppel to prevent acquisition of the real estate. *Davey v. Meier*, 117 Ind. App. 577, 73 N.E.2d 56 (1947). Thus it would seem that the common law rule and its exception are predicated upon the theory that the estoppel is limited to the title as it existed at the commencement of the lease, and that a tenant may subsequently assert any change in the relationship as long as the tenant has not brought about the change by wrongful conduct.

The minority view in this country is that the estoppel continues as long as the tenant is in possession, regardless of any change of title, and consequently that the purchase by the tenant must be treated as a payment of the taxes and a redemption of the real estate in order that the title of the landlord and the possessory rights of the tenant may be preserved. *Crim v. Holcombe*, 254 Ala. 692, 49 So.2d 277 (1950). There is also a compromise view which allows the tenant to purchase in his own right but estops him from asserting title by tax deed until he surrenders possession of the land after the termination of his tenancy. *Johnson v. Langston*, 179 Miss. 622, 176 So. 531 (1937).

The minority courts usually recognize that the estoppel is a technical one, not a legal one, for the tenant has done nothing to estop himself; yet they insist upon enforcing it on the broad grounds of public policy. In many instances it is true that a tenant should be

estopped to establish title adverse to that of his landlord, whom he has continuously acknowledged as such; yet in the tax deed situation it is submitted that the rule has no application, for it is the conduct of the landlord and not the misconduct of the tenant which has caused the former to lose his title.

In the principal case the defendant landlord argued the common law rule, but the court found that the fact situation justified the use of the exception since the landlord had lost his title through operation of law. Actually, there is no injustice under the holding, for the landlord had a redemption period during which only he could make application to regain the land by paying his taxes, and even after the tax deeds were offered to the public, he had a right to repurchase the land provided his application was prior in time to any other application. From point of legal theory, there is justification for estopping the tenant only where he has occasioned the landlord's misfortunes, and where the tenant has violated no duty owed the landlord the title he obtains from the state should be regarded as a new and independent title which has cut off any right, title or interest in the landlord.

It is submitted that the rule of this case should not be extended beyond its facts to allow a tenant to assert a tax title against his cotenant or the landlord's remainderman, or to allow one mortgagee to prevail over a successive mortgagee at a tax sale. Unless the remainderman, cotenant or successive mortgagee owned a duty to pay the taxes and failed to do so, the purchase by the tenant should inure to the benefit of the remaining estate, so that no injury will be sustained by a party whose actions have not occasioned the tax delinquency and the subsequent tax sale.

Ivan Irwin, Jr.

Taxation — "Convenience of Employer" Rule —Applicability to Partners

D and his wife were co-partners and owners of a hotel which they managed themselves. In order to run the business properly, they found it necessary to live on the premises and eat most of their meals there. They owned a home separate and apart from the hotel, but were unable to use it very often. The Tax Court determined that the costs of the taxpayers' food and lodging at the hotel were business expenses and ruled that *D* and his wife were entitled to deduct those amounts in computing their income tax for 1950. The Commissioner

appealed. *Held*: Partners who take their meals and lodging on the business premises are not entitled to deduct the costs as business expenses under the "convenience of employer" rule which allows employees to exclude such benefits from their taxable income; such costs are personal expenses and nondeductible. *Commissioner v. Doak*, 234 F.2d 704 (4th Cir. 1956).

The Internal Revenue Code of 1939, under which the principal case was decided, provided that no taxpayer could deduct any personal, living, or family expenses in computing his net income. INT. REV. CODE OF 1939, §24(a)(1), 56 STAT. 819 (1942). Correlatively, the Bureau of Internal Revenue ruled that an employee receiving, in addition to his salary, compensation in the form of living quarters or meals should include the fair market value of such benefits in his gross income; however, this was not necessary if the meals and/or lodging were furnished for the "convenience of the employer." U. S. Treas. Reg. 111 §29.22(a)-3 (1943). Effective January 1, 1949, the Commissioner directed that the "convenience of employer" rule should be primarily an administrative test to be applied when the character of the benefits as compensation could not be determined otherwise. Mim. 6472, 1950-1 CUM. BULL. 15.

It was against this background that the federal trial courts held that partners who lived and ate on the business premises for the purpose of management were, like employees, not required to include in income the value of meals and lodging. *Papineau v. Commissioner*, 16 T.C. 130 (1951); *Briggs v. U.S.*, 4 P-H 1956 FED. TAX SERV. para. 72319 (D. Colo. 1955). The instant case overruled those and other decisions on this point, with the Court basing its decision on early cases which had held that a partner could not be an employee of the partnership, see, e.g., *Pauli v. Commissioner*, 11 B.T.A. 784 (1928), and on a strict construction of the word "employees" as used in the Treasury Regulations in effect in 1950. Thus, the Court of Appeals adopted the "aggregate" concept of partnership identity, which accepts the view that a partnership and the partners comprising it are inseparable for purposes of taxation.

The position adopted here has confused, rather than clarified, the situation as it applies to partners. Clearly, the majority of the Court chose to decide the case on the grounds of the deductibility or non-deductibility of expenses personal in nature. In order to do this, they were effectively forced to disregard the partnership as a tax-computing entity and to treat the partners as individuals. Unfortunately the opinion cited the provision of the 1954 Tax Code which

enacted the "convenience of employer" rule into statutory form. INT. REV. CODE OF 1954, §119. This raises the inference that the rule of the *Doak* case will be applied to future situations in which partners seek to invoke Section 119 in computing their individual returns. It would follow that where the partner is the recipient of benefits which do not entitle him to the non-includability provision of Section 119, the firm may not deduct these expenses in computing the partnership net income. Seemingly, this would be true even though the costs are legitimate business expenses.

In the principal case, *Doak's* tax liability probably would not have been changed had the Court adopted the alternate course and found that the costs were business expenses of the partnership, but were not excludable from the partners' individual gross income because the benefits were not given for the convenience of the employer. Nevertheless, acknowledging that the *result* was correct does not admit the correctness of the *holding*. If the case is followed in the future, it will result in a reduction of the distributive share of partnership income belonging to an outside investor in the partnership, even though the costs of meals and lodging paid to a resident manager-partner are legitimate business expenses as far as the "outsider" is concerned.

Further, the 1954 Code, §707, provides that a partner dealing with a partnership in a capacity other than as a member shall be treated as a stranger to the firm. The latter provision applies only for the purpose of determining the partnership's gross income and business expenses. Thus for certain purposes the 1954 Code clearly adopts the "entity" theory of partnership identity, and holds the firm as separable from its members in some cases. If the principal case purports to define Section 119 of the 1954 Code, it could cause the paradoxical situation of a court being forced to follow both the "aggregate" and "entity" concepts in the same case.

As an illustration, a firm consisting of a husband and wife and an outside investor could draw up articles of agreement providing for the hiring of a manager at a guaranteed salary to be paid without regard to partnership income, and further providing that the manager should live and eat on the premises as a condition of employment. If a partner were hired as manager, the court would treat the partnership as an entity as to the salary and allow the firm to deduct the cost as a business expense, but would not allow the expenses of meals and lodging to be deducted in computing the net income of the partnership. This would be an obvious injustice to the outside in-

vestor, particularly since the deduction would probably be allowed if a stranger were hired. Where a partnership must employ a resident manager in order that the activities of the business be conducted properly, it logically should make no difference whether the manager is a partner or a stranger.

It is submitted that the proper course would have been to allow the partners in the *Doak* case to take their deduction from the partnership's gross income and then decide independently on the partners' individual returns whether they could exclude the benefits from their income on the basis of the "convenience of employer" rule. Also, it would have been better had the Court not considered the personal nature of the expenses in determining whether or not the benefits were excludable. There is nothing in the Code to justify the use of this criterion. Such a holding would have been a more just solution so far as other partnerships are concerned and would not have cast a shadow on the 1954 Code provisions. It would further have permitted a holding that the employer deducts the *cost* of the benefits and the employee either includes or excludes their *market value*, which may be more or less than the cost to the employer. In future cases, this holding should be confined to the facts, or be regarded as having no effect on present tax law; the latter choice seems best in the light of the Court's language and the complete change in the Code.

Eugene L. Smith

Torts — Negligence — Res Ipsa Loquitur

P, a passenger in a car driven by her husband, brought this action against her husband's insurer for injuries suffered by her when the car unaccountably left the road. *P* introduced no direct evidence of her husband's negligence but, instead, requested the court to instruct the jury on *res ipsa loquitur*. *D* introduced inconclusive evidence that the husband had suffered a heart attack immediately prior to the accident. The trial court refused to instruct the jury on *res ipsa loquitur* and directed a verdict for *D*. *Held*: Reversed. The doctrine of *res ipsa loquitur* is not made inapplicable by the introduction of inconclusive evidence of a fact which, if proved, might reasonably be inferred to have been the cause of the accident. *Wood v. Indemnity Insurance Co. of North America*, 273 Wis. 93, 76 N.W.2d 610 (1956) (5-2 decision).

Ordinarily, in a suit based on negligence, the defendant is not

presumed to have been negligent, *Wells v. Texas Pac. Coal & Oil Co.*, 140 Tex. 2, 164 S.W.2d 660 (1942); *Interstate Circuit, Inc. v. Le Normand*, 100 F.2d 160 (5th Cir. 1938); and it is necessary for the plaintiff to prove the allegations of negligence which form the basis of his case. *Chicago, R.I. & G. Ry. Co. v. Myers*, 264 S.W. 151 (Tex. Civ. App. 1924). However, in certain fact situations the mere proof of an accident and the surrounding circumstances creates an inference, by virtue of the doctrine of *res ipsa loquitur*, that the defendant was negligent and allows the case to go to the jury without any direct proof of specific acts of negligence. *Yarbroughs, Inc. v. McNabb*, 222 S.W.2d 274 (Tex. Civ. App. 1949) *error ref. n.r.e.*; *Chiles v. Ft. Smith Commission Co.*, 139 Ark. 489, 216 S.W. 11 (1919). The Court in the principal case assumed that this doctrine was applicable to the situation where a car traveling along a straight road unaccountably turns off the road and is wrecked, and this assumption appears valid. *Morrow v. Hume*, 131 Ohio St. 319, 3 N.E.2d 39 (1936); *Bennett v. Edward*, 239 App.Div. 157, 267 N.Y.S. 417 (1933).

The principal issue in the instant case concerned the sufficiency of the evidence which a defendant must tender in order to rebut the inference of negligence raised by application of *res ipsa loquitur*. One line of cases appears to hold the introduction of any rebutting evidence by the defendant will be sufficient to nullify the inference raised by the doctrine. *Louisville & N.R.C. v. Marbury Lumber Co.*, 125 Ala. 237, 28 So. 438 (1900); *Scarelli v. Washington Water Power Co.*, 63 Wash. 18, 114 Pac. 870 (1911). On the other hand, a majority of the courts hold that where the plaintiff's proof of negligence is based solely on *res ipsa loquitur* and the defendant offers rebutting evidence, the court should not take the case from the jury and direct a verdict for the defendant unless the defendant's evidence conclusively proves that the cause of the accident was nonactionable. *Southern Ry. Co. v. Hussey*, 42 F.2d 70 (8th Cir. 1930), *aff'd* 283 U.S. 136 (1931); *Wells v. Asher*, 286 S.W.2d 567 (Mo. Ct. App. 1955); *Watts v. Richmond, F. & P.R. Co.*, 189 Va. 258, 52 S.E.2d 129 (1949). Texas apparently follows the majority rule, *Gulf, C. & S.F. Ry. Co. v. Durman*, 27 S.W.2d 116 (Tex. Comm. App. 1930); for an excellent analysis of this problem see Morris, *Res Ipsa Loquitur in Texas*; 26 TEXAS L. REV. 761, 777-8 (1948).

The defendant may be able to prove conclusively that a certain fact or combination of facts proximately caused the accident and, in this event, he would of course be entitled to a directed verdict. *Sims v.*

Dallas Ry. & Terminal Co., 135 S.W.2d 142 (Tex. Civ. App. 1939). For example, suppose the plaintiff were injured by a falling electric line. If the line had but a single break in it and if the fact that a stray bullet broke the line were proved, that fact necessarily would have caused the line to fall and proximately caused the injury. More often, however, the defendant is forced to rely on a fact which, even if proved, would not necessarily have been the cause of plaintiff's injuries. This class of facts is typified by the evidence of heart attack in the principal case. Even if the heart attack had been proved, it was not necessarily the cause of the accident since it could have occurred after the crash. Although an application of the majority rule would have required the defendant to prove not only the heart attack but also that it occurred prior to (and thus caused) the accident, the Court modified that rule in this type fact situation since it did not compel the defendant to prove the causal connection between the heart attack and the accident; it only compelled him to prove conclusively the existence of a fact (the heart attack) which, by its nature, was related to the situation at the time of the accident in such a manner as to make possible a reasonable inference that it caused the wreck.

The decision in the principal case appears sound, since the rule is well established that the doctrine of *res ipsa loquitur* does not apply unless it is more reasonably probable that an accident was due to the defendant's negligence than to another fact. *Emmons v. Texas & P. Ry. Co.*, 149 S.W.2d 167 (Tex. Civ. App. 1941) *error disp. judgm. cor.*; *Alley v. Texas Electric Service Co.*, 134 S.W.2d 762 (Tex. Civ. App. 1939); *Klein v. Beeten*, 169 Wis. 385, 172 N.W. 736 (1919). Yet it is submitted that, under certain circumstances, the holding should be limited. Thus, where the defendant has greater access to or knowledge of the evidence than the plaintiff, as is probably more often the case, the defendant should not be able to obtain a directed verdict on proof of one fact alone but should be required to go further in his proof and show that the circumstances concerning the fact are such as to make it likely that there was a causal connection between the fact and the accident.

William T. Blackburn

Torts — Right of Privacy — Publication of Photograph of Dead Body

Plaintiffs brought action for invasion of their rights of privacy after defendants published photographs in their respective newspapers showing the partially decomposed bodies of the plaintiffs' children upon discovery of the missing bodies. *Held*: The individual right of privacy is not superior to matters of legitimate public interest. *Waters v. Fleetwood*, —Ga.—, 91 S.E.2d 344 (1956); and *Bremer v. Journal-Tribune Publishing Company*, —Iowa—, 76 N.W.2d 762 (1956).

The right of privacy was not recognized in the early common law, but it has now been established in all but a few jurisdictions in the United States. PROSSER, TORTS, 636 (2d ed 1955). The interests to be protected are the individual's rights of freedom from unwarranted publicity and to pursue happiness by remaining in seclusion if he so desires. *Melvin v. Reid*, 112 Cal. App. 285, 297 Pac. 91 (1931); *Munden v. Harris*, 155 Mo. App. 445, 134 S.W. 1076 (1911). Despite an early refusal to extend the right to the unauthorized use of an individual's picture, *Atkinson v. John E. Doherty & Co.*, 121 Mich. 372, 80 N.W. 285 (1899); *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902), later decisions have held such a publication to be an actionable invasion of the right of privacy. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1904); *Edison v. Edison Polyform & Mfg. Co.*, 73 N.J. Eq. 136, 67 Atl. 392 (1907). Some decisions have hinged recovery on the basis of an invasion of a property right. *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953). Others have granted relief solely for the protection of personal feelings. *Brazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930). In the absence of a Supreme Court decision, Texas has refused to recognize the right of privacy because it did not exist in the common law at the time the State Constitution was adopted. *Milner v. Red River Valley Pub. Co.*, 249 S.W.2d 227 (TEX. CIV. APP. 1952); *McCullagh v. Houston Chronicle Pub. Co.*, 211 F.2d 4 (5th Cir. 1954). For a criticism of the Texas reasoning see Seavey, *Can Texas Courts Protect Newly-Discovered Interests?*, 31 TEXAS L. REV. 309 (1953).

It is generally recognized that the right of privacy must sometimes yield when it conflicts with matters of legitimate news interest to the public. RESTATEMENT, TORTS § 867, comment *c* (1939). When an individual becomes a part of a newsworthy event, the

constitutional guarantee of freedom of the press and the public interest in the free dissemination of news have been held to be superior to the individual's injured feelings. *Metter v. Los Angeles Examiner*, 35 Cal. App.2d 79, 95 P.2d 491 (1939); *Smith v. Doss*, 251 Ala. 250, 37 So.2d 118 (1948). The scope of legitimate public interest has been extended to include pictures of a robbery victim, *Themo v. New England Newspaper Pub. Co.*, 306 Mass. 54, 27 N.E.2d 753 (1940); a principal to a divorce proceeding, *Berg v. Minneapolis Star Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948); and a woman who tried to fight off her husband's assailants, *Jones v. Herald Post*, 230 Ky. 227, 18 S.W.2d 972 (1929). Liability was denied for publication of a picture of the corpse of an accident victim on the ground that the limits of legitimate news are too hard to define. *Kelly v. Post Pub. Co.*, 327 Mass. 275, 98 N.E.2d 286 (1951). However, other courts have granted relief where the intrusions have gone beyond the limits of decency. *Barber v. Time Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942) (publication of pictures of a woman in a hospital gown which were an unnecessary part of a medical report of her treatment for a rare internal disorder.)

The extent to which public interest will abrogate the right of privacy depends upon the court's evaluation of the benefit to the public as compared to the harm done to the individual. It has been held that the public has no legitimate interest in the publication of a picture of a deformed child, *Brazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930); *Douglas v. Stokes*, 149 Ky. 506, 149 S. W. 849 (1912), a picture of a woman who had been the victim of gas poisoning, *Elmhurst v. Shoreham Hotel*, 58 F. Supp. 485 (D. D.C. 1945), or fictionalized accounts of news events. *Hazlitt v. Fawcett Publications*, 116 F. Supp. 538 (D. Conn. 1953).

The principal cases deny recovery on the theory that the privilege of freedom of the press is absolute if a public interest in the event can be established. These decisions have not determined whether the privilege to publish newsworthy items may become qualified when the benefit to the public is slight as compared to the mental anguish suffered by the plaintiff. Another element which deserves consideration is whether the publication is offensive to members of the public. If a picture is distasteful to the average viewer, the benefit to the public from its publication is harder to establish; contrariwise, the invasion of plaintiff's interest in freedom from mental anguish is more easily shown and is probably more extreme.

The rights of freedom of the press and the right to privacy are

sometimes in direct conflict. Establishing the limits of either is a matter of harmonizing individual rights with community interests. While it is true that the law cannot provide a remedy for every human grievance, a publication which goes beyond what good conscience and public mores will tolerate should be actionable.

John H. McElbaney

Wills — Disinheritance Provision — Pretermitted Children Statutes

Testator's will provided that "If . . . any person who if I died intestate would be entitled to share in my estate, shall, in any manner whatsoever, directly or indirectly contest this will . . . then I hereby bequeath to each such person the sum of One Dollar . . . only" Plaintiff, child of the testator, claimed to be a pretermitted heir under a statute which provided that if a testator failed to provide for his child in his will, then such child should take by intestacy, unless the omission appeared intentional from the face of the will. *Held*: A provision in a will for any person who, if testator had died intestate, would be entitled to share in the estate is sufficient to prevent a child from being pretermitted. *Van Strien v. Jones, Ex'r.*, — Cal. —, 299 P.2d 1 (1956).

A pretermitted child is a child of the testator who is passed by, omitted, or disregarded in the will of his parent; if the child is provided for in the will, even with something of small value, the child is not pretermitted. *McQueen v. Stephens*, 100 S.W.2d 1053 (TEX. CIV. APP. 1937). The term does not include the grandchildren of the testator, *McQueen v. Stephens, supra*, nor his illegitimate offspring. *Brewster v. Brewster*, 271 S.W.2d 842 (Tex. Civ. App. 1954). At common law, failure of a testator to provide for his children, even when wholly inadvertent, left the children without remedy. *Goff v. Goff*. 352 Mo. 809, 179 S.W.2d 707 (1944). Statutes have been enacted in many states to give relief in such cases, see ATKINSON, WILLS §36 (2nd ed. 1953), and it has been held that the basic purpose of these statutes is to guard against hardship to the children due to oversight of the testator, rather than to control his right to dispose of property by will, the legal presumption being that the parent did not intend to disinherit his children. *Porter v. Porter's Ex'r*, 120 Ky. 302, 86 S.W. 546 (1905); *In re Fell's Estate*, 70 Idaho 399, 219 P.2d 941 (1950). Under the so-called Missouri type statute, unless

the testator mentions or provides for his children in the will, the children are pretermitted and take their intestate share without regard to the will. *Walker v. Case*, 211 Ark. 1091, 204 S.W.2d 543 (1947). However, under the Massachusetts type statute, even though the testator fails to mention or provide for his children in his will, they do not take by intestacy if such omission appears from the face of the will to have been intentional. *In re Dixon's Estate*, 28 Cal. App.2d 598, 83 P.2d 98 (1938).

Texas statutes provide that a *posthumous* pretermitted child, and *after-born* and *after-adopted* pretermitted children, take by intestacy unless the testator leaves the estate to the surviving wife in the former situation or to the surviving spouse in the latter; however, if no child was living when the will was made, and at testator's death there are pretermitted children, the will is void in its entirety, unless the child dies within one year after testator's death. TEX. REV. CIV. STAT. (1925), PROBATE CODE, § 66, 67 (a) and (b); *Hill v. Joseffy*, 259 S.W.2d 760 (Tex. Civ. App. 1953).

The Court in the principal case, dealing with a Massachusetts type statute, was not confronted with a general provision for "any contestants of the will," such provision being generally not sufficient to include heirs otherwise pretermitted. *In re Estate of Cochran*, 116 Cal. App.2d 98, 253 P.2d 41 (1953). The provision in question for "any person who if I died intestate would be entitled to share in my estate . . ." was held to be a provision for the heirs of the testator. The word "heirs" in such circumstances includes children, and so indicates that the testator intended to provide nominally for his children, or to disinherit them. *In re Hassel*, 168 Cal. 287, 142 Pac. 838 (1914). By providing nominally for his children as a class, the testator may effectively disinherit his children without specially naming them in his will. *In re Lombard*, 16 Cal. App.2d 526, 60 P.2d 1000 (1936). The dissenting opinion, however, reasoned that the provision in question was merely a general provision for contestants of the will and did not include children within its meaning, because it is well settled that pretermitted children do not *contest* a will but, rather, take by intestacy. *In re Price's Estate*, 56 Cal. App.2d 335, 132 P.2d 485 (1942).

It is submitted that the majority opinion in the principal case is better reasoned, for if the words ". . . any person who if I died intestate would be entitled to share in my estate. . ." have any meaning, it certainly includes the testator's children. If the dissent's reasoning had been followed, a testator under either type of statute would

have to name his children in his will in order to disinherit them. For various personal reasons the testator may not want to do this, and properly should be allowed to express his intent to disinherit in the manner used in the principal case.

Carroll Jarnagin