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## Recent Case Notes

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# RECENT CASE NOTES

## Anti-Trust Laws — Interstate Commerce —

### Professional Football

Plaintiff, a professional football player, brought an action against defendant, the professional football league, to dissolve an alleged conspiracy to monopolize and control organized professional football, as an alleged violation of the Sherman Anti-Trust Act, 26 Stat. 209, 15 U.S.C.A. § § 1, 2 (1890). *Held*: The volume of interstate business involved in organized professional football places it within the provisions of the federal anti-trust acts. *Radovich v. National Football League*, 352 U.S. 445 (1957).

The term "trade or commerce" (Section 1 of the Sherman Act, *supra*), and "any part of the trade or commerce" (Section 2 of the Sherman Act, *supra*), are construed both in the common-law sense and also as their special part in the broad statutory plan indicates. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). These sections have been interpreted to include all economic activities, so long as the requisite interstate effect is found. *Wickard v. Filburn*, 317 U.S. 111 (1942). Thus banking, insurance and organized medical care all are within the term "trade or commerce," for such is not limited to economic activities involving the production and physical movement of goods. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1942); *United States v. American Medical Ass'n*, 110 F.2d 703 (D.C. Cir. 1940), *cert. denied*, 310 U.S. 644 (1940).

In one of the first cases of major significance where an application of anti-trust laws to entertainment was attempted, *Federal Baseball Club v. National League*, 259 U.S. 200 (1922) (Holmes, J.), it was held that transportation of baseball players across state lines was ". . . a mere incident and not the essential thing" to the business of professional baseball, and therefore baseball was not subject to the anti-trust laws. But in *Hart v. B. F. Keith Vaudeville Exchange*, 262 U.S. 271 (1923) (Holmes, J.), it was held that interstate activities of vaudeville companies subjected them to anti-trust laws; the court distinguished *Federal Baseball Club v. National League*, *supra*, by saying that which was merely incidental (*i.e.*, travel across state lines) may grow to such a magnitude as to require independent consideration. Thus in the *Hart* and *Federal Baseball* cases a theory was developed to the effect that where interstate activity, such as travel, had been merely incidental to the business, such activity per se did

not subject the business to anti-trust laws, but it *could* increase to such a proportion that the entire business would become subject to such legislation. And the later case of *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949), considered the use of radio, films and television so connected with organized professional baseball that it colored the whole, and that the sale of such radio and television broadcast rights subjected the business to anti-trust laws. It must be noted that the court in the *Gardella* case was confronted with the sufficiency of plaintiff's cause of action. Yet in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), the Court without hesitation again exempted professional baseball from anti-trust laws saying that where for thirty years a business had developed in reliance on a Supreme Court ruling (*Federal Baseball, supra*) and where Congress had not legislated to overrule that decision, the Court would not reverse itself where a potentially severe retrospective effect would probably occur. However, *Toolson's* reliance on an "understanding" with organized professional baseball presaged later holdings [*United States v. International Boxing Club*, 348 U.S. 236 (1955); *United States v. Shubert*, 348 U.S. 222 (1955)] to the effect that "*Toolson* was a narrow application of the rule of *stare decisis*" not necessarily applicable to business involving other sports or arts. See 9 Sw. L.J. 369 (1955).

The *Toolson* decision is difficult to rationalize, since *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), upon which the *Federal Baseball* case was based, was expressly overruled in the *South-Eastern Underwriters case, supra*, with an equally retrospective effect, and it has never been the law that particular decisions were "contracts" or "understandings" between courts and litigants. See, e.g., *United States v. Swift & Co.*, 286 U.S. 106 (1932). Also, if extended, the rationale of protecting business interests which were built up in reliance on prior decisions could dangerously limit the adaptability and growth of the law.

After this background of decisions, the Court in the principal case correctly held that due to its volume of interstate business organized professional football was subject to anti-trust laws. The contention that *stare decisis* as enunciated in *Helvering v. Hallock*, 309 U.S. 106 (1940), compelled the same results as in the *Federal Baseball* and *Toolson* cases, *supra*, was overruled, and the court reaffirmed *United States v. International Boxing Club, supra*, to the effect that the *Federal Baseball* decision ". . . could not be relied upon as a basis of exemption for other segments of the entertainment business, ath-

letic or otherwise. . . . The controlling consideration in *Federal Baseball* . . . was . . . the degree of interstate activity involved in the particular business under review." The Court goes one step further in the principal case by holding on page 451: ". . . we now specifically limit the rule established to the facts there involved, *i.e.*, the business of organized professional baseball."

Thus it would seem that the principal case adopts the *Gardella v. Chandler* doctrine, which heretofore had been rejected, that the transmission of games by radio and television was such an important part of organized professional football as to color the entire business. This doctrine had also been adopted in the *International Boxing Club* and *Shubert* cases. When Justice Clark in the principal case says: "If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer . . . that were we considering the question of baseball for the first time upon a clean slate we would have no doubts," one is led to the inevitable conclusion that the baseball decisions (*i.e.*, *Federal Baseball* and *Toolson*) are considered wrong today. And in the words of the dissent of Justices Harlan and Brennan at page 456, "If the situation resulting from the baseball decisions is to be changed, I think it far better to leave it to be dealt with by Congress than for this Court to becloud the situation further, either by making untenable distinctions between baseball and other professional sports or by discriminatory fiat in favor of baseball." Such legislation would appear very desirable in view of the arbitrary discrimination now existing.

B. J. Barton

### Constitutional Law — Charitable Trusts — Administration By Municipality

In 1831 Stephen Girard bequeathed a fund in trust to the City of Philadelphia to establish a "college" for "poor white male orphans," and in 1867 the Pennsylvania Legislature created the Board of Directors of City Trusts to administer the trust in the name of the city. In 1954, petitioners' application for admission was refused by the Board because they were Negroes, although they met all other qualifications. *Held*: The Board operating the college is an agent of the state, and although acting only as trustee, its refusal to admit petitioners because of their race is a discrimination by the state forbidden by the fourteenth amendment. *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957).

A municipal corporation is a subordinate branch of state government created by the legislature to aid in state administration and therefore derives all its power from the state. *City of Worcester v. Worcester Consol. Street Ry.*, 196 U.S. 539 (1905); *Mayor v. Ray*, 86 U.S. (19 Wall.) 468 (1873); *Rogers v. Burlington*, 70 U.S. (3 Wall.) 654 (1865). Municipal corporations are “. . . in every essential sense, only auxiliaries of the State for the purposes of local government . . .,” *Atkins v. Kansas*, 191 U.S. 207, 220 (1903), and are liable to have their powers, rights and duties modified or even abolished at any moment at the whim of the legislature. *East Hartford v. Hartford Bridge Co.*, 18 U.S. (10 How.) 483 (1850). It is a basic principle that their incorporation is for *public purposes only*. *Atkin v. Kansas, supra*; *Mayor v. Ray, supra*; 1 DILLON, MUNICIPAL CORPORATIONS §38 (5th ed. 1911); 2 McQUILLIN, MUNICIPAL CORPORATIONS §10.31 (3rd ed. 1950). It has long been held that a municipal corporation may act as trustee for a charitable trust, *Vidal v. Girard's Ex'rs*, 15 U.S. (2 How.) 61 (1844), but the charity must be for a public use or public purpose, *Treadwell v. Beebe*, 107 Kan. 31, 190 Pac. 768 (1920); *In re Franklin's Estate*, 150 Pa. 437, 24 Atl. 626 (1892), consistent with the proper purposes for which the corporation was created and “. . . germane to the objects of the incorporation.” *Vidal v. Girard's Ex'rs, supra* at 75; *Perin v. Carey*, 65 U.S. (24 How.) 465 (1860); Annot., 10 A.L.R. 1368 (1921); 1 BOGERT, TRUSTS §130 (1951).

The question was raised in this case whether a municipal corporation, or its agent, is *capable* of acting solely in a fiduciary capacity “. . . exercising no State or governmental function or power in the slightest degree.” *In re Girard's Estate*, 386 Pa. 548, 127 A.2d 287, 293 (1956) *rev'd by principal case*. State courts have recognized a dual capacity in municipal government: (1) its governmental capacity, *i.e.*, to act as agent of the state, and (2) its proprietary or private capacity as an agency for the satisfaction of local needs, 1 DILLON, MUNICIPAL CORPORATIONS §38 (5th ed. 1911); 2 McQUILLIN, MUNICIPAL CORPORATIONS §10.05 (3rd ed. 1950), which distinction originated as a matter of justice to bypass local governmental immunity from suit in certain cases, usually involving tort liability. *Trenton v. New Jersey*, 262 U.S. 182 (1923). However, the distinction applies only to relations between the municipality and the *public*, for with respect to the *state*, all of the municipal corporation's powers and functions are of a governmental nature. *Darlington v. Mayor*, 31 N.Y. 164 (1865);

*Ohio v. Smith*, 44 Ohio St. 348, 7 N.E. 447 (1886); 1 DILLON, MUNICIPAL CORPORATIONS §110 (5th Ed. 1911); 2 McQUILLIN, MUNICIPAL CORPORATIONS §10.31 (3rd ed. 1950). The United States Supreme Court has recognized this distinction as a permissible one for purposes of state law, but regards municipalities as mere administrative units of the state when involved in constitutional inquiry. *Barnes v. District of Columbia*, 91 U.S. 540 (1875); *Rogers v. Burlington*, 70 U.S. (3 Wall.) 654 (1865); *East Hartford v. Hartford Bridge Co.*, *supra*; *Maryland v. Baltimore & O.R.R.*, 15 U.S. (3 How.) 541 (1844). For example, a municipal corporation which leases property held in a proprietary capacity to a private organization for public purposes must see that constitutional restrictions are observed to the effect that such property may not be used in a manner to violate the fourteenth amendment. *Lawrence v. Hancock*, 76 F.Supp. 1004 (S.D.W.Va. 1948); *Kern v. City Com'rs*, 151 Kan. 565, 100 P.2d 709 (1940); *Culver v. City of Warren*, 84 Ohio App. 373, 83 N.E.2d 82 (1948). A municipal corporation's "capacity" to be even a trustee is limited in that a municipality cannot act as trustee for a private trust, *Piper v. Moulton*, 72 Me. 155 (1881); *In re Franklin's Estate*, *supra*; *Philadelphia v. Fox*, 64 Pa. 169, 181 (1870) (dictum), nor may it administer a religious trust, *Bullard v. Town of Shirley*, 153 Mass. 559, 27 N.E. 766 (1891); 1 SCOTT, TRUSTS §96.4 (2nd ed. 1956), because of the constitutional separation of church and state. *Maysville v. Wood*, 102 Ky. 263, 43 S.W. 403 (1897).

The United States Supreme Court has considered *all* activities of a municipality to be those of an agent of the state. *Mayor v. Ray*, *supra*; *East Hartford v. Hartford Bridge Co.*, *supra*. "If there is any restriction implied and inherent in the Spirit of the American Constitution, it is that the government and its subdivisions shall confine themselves to the business of government for which they were created," *Leob v. Jacksonville*, 101 Fla. 429, 134 So. 205, (1931); therefore constitutionally, a municipal corporation cannot undertake any function of a really private nature. *Petersburg v. Alsup*, 238 F.2d 830 (5th Cir. 1956) *possible qualification disposed of by principal case*; *Marin Water & Power Co. v. Town of Sausalito*, 49 Cal.App. 78, 193 Pac. 294 (1920); *Leob v. Jacksonville*, *supra*; 1 DILLON, MUNICIPAL CORPORATIONS §38 (5th ed. 1911). Indeed, a United States Supreme Court dictum classifies the function of a municipality even when trustee of a public charity as governmental,

vis-a-vis private or proprietary. *Trenton v. New Jersey*, *supra* at 191.

The central concept in the principal case, *viz.*, that an agent of the state even when acting as trustee exercises state action, is consistent with a line of decisions developed in well over a century of litigation. The case is particularly significant since it *appears* to be another extension of the theory of state action, but upon examination it is found that the case did not offer, as has been suggested, “. . . an opportunity to consolidate a decade of decisions and thinking on ‘state action’,” Shanks, *State Action and the Girard Estate Case*, 105 U. PA. L. REV. 213, 214 (1956), for the decision merely reaffirmed the Court's earlier position that with regard to constitutional theory, the city is only an agent of the state, and thus *any* action of the city is state action. The writer suggests it could not be consistently and logically held that an agency which can be created only for *public purposes*, in administering a trust necessarily established for *public purposes*, can act exclusively in one of the most private capacities known to the law—a fiduciary. A holding to that effect would have permitted agents of the state to circumvent or avoid the effect of cases construing the fourteenth amendment by the simple device of a trust, and conceivably could have permitted a municipality to administer a trust for religious purposes without offending our traditional concept of separation of church and state. Thus it appears that the fiduciary capacity of a municipal corporation or its agents is significant only so far as courts of equity will not allow it to breach the trust and confidence placed in it by the settlor, but with respect to constitutional inquiry, municipal corporations are not capable of acting in a truly private capacity (*e.g.*, as a fiduciary) entirely removed from governmental functions. The principal case does not hold that an individual may not establish a discriminatory trust, but means only that state action, and thus a municipal corporation, may not be used to administer it.

*Marshall J. Doke, Jr.*

### Contracts — Submission of Bids — Duty of Good Faith

P, a reputable manufacturer, submitted the low bid in response to an advertisement by the Army for offers, but his bid was rejected in favor of one much higher. P alleged in a suit for anticipated profits and preparation costs that his bid was rejected capriciously

and in bad faith, a violation of the Armed Services Procurement Act of 1947, 62 Stat. 23, 41 U.S.C. §152(b) (1952), which requires that the contract be made with ". . . that responsible bidder whose bid . . . will be the most advantageous to the Government." *Held*: Where a bid is rejected in bad faith its offeror has no claim for anticipated profits, but is entitled to recover expenses incurred in preparing the bid, for there is an implied promise to consider all bids in good faith. *Heyer Products Co. v. United States*, 140 F. Supp. 409 (Ct. Cl. 1956).

The federal courts have previously held that an unsuccessful bidder has no standing to sue for violation of the Armed Services Procurement Act and must seek his remedy in common law principles. *Royal Sundries Corp. v. United States*, 111 F. Supp. 136 (E.D.N.Y. 1953), *amended complaint dismissed*, 112 F. Supp. 244 (1953). This is in accord with cases uniformly holding that an unsuccessful bidder has no standing to base an action on such procurement statutes because they are promulgated solely for the benefit of the government and the public and bestow no legal rights upon bidders. *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1939); *Friend v. Lee*, 221 F.2d 96 (D.C. Cir. 1955).

The principle has been stated that when the United States enters into a contract relation, its rights and duties therein are governed generally by the law applicable to contracts between private parties. *Lynch v. United States*, 292 U.S. 571 (1934). But previously where plaintiffs (low bidders) have claimed a right to the contract bid on, the courts, in dismissing the complaints, have held that a bid is only an offer which the government has no duty to accept. *Levinson v. United States*, 258 U.S. 198 (1922); *O'Brien v. Carney*, 6 F. Supp. 761 (D. Mass. 1934). Some state courts, however, have granted writs of mandamus compelling the contract award to the complaining bidder. *State ex rel. United Dist. Heating, Inc. v. State Office Bldg. Comm'n*, 124 Ohio St. 413, 179 N.E. 138 (1931). Contra, *Anderson v. St. Louis Pub. Schools*, 122 Mo. 61, 27 S.W. 610 (1894); *Molloy v. New Rochelle*, 198 N.Y. 402, 92 N.E. 94 (1910). Although there are statements to the effect that mandamus will lie if the rejection is arbitrary, capricious or an abuse of discretion, *Work v. United States ex rel. Rives*, 267 U.S. 186 (1925), it has been held under a similar statute that the bidder has no standing "to compel the officer to enter into a contract for the work with him, when such officer is about to award or has awarded it to another." *United States Wood Preserving Co. v. Sundmaker*,



186 Fed. 678 (6th Cir. 1911). But even if mandamus were proper, it would not have the effect of undoing action already taken, nor would it compel judgment or discretion in a particular direction. *Wilbur v. United States*, 281 U.S. 206 (1930). And *cf. Martin v. United States*, 61 Ct. Cl. 430 (1926) (where plaintiff's low bid was rejected in favor of a higher one and reimbursement for preparation costs was denied.) It is thus settled that an ordinary advertisement for bids is not an offer, but that the bid is an offer which creates no rights until accepted. 1 WILLISTON, CONTRACTS §31 (rev. ed. 1936).

The Court of Claims, under the Tucker Act of 1887, 24 Stat. 505, 28 U.S.C. §1491 (1952), has jurisdiction only over contract actions not sounding in tort. The dissent by Judge Laramore was based on the theory that the action was in tort (deceit) for which the Court of Claims had no jurisdiction. If correct, it would be inferred that calling this a contract suit was only a subterfuge to allow the court to take jurisdiction and permit deserved recovery. The distinction between tort and contract in this sort of case has been easier to draw in theory than to apply in actual cases. However, the United States in the instant case clearly seems to have been guilty of misrepresentation which generally is treated as a tort. Thus, by implying a contract upon principles not customarily sanctioned in contract law, the court in the principal case evaded the Tucker Act, *supra*, utilizing the only available method to provide a remedy.

It is probable that the holding of the case at hand will not affect contracts other than Government contracts. If a similar situation arose between private parties such a distinction between tort and contract in theory of action would not be of paramount importance as the tort measure of damages (*i.e.*, out of pocket loss) would be the measure of recovery. By requiring "clear and convincing proof that the bids were not invited in good faith," the court has created a satisfactory safeguard against such possible abuse of discretion, protecting the bidder from deliberate discrimination.

*James Alfred Stockard*

## Criminal Law — Searches and Seizures — Search Warrants

By means of a search warrant describing the premises as "a residence situated in Dallas County, Texas at 719 Bonnie View which

said Billy Joe Helton occupies, possesses, controls, and has charge of . . . " officers entered *D*'s home in search of four stolen phonograph records which were believed to be concealed there. The records were not found, but instead the officers discovered marijuana hidden in the house. *D* appealed from a conviction for unlawful possession of marijuana on grounds that the search warrant was void. *Held*: Omitting the name of the city from a search warrant renders the warrant vague and defective and therefore void. *Helton v. State*, 300 S.W.2d 87 (Tex. Crim. App. 1957).

Evidence is not admissible in a criminal case if obtained by means violating a statutory or constitutional provision. TEX. CODE CRIM. PROC. ANN. art. 727a (1956 Supp.); *Hebert v. State*, 157 Tex. Crim. 504, 249 S.W.2d 925 (1952); *Morrison v. State*, 150 Tex. Crim. 496, 202 S.W.2d 938 (1947); *Odenthal v. State*, 106 Tex. Crim. 1, 290 S.W. 743 (1927). Both the United States and Texas Constitutions, in an effort to prevent unreasonable searches and seizures, require that the premises be adequately described in the warrant, the Federal Constitution reading ". . . and particularly describing the place to be searched . . .", U. S. CONST. amend. IV, and the Texas Constitution requiring that the premises be described ". . . as near as may be. . . ." TEX. CONST. art. I, §9.

Although there is no doubt that a description of the premises to be searched is necessary in warrants, the sufficiency thereof in individual cases is a question to be determined from the circumstances of each case. *Malone v. State*, 147 Tex. Crim. 433, 181 S.W.2d 281 (1944); *Miller v. State*, 134 Tex. Crim. 118, 114 S.W.2d 244 (1938); *Steverson v. State*, 109 Tex. Crim. 11, 2 S.W.2d 453 (1928). "The courts, both state and federal, have been very zealous in guarding and protecting the security of a man's home against unreasonable searches and seizures, as guaranteed in our Bill of Rights, Art. I, Sec. 9, Constitution of Texas, and in the 4th Amendment to the Federal Constitution. A liberal construction has been adopted to preserve that right." *Cagle v. State*, 147 Tex. Crim. 354, 180 S.W.2d 928 (1944). However, many decisions have held that a description is sufficient which merely distinguishes the premises to be searched from all other places in the community. *Rhodes v. State*, 134 Tex. Crim. 553, 116 S.W.2d 395 (1938); *Hoppe v. State*, 122 Tex. Crim. 440, 55 S.W.2d 1053 (1932); *Hernandez v. State*, 109 Tex. Crim. 246, 4 S.W.2d 82 (1927).

Under the decision of the principal case the inclusion of the name

of the city is necessary to meet the minimum standard required by the constitution. The court expressly overruled a previous Texas case in which a description in a warrant which omitted the name of the city was held valid. *Cruze v. State*, 114 Tex. Crim. 450, 25 S.W.2d 875 (1930). Under the *Cruze* interpretation, lack of precision or technical accuracy in the description is insufficient to nullify an otherwise valid warrant; but such a rule is contrary to the traditional requirement of certainty, long recognized by both statute and precedent, which denies the exercise of the executing officer's personal knowledge to supply omissions in a warrant. See *Miller v. State*, *supra*, and *Aguirre v. State*, 109 Tex. Crim. 584, 7 S.W.2d 76 (1928).

The principal case indicates a judicial attitude calculated to provide the maximum protection allowed by the Texas constitution. With this purpose in mind one can readily appreciate the soundness of the decision; for clearly a warrant which omits the name of the city fails to describe the premises as closely as it could have. The point is not purely technical, for such technicalities were demanded by the legislature for protection of the public, and it is the duty of the courts to see that full protection is given.

*Pat Beadle Jr.*

### Evidence — Dead Man's Statute — Applicability To Automobile Accidents

*P*, a passenger, was the sole survivor of an automobile collision in which the drivers of both cars were killed. In an action against the administrator of the deceased driver of the other car, the trial court excluded *P*'s testimony as to the movements of the vehicles on the theory that it was prohibited by the Dead Man's Statute, which forbids testimony of an interested party regarding a "transaction" with the deceased. *Held*: A passenger who exercises no control over the vehicle in which he is riding does not participate in a personal "transaction" with the deceased driver of the other car and his testimony as to the facts involved in the collision is admissible. *Gibson v. McDonald*, —Ala.—, 91 So. 2d 679 (1957).

At common law all parties to a suit were disqualified from giving testimony. GREENLEAF, EVIDENCE §§ 329, 386 (15th ed. 1899). Dissatisfied with this strict exclusionary rule, most legislatures enacted statutes making such parties competent witnesses. By these

same statutes however one common-law disqualification was retained, popularly referred to as the Dead Man's Statute, which excludes the testimony of an interested party regarding a "transaction" with the deceased. See *e.g.*, ALABAMA CODE tit. 7, § 433 (1940); TEX. REV. CIV. STAT. ANN. art. 3716 (1926). The general purpose of the Dead Man's Statutes was to protect decedents' estates in suits where it would be a temptation for the adverse party to claim falsely that certain events had occurred and where he would prevail in the action because of such perjured testimony. *Hodges v. Denny*, 86 Ala. 226, 5 So. 492 (1899); *Holland v. Nimitz*, 111 Tex. 419, 232 S.W. 298 (1921); WIGMORE, EVIDENCE § 578 (3d ed. 1940). The Alabama and Texas statutes, therefore, have been interpreted to exclude the testimony of a surviving plaintiff in establishing his action and likewise have prevented a surviving defendant from developing his defense. *Pollack v. Winter*, 197 Ala. 173, 72 So. 386 (1916); *Caldwell v. Tucker*, 246 S.W.2d 923 (Tex. Civ. App. 1952).

Although the statute construed in the principal case does not expressly require that the "transaction" be *personal*, as do the statutes of many states, see WIGMORE, EVIDENCE § 488 (3d ed. 1940), Alabama courts have made this element necessary before testimony will be excluded under their Dead Man's Statute. *Warten v. Black*, 195 Ala. 93, 70 So. 758 (1915). And by basing their holding on the theory that an automobile accident is a "transaction" the Alabama courts have also expressed the rule that a *driver* who survives a collision may not testify against the deceased driver of the other car. *Southern Natural Gas Co. v. Davidson*, 225 Ala. 171, 142 So. 63 (1932). The principal case reasoned that the element of control must be present before the "transaction" can be personal; hence they distinguished the *Southern Natural Gas* case in this vital respect, as here P was a mere *passenger* without control. Since the driver of an automobile owes the same duty of care to drivers as he does to passengers of other cars this distinction seems superficial because logically the same evidence necessary for a driver's recovery would be required also of a passenger; hence the testimony of one would be just as violative of the purpose of the Dead Man's Statute as would be the testimony of the other.

In automobile accident cases the term "transaction" has received three distinct interpretations. A majority of courts conclude that an automobile accident is not a "transaction" and is without the statute; neither do they make a distinction as to whether the wit-

ness or the deceased was driving one of the vehicles, *Shaneybrook v. Blizzard*, 209 Md. 304, 121 A.2d 218 (1956), or merely a passenger, *Christofiel v. Johnson*, 290 S.W.2d 215 (Tenn. App. 1956), or even a pedestrian, *Kinsella v. Meyer's Adm'r*, 267 Ky. 508, 102 S.W.2d 974 (1937). One majority court bases its holding on the theory that an automobile accident is not within the usual meaning of the term "transaction," *Rankin v. Morgan*, 193 Ark. 751, 102 S.W.2d 552 (1937), while others reason that "transaction" imports more than an involuntary, unilateral act. *Shaneybrook v. Blizzard*, *supra*; *McCarthy v. Woolston*, 210 App. Div. 152, 205 N.Y. Supp. 507 (1924); *Newman v. Tipton*, 191 Tenn. 461, 234 S.W.2d 994 (1950).

But a strong minority of jurisdictions concludes that an automobile accident is such a "transaction" and permits an interested witness to testify only as to his *own* actions and movements, these being "independent facts" rather than the subject of a negotiation with the deceased. *Kilmer v. Gustason*, 211 F.2d 781 (5th Cir. 1954); *U.S.A.C. Transport, Inc. v. Corley*, 202 F.2d 8 (5th Cir. 1953); *Strode v. Dyer*, 155 W.Va. 733, 177 S.E. 878 (1934). A small minority line of cases disallows all testimony of the surviving party for the reason that the accident is considered a "transaction" and further because public policy forbids such testimony. *Wright v. Wilson*, 154 F.2d 616 (3d Cir. 1946); *Mondin v. Decatur Cartage Co.*, 325 Ill. App. 332, 60 N.E.2d 38 (1945); *Andreades v. McMillan*, 256 S.W.2d 477 (Tex. Civ. App. 1953) *error disp.*

While it has been continually reiterated by Texas courts that their statute should be strictly construed, it has been interpreted so as to prevent testimony in virtually all conceivable situations, e.g., probate of a will, *Holland v. Nimitz*, *supra*; collection of a note, *Coker v. Tone*, 27 S.W.2d 597 (Tex. Civ. App. 1930); action to recover for medical services, *Caulk v. Anderson*, 120 Tex. 253, 37 S.W.2d 1008 (1931); suit to establish a common-law marriage, *Huggins v. Myers*, 30 S.W.2d 565 (Tex. Civ. App. 1930); suit for insurance proceeds, *International Travelers' Ass'n v. Bettis*, 120 Tex. 67, 35 S.W.2d 1040 (1931). See also Ray, *The Dead Man's Statute—A Relic of the Past*, 10 Sw.L.J. 390 (1956). But only once in Texas has the Dead Man's Statute been discussed in an automobile collision case, *Andreades v. McMillan*, *supra*, and there with some hesitation the court extended the statute once again by excluding the testimony of a surviving driver and his wife who was a passenger.

The cases have discussed extensively the meaning of the term "transaction" but none have specifically decided at what point in time the "transaction" begins. It is believed that this is an indispensable inquiry to a rational application of the term in an automobile accident case. By implication, both minority views hold that the "transaction" begins at the moment the drivers see each other. This construction appears faulty and perhaps unnecessary under the statute, because even if the collision is a "transaction" it seems that it would begin at the time of impact. Logically therefore testimony concerning events before the collision should be received, because the statute only forbids testimony regarding a "transaction with" the deceased. See, WIGMORE, EVIDENCE § 578 (3d ed. 1940); MCCORMICK AND RAY, TEXAS LAW OF EVIDENCE §§ 321-39 (2d ed. 1956).

Perhaps the strongest objection is that the statute has subordinated honest claims of living people to the protection of decedents' estates, mainly on the theory that all adverse witnesses are potential liars. Thus, even though the distinction made in the principal case is without logic, it seems justified, in the writer's opinion, because it overcomes this fallacy and reaches the desired result. The course of judicial decision, however, indicates that this antiquated rule of exclusion will survive unless defeated by proper legislation, and in this field the New York statute affords an impressive example, for it permits a survivor to testify as to the facts or results of an automobile accident when ". . . the defense or cause of action involves a claim of negligence or contributory negligence. . . ." N.Y. CIV. PRAC. ACT. § 347. When it is considered that most Dead Man's Statutes were enacted long before the era of the automobile had begun, a fact which leads to the conclusion that the legislatures could not have intended such accidents to be "transactions," it is believed that amendments like that of New York could be adopted without doing violence to the reason and rationale of the original statute.

*Elton R. Hutchison*

### **Insurance — Automobile Liability Policy — "Other Automobiles" Clause**

Before a new automobile ordered by Egge was delivered, Egge sold his old automobile and borrowed another to use until the new one arrived. An agent of defendant insurance company advised

Egge not to cancel the unexpired policy covering the old car, but instead to transfer it to the new car on its arrival. While driving the borrowed car, Egge injured the plaintiff in an automobile collision. *Held*: There is no coverage under a policy until the permanent replacement automobile is received, for a borrowed car can not qualify under the "Use of Other Automobiles" provision, unless the insured has title to a car. *Dauggard v. Hawkeye Security Ins. Co.*, 239 F.2d 351 (8th Cir. 1956).

It is a basic principle in insurance law that ambiguous policies prepared by insurance companies are construed most favorably for the insured. *Farm Bureau Mut. Ins. Co. v. Violano*, 123 F.2d 692 (2d Cir. 1941); *Pray v. Leibfarth*, 106 F. Supp. 613 (N.D. Mich. 1953). The "Temporary Use of Substitute Automobile" provision extending coverage from the insured vehicle to a temporary substitute car not owned by the insured has been held ambiguous, and therefore given a construction most favorable to the insured. *Fleckenstein v. Citizen's Mut. Automobile Ins. Co.*, 326 Mich. 591, 40 N.W.2d 733 (1950).

Most automobile liability policies have two clauses relating to use of other vehicles by the insured, *viz.*, "Automatic Insurance for Newly Acquired Automobiles" and "Temporary Use of Substitute Automobile." It is well settled that the "Automatic Insurance for Newly Acquired Automobiles" provision does not extend the insurance to an automobile used but not owned by the insured, *e.g.*, a borrowed car. *Aetna Cas. & Surety Co. v. Chapman*, 240 Ala. 599, 200 So. 425 (1941); *Clarno v. Gamble-Robinson Co.*, 190 Minn. 256, 251 N.W. 268 (1933). Likewise it is clear that insurers do not intend the "Temporary Use of Substitute Automobile" provision to extend their liability to substituted vehicles which are owned by the named insured. *Utilities Ins. Co. v. Wilson*, 207 Okla. 574, 251 P.2d 175 (1952). But one case has held that under such a provision, the policy does cover a borrowed car used as a temporary substitute, even though the car insured was previously sold for junk and the insured had no title to any car. *Freeport Motor Cas. Co. v. Tharp*, 338 Ill. App. 593, 88 N.E.2d 499 (1949).

The principal case is the first to hold in effect that title to some car is a prerequisite to the insurance contract's validity. This was in spite of the fact that the "Use of Other Automobiles" provision in the policy stated that a temporary substitute car could be used while the insured car was withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, provided that

the temporarily used car did not belong to the insured. On principle the court's holding cannot be sustained; they have added an implied condition contrary to the express terms of the policy, resulting in a forfeiture of the insurance.

The court rejected the reasoning in *Freeport Motor Cas. Co. v. Tharp, supra*, and sought support for its holding in two cases not directly in point: (1) In *Campbell v. Aetna Cas. & Surety Co.*, 211 F.2d 732 (4th Cir. 1954), it was stated that the insured must own an automobile before the temporary substitute clause would apply; however, this was dictum, since the case was decided upon the proposition that the substitute car in that case was not temporary, as the insured had been using it for over two months, it was the only car to which the insured had access and it belonged to his son living in the same household. (2) In *Byrd v. American Guarantee & Liab. Ins. Co.*, 89 F. Supp. 158 (E.D. Va. 1950), insured sold his car, after which the vendee was involved in an accident. In a suit against the insured the court held that once the car was sold, the vendor's insurance terminated as to that car; there was also a statement that if the insured car were not replaced the policy would automatically terminate.

Thus, it seems that the principal case is erroneous in relying on its authority as well as in principle. The court did not recognize the only other case directly in point but instead attempted to create new law from poorly considered dicta and fact situations clearly distinguishable. The case creates an unfortunate precedent that can be extended to any situation where the insured has lost title to his car. There is no good reason for insisting that the insured party own a car when the very terms of the policy state that the temporary substitute car may be used when the insured car is withdrawn from service because of loss or destruction, when it is possible for the insured to abandon his ownership in a lost or destroyed car. The insurance company has created an ambiguity by not specifically stating what effect a loss of title to the insured automobile would have on the policy; therefore, the ambiguity should be resolved in favor of the insured. Moreover, the holding in the principal case seems patently wrong when applied to a policy containing a "Temporary Substitute" clause not limited to use where the insured car is withdrawn from service, but extending to all casual driving by the insured of cars not owned by him or furnished for his regular use. The court has in effect created a suspension of the insurance, even though the general rule is well established that suspension of



insurance will not result unless specifically provided for in the contract.

Larry L. Gollaber

### Labor Law — Peaceful Picketing — Freedom of Speech

Defendant unions sought unsuccessfully to induce some of P's employees to join and then commenced picketing the company's business, which was an *intrastate* establishment, with signs reading: "The men on this job are not 100% affiliated with A.F.L." Drivers of several trucking companies refused to deliver goods across the picket line, causing substantial damage to the P's business. An injunction to restrain the picketing was obtained on the grounds that it was for an unlawful purpose since it violated a state statute. *Held*: Picketing is more than mere communication and, even though peaceful, may be enjoined if it violates a valid public policy of the state. *International Brotherhood of Teamsters, AFL v. Vogt, Inc.*, 354 U.S. 284, 77 Sup. Ct. 1166 (1957).

The due process clause of the fourteenth amendment protects freedom of speech from state abridgement, *Gitlow v. New York*, 268 U.S. 652 (1925), and the Supreme Court has held that the right to express views and facts in a labor dispute is within the area of free discussion guaranteed by the Constitution. *Thornbill v. Alabama*, 310 U.S. 88 (1940). Furthermore, mere absence of a labor dispute is not enough to exempt picketing from the guaranty of freedom of discussion, *Bakery & Pastry Drivers v. Wohl*, 315 U.S. 769 (1942). Later decisions, however, have introduced a concept of "peaceful picketing" as something more than mere communication because experience indicated that the very presence of a picket line often induced disorder. *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470 (1950); *Building Service Employers International Union v. Gazzam*, 339 U.S. 532 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Bakery & Pastry Drivers v. Wohl*, *supra* (concurring opinion).

A doctrine which recognizes that communication is but one facet in a picketing program allows state courts to enjoin picketing activity which may be unlawful when judged by the public policy of that state, *e.g.*, attempts by a union to compel an employer to coerce his employees into joining the union or selecting a bargaining agent. *Building Service Employers International Union v. Gazzam*,

*supra*. When an interstate problem is not involved, peaceful picketing is generally said to be unlawful when its *purpose*, as inferred from the facts and surrounding circumstances, is in conflict with state public policy. *Pappas v. Stacey*, 151 Me. 36, 116 A.2d 497 (1955); cf. *Anderson v. Local 698, Retail Clerks' Union, AFL*, 140 N.E.2d 432 (Ohio Ct. App. 1956). The instant case reaffirms the view that the several states have wide discretion in determining whether any particular picketing activity is conducted for an illegal purpose, subject to the qualification that blanket prohibition of all picketing is invalid. *Thornhill v. Alabama, supra*. Justice Douglas' dissent, in which he was joined by Chief Justice Warren and Justice Black, states at page 296: "The state courts' characterization of the picketer's 'purpose' has been made well-nigh conclusive." The exact extent of the state power to enjoin peaceful picketing is unknown; however, it can be said that ". . . peaceful picketing as a mantle of immunity has been exploded." Comment, 1 BAYLOR L. REV. 455 (1949).

The principal case is a further demonstration that peaceful picketing is not completely protected as freedom of speech and that under proper circumstances state courts have authority to enjoin such activity. Yet the opinion states that picketing cannot be automatically restrained without an investigation into its conduct and purpose. It appears that picketing simply for organizational purposes is free from restraint; but, if certain other factors come into play (*e.g.*, violence, *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941), or coercion of an employer to interfere with his employees' freedom to join or not to join a union) picketing to organize may be prohibited. Each particular fact situation must control and be determined by its own merits.

It is believed that the principal opinion is sound in view of the close proximity of state courts and administrations to those economic and social influences which often precipitate labor grievances, for they can better balance the conflicting interests than more remote agencies. When a union is attempting to coerce an employer to interfere with his employees' right to decide whether to join that union, as in the principal case, an injunction would seem justified. The limitations that a state cannot arbitrarily prohibit all picketing and that any prohibition must be founded on a valid and specific public policy are probably sufficient safeguards against possible abuse of discretion by the state courts. Picketing, even though peaceful, is not an absolute freedom as fully protected as free speech, but

when properly conducted should not be deprived of legal sanction. Restraint should be applied only when the activity results in unreasonable harm compared with its possible advantages.

*Charles E. Galey*

### National Service Life Insurance — Statute of Limitations — Presumed Death

In 1954 *P*, as beneficiary, brought action on a National Service Life Insurance Policy on her son, who disappeared from his Army unit in 1943 while training in Georgia. It was alleged that the insured had died in 1943 prior to the lapse of the policy but that by virtue of a seven year statutory presumption of death, the beneficiary's cause of action on the policy did not mature until 1950. The government contended that if the action was based on the insured's presumed death in 1950, no recovery was possible for the policy lapsed in 1943 due to non-payment of premiums; and if based on insured's alleged actual death in 1943, the action was barred by the six year statute of limitations. *Held*: In cases of presumed death the statute of limitations does not begin to run until the end of a seven year period of unexplained absence even though the beneficiary introduce evidence that the actual death occurred at some date within the seven years. *Peak v. United States*, 353 U.S. 43 (1957) (6-3 decision).

Statutes of limitation are acts limiting the period of time in which legal actions may be brought. *Ley v. Simmons*, 249 S.W.2d 808 (Ky. 1952). Generally under these statutes, causes of action accrue when the complaining party first has a right to seek his legal remedy, *Howard v. Equitable Life Assurance Soc'y*, 197 Wash. 230, 85 P.2d 253 (1938); and in life insurance contracts, the cause of action accrues upon the death of the insured. *United States v. Towery*, 306 U.S. 324 (1939). The purpose of limitation acts is to bar suits after such a period of time has elapsed that the necessary evidence may have been destroyed or witnesses probably have disappeared or forgotten. *Leitch v. New York Cent. R.R.*, 388 Ill. 236, 58 N.E.2d 16 (1944). In line with this policy and the fundamental concept that no cause of action can be maintained against the federal government without its permission, such statutes are strictly construed in favor of the government. *Murno v. United States*, 303 U.S. 36 (1938); *Coleman v. United States*, 100 F.2d

903 (6th Cir. 1939). Federal courts have consistently held that the inability of a litigant to obtain evidence necessary to his suit within the time allowed would not toll the statute. *McMahon v. United States*, 342 U.S. 25 (1951).

In commercial life insurance cases where the insured disappears and no actual proof of death is available, the beneficiary's cause of action is based upon a presumption of the insured's death which arises after his continuous, unexplained absence for seven years, unheard of by family or friends who normally would have received news of him. 1 MCCORMICK AND RAY, TEXAS LAW OF EVIDENCE § 83 (1955). The majority view is that this presumption is as to the *fact* of death only and evidence is permitted which tends to establish the *time* of death at a particular date within the period. *Davie v. Briggs*, 97 U.S. 628 (1878); *Westphal v. Kansas City Life Ins. Co.*, 126 F.2d 76 (7th Cir. 1942), *cert. denied*, 316 U.S. 705 (1942). This is a true presumption which unless rebutted will require that the court find as a matter of law the fact of the insured's death. 9 WIGMORE, EVIDENCE § 2531(a) (3rd ed. 1940). A minority of courts hold that the presumption establishes *both* time and fact of death; *i.e.*, if used to prove fact of death, the time of death is considered to be at the end of the seven year period. *United States v. Robertson*, 44 F.2d 317 (9th Cir. 1930). While a few courts adhering to the minority rule consider this a true presumption, others hold that it is merely an inference of fact to be considered with other evidence by the jury. 9 WIGMORE, EVIDENCE § 2531 (3rd ed. 1940).

However, the law applicable to the government life insurance involved in the principal case is set forth in the National Service Life Insurance act which contains a six year statute of limitations, 46 STAT. 992 (1930), 38 U.S.C. § 445 (1952), and specifically provides that no state law as to presumed death used in commercial life insurance cases shall apply. 54 STAT. 1013 (1940), 38 U.S.C. § 810 (1952). Instead, the Act provides that after seven years of unexplained absence the death of the insured ". . . as of the *date of expiration* of such period . . . may be considered sufficiently proved." 54 STAT. 1013 (1940), 38 U.S.C. § 810 (1952). (Emphasis added.) One case construed this section as creating a statutory presumption of both fact *and* time of death at the end of the seven year period. *Rogers v. United States*, 133 F. Supp. 62 (W.D. Ky. 1955). But in *United States v. Willbite*, 219 F.2d 343 (4th Cir. 1955), the court with some hesitation declared the stat-

utory presumption related to *fact* of death only, thus in effect, applying the same presumption used in a majority of commercial life insurance cases. The *Willbite* interpretation was adopted by the Court in this case.

While the decision undoubtedly places recovery under NSLI policies on the same basis as that used in most commercial life insurance cases, the result is difficult to reconcile with the apparently contrary language of the statute creating the presumption. A more reasonable interpretation would seem to be that the legislators intended that both fact and time of death should be presumed to occur at the end of the statutory period, rather than fact of death alone. This interpretation is strengthened by comparison of the language to that in most state statutes, which omit any mention of date, merely stating that after seven year's absence the insured is presumed to be dead. See, e.g., CAL. CODE CIV. PROC. art. 1963 (1953) and TEX. REV. CIV. STAT. ANN. art. 5541 (1941). These statutes have been construed to create a presumption as to fact of death only. *Benjamin v. District Grand Lodge*, 171 Cal. 260, 152 P. 731 (1915); *American National Ins. Co. v. Dailey*, 187 S.W.2d 716 (Tex. Civ. App. 1945) *error ref.* Aside from considerations of statutory interpretation, the presumption here applied by the Court can not be logically sustained. Under it, the limitation period begins to run on establishment of the *fact* of death after seven years absence while proof of the actual *time* of death is held relevant only to establish that death occurred while the policy was in force. Thus, even though it is alleged that the actual time of the insured's death was the day of his disappearance, the beneficiary in bringing suit has the benefit of both the seven year presumed death period plus the six year statute of limitation period. Admittedly no cause of action accrues until the death of the insured, but it would seem equally apparent that the statute of limitations, being a time limit, should logically begin to run at the time of the insured's death regardless of the type of actual or presumptive proof used to establish that point in time.

The decision amounts to a judicial extension of the statute of limitations from six to thirteen years in NSLI cases where the insured's presumed death is alleged. As a practical matter it places the Veteran's Administration in a position of either having to pay all doubtful claims filed within thirteen years of the alleged death of the insured or risk litigation which might well cost the government more than the amount claimed. It was for the very purpose of

protecting the government from such stale claims that the six year statute of limitations was placed in the NSLI Act. The judicial tolling of the statute in behalf of this petitioner for reasons of individual hardship does not seem justified.

*Ken Hobbs*

### Real Property — Implied Restrictions on Use — Private Burial Grounds

D purchased a tract of land on which a private burial ground was located. Upon learning of this, he attempted to convey the land to descendants of those buried there, but the conveyance was refused. Twenty-five years later, D employed a contractor to improve the land and the contractor, following the defendant's orders, removed a burial monument from the soil. The defendant was indicted under Georgia law, which declared such a removal to be a misdemeanor. He defended on the grounds that the burial ground had been abandoned. *Held*: A private burial ground is not abandoned so long as there are monuments on graves sufficient to put one on notice that the land is a burial ground. *Adams v. State*, —Ga.—, 97 S.E.2d 711 (1957).

The dedication of land for a private burial ground restricts the land so that it may be used for no other purpose, in effect estopping the fee owner to assert his right of exclusive possession of the land while the dedication is in force. *Hunter v. The Trustees of Sandy Hill*, 6 Hill 407 (N.Y. 1844); *Barker v. Hazel-Fain Oil Co.*, 219 S.W. 874 (Tex. Civ. App. 1920) *error ref.* A grantee may not take the land free of the restriction although no reservation of the burial ground is in the deed or chain of title, for the presence of monuments on the land is sufficient notice of its use. *Michels v. Crouch*, 122 S.W.2d 211 (Tex. Civ. App. 1938). In addition to recognizing the restriction burdening his use of the land, the fee owner must also tolerate implied easements in favor of certain interested parties, *e.g.*, "the descendants," *White v. Williams*, 57 S.W.2d 385, 386 (Tex. Civ. App. 1933), "the family as a whole," *Benn v. Hatcher*, 81 Va. 25, 30 (1885), or "the heirs" of the dedicator. *Mitchell v. Thorne*, 134 N.Y. 536, 32 N.E. 10, 11 (1892). Such interested parties may enjoin any attempt of the landowner to violate the restriction, *White v. Williams, supra*, and they may visit the graves, erect monuments and make improvements on the

land and be buried there. *Mitchell v. Thorne, supra*; *Hines v. State*, 126 Tenn. 1, 149 S.W. 1058 (1911).

The majority of jurisdictions, including Texas, hold that no special instrument or ceremony is required to dedicate land as a private burial ground; the intention to dedicate plus the actual interment of bodies is sufficient, *Andrus v. Remmert*, 136 Tex. 179, 146 S.W.2d 728 (1941); *Benn v. Hatcher, supra*. And an implied dedication may be enforced if the landowner acquiesces in the burial of strangers on his property. *Lay v. Carter*, 151 N.Y.S. 1081 (1915). But Missouri governs the dedication of private burial grounds by statute, MO. REV. STAT. § 214.140 (1949), and the courts require strict statutory compliance in order for such a dedication to be effective. *Wooldridge v. Smith*, 243 Mo. 190, 147 S.W. 1019 (1912). Assuming dedication and interment, however, the restriction presumably encompasses the entire tract dedicated so long as a reasonable prospect of future burials remains, *Andrus v. Remmert, supra*, or until the burial ground is abandoned.

Abandonment of a burial ground is a conclusion of law reached when no other conclusion is reasonably possible. JACKSON, CADAVERS 396 (2d ed. 1950). Thus, a private burial ground is not abandoned so long as the interested parties assert rights under the easements, *Clarke v. Keating*, 102 Misc. 361, 169 N.Y. Supp. 24 (1917), *modified*, 183 App. Div. 212, 170 N.Y. Supp. 187, but their consent to the removal of the bodies to a more suitable location establishes an abandonment. *Barker v. Hazel-Fain Oil Co., supra*. Any part of a tract dedicated for private burial purposes in which there are no interments and no reasonable prospect thereof is considered by the courts to be abandoned as a burial ground. *Andrus v. Remmert, supra*. But the mere failure to use a private burial ground does not constitute an abandonment; only when the land becomes "wholly unknown as a graveyard" does an abandonment become established. *Hunter v. The Trustees of Sandy Hill, supra* at p. 414. The abandonment of a private burial ground revests exclusive possession of the land in its fee owner, *A. F. Hutchinson Land Co. v. Whitehead Bros. Co.*, 127 Misc. 558, 219 N.Y. Supp. 413 (1926), but even without an abandonment, interested parties may be barred by laches to assert their rights, *Van Buskirk v. Standard Oil Co.*, 100 N.J. Eq. 301, 134 Atl. 676 (1926), or they may be estopped by their conduct to *interfere* with the owner's free use of the land. *Mayes v. Simons*, 189 Ga. 845, 8 S.E.2d 73 (1941).

Texas statutes presently regulate the location of all burial grounds;

according to a city's population, no urban land may be dedicated for burial purposes unless the tract is located one to five miles from the incorporated line of the city. TEX. REV. CIV. STAT. ANN. art. 912a-24 (1956 supp.). Texas municipalities and residents of such municipalities may apply to the courts to enjoin the continuance of a cemetery if its presence in the municipality is a nuisance, and the courts, upon proper application by a municipality, may enjoin the continuance of neglected or abandoned cemeteries for which there is no perpetual care and endowment fund. TEX. REV. CIV. STAT. ANN. art. 912a-25. But as there is no statute covering the problem of the principal case an owner in possession acts at his peril if he interferes with burial grounds which he may acquire. However, it seems possible that an owner in possession of a private cemetery illegally dedicated under Article 912a-24, *supra*, may be held to have exclusive possession of the burial grounds. Cf. *Wool-dridge v. Smith*, *supra*.

The court in the principal case held correctly that the graveyard had not been abandoned. Refusal by the descendants to take back the land when it was offered might have estopped them to enjoin the defendant's use of the land, but this would not establish an abandonment. The dissent assumes the descendants to be so estopped and argues that the state in effect should have been estopped to prosecute criminally, an argument which fails to recognize that public and private interests in cemeteries, which continue until abandonment, apparently are founded on different theories. The interest of descendants arises out of the natural love and affection which they have for their ancestors; the public interest is predicated on the historical and present belief in the sacrosanctity of burial grounds. Thus, the failure of descendants to preserve the cemetery should not prevent the public's acting to punish its desecration.

*Allen Butler*

### Texas Probate Code — Minority — Removal of Disability by Marriage

When P was eighteen years old he contracted to buy an automobile. Shortly thereafter he married and several months later the new Texas Probate Code section 3(t), which defined minors as "all persons under twenty-one who have never been married . . . , " be-



came effective. While *P* was still under twenty-one suit was brought by *next friend* to rescind the contract. *Held*: The definition of minor in the Probate Code is not limited to probate matters; hence when a male under twenty-one marries he becomes an adult for all purposes and suits may be maintained only in his own name. *Pittman v. Time Securities Co.*, 301 S.W.2d 521 (Tex. Civ. App. 1957).

At common law, a minor was any person under twenty-one years of age. *Means v. Robinson*, 7 Tex. 502 (1852). But a married female under twenty-one was given adult status (except voting rights) by statute. TEX. REV. CIV. STAT. ANN. arts. 4104, 4625 (Supp. 1951). However, until the new Probate Code was enacted, the husband under twenty-one years of age remained a minor.

In construing the definition of minor in the Probate Code, the court followed well-established principles of construction. The court's reasoning was predicated on the assumption that the legislature's purpose was to codify the law and thus eliminate confusion and uncertainty. For "minor" to have one meaning in probate matters and another meaning in all other fact situations would lead to confusion, uncertainty and possible anomalies. For example, a married male under twenty-one would not be able to bind himself by contract irrevocably nor could he convey real estate, yet he could not have a guardian appointed to do so since for probate purposes he would no longer be a minor. It should be noticed that the section construed prefaced the definition with this limitation: "When used in this code, unless otherwise apparent from the context." TEX. PROB. CODE ANN. section 3 (t) (1956). In extending this definition to purposes other than probate matters, the court reasoned that the phrase "when used in this code" must be read as modified by the phrase "unless otherwise apparent from the context." When read together they are merely an expression of typical legislative caution to provide for a situation in which "minor" might be used with an obviously different meaning and it was not intended to limit the definition exclusively to probate matters.

This decision apparently places a married male under twenty-one in the same legal position that a married female of the same age has long enjoyed. The most reliable approach to the prediction of probable effects on current law is through an analogy to the interpretations courts have placed on the emancipation of a female by marriage. There should be few problems arising in the criminal area since most penal statutes indicate that this new definition would be inapplicable. See, e.g., TEX. PEN. CODE ANN. art. 666-26 (Supp.

1952). (Forbids the sale of liquor to *any person under twenty-one* and article 1177 of the same code makes taking a minor *from the control of his parent or guardian* kidnapping.) With regard to the few statutes that refer only to minors, such as article 489, TEX. PEN. CODE ANN. (Supp. 1952), which forbids the sale of firearms to *minors*, there should still be little difficulty since it has been held that the majority given to a female minor by marriage did not extend to criminal matters. *Beezley v. State*, 1 S.W.2d 903 (Tex. Crim. App. 1927). Also, the position of a female with regard to the juvenile delinquency statutes has been held unaffected by marital status. *Phillips v. State*, 20 S.W.2d 790 (Tex. Crim. App. 1929). Even before article 5518, TEX. REV. CIV. STAT. ANN. (1941), which provides that adverse possession does not run against a minor, was amended to include married females under twenty-one, the case of *Gibson v. Oppenheimer*, 154 S.W. 694 (Tex. Civ. App. 1913) *error ref.*, held that the statute did not run against a woman under twenty-one even though she was married. By analogy to a person under twenty-one who has had his disabilities removed, there appears to be nothing which would prevent an "underage" husband from making an irrevocable contract for any purpose or from executing a valid conveyance of real estate. *Jones v. Teat*, 57 S.W.2d 617 (Tex. Civ. App. 1933).

The result appears to be a correct reflection of the probable intention of the legislature which was aware of the previous construction given article 4104, TEX. REV. CIV. STAT. ANN. (Supp. 1951), *viz.*, that the emancipation of a married female was not limited to guardianship matters although in the Revised Statutes it was under the title "Guardian and Ward." *Wells v. Hardy*, 21 Civ. App. 454, 51 S.W. 503 (1899). Article 4104, *supra*, was specifically repealed by the Probate Code and it would be difficult to conceive of any intent other than to bring a married male within the same definition as a married female, although admittedly this was done rather awkwardly and with the risk that this intent might be frustrated by the qualification "when used in this code." It could probably be said with some degree of accuracy that this definition will be effective for all civil purposes, *unless statutory wording makes another meaning apparent*, and will not be extended to criminal and juvenile delinquency matters.

*Roger Rhodes*

### Torts — Defamation — Television Libel or Slander

During a television broadcast, *D* spoke a defamatory statement concerning *P*. *P*'s action was in libel and *D* moved to dismiss the suit because the statement was not read from a prepared script. *Held*: A defamatory statement which is televised will be in the nature of libel even though a prepared script is not used. *Shor v. Billingsley*, 4 Misc. 2d 857, 158 N.Y.S.2d 476 (1957).

Libel apparently developed from the concept that printed or written defamation was the more damaging, with the result that a statement could be libelous if written but would not be slanderous if merely spoken. DAVIS, RADIO LAW 101 (2d ed. 1930). This difference was considered of sufficient importance to allow such an action without requiring plaintiff to prove special damages, as was required in slander. PROSSER, TORTS 585 (2d ed. 1955). Slander, however, is not actionable unless actual damage is proved, subject to certain exceptions, *viz.*, matters affecting business or occupation or imputations of crime, loathsome disease, or unchastity. PROSSER, TORTS, *supra* at 588.

It was an early common-law rule that the reading aloud of a defamatory writing would constitute publication of a libel if in the presence of others. *John Lamb's Case*, 9 Co. Rep. 59b, 77 Eng. Rep. 822 (1610); *De Libellis Famosis*, 5 Co. Rep. 125a, 77 Eng. Rep. 250 (1605); PROSSER, TORTS, *supra* at 598. This rule has been consistently followed, Annot., 171 A.L.R. 761 (1947), with the listeners' knowledge of the existence of the defamatory writing being deemed immaterial. *Sorensen v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932). But with widespread radio broadcasting, modern courts were confronted with the same basic problem that first arose with the advent of the printing press, *viz.*, whether defamation disseminated by a more effective medium of communication should be considered libel or slander. It was first held that a defamatory radio broadcast *when read from a script* was libelous rather than slanderous, *Sorensen v. Wood*, *supra*, but it was indicated that had the statement been extemporaneous, it would have been considered slander. Thus the rule was developed that defamatory *ad-libs* published through the medium of radio gave rise to an action of slander because their lack of permanence took such defamation outside the historic definition of libel. *Locke v. Gibbons*, 164 Misc. 877, 299 N.Y. Supp. 188 (1937). Televised defamation has been held analogous to defamation over radio and accordingly, extemporaneous defamatory statements made on a television broadcast have been re-

garded as slander. *Remington v. Bentley*, 88 F. Supp. 166 (S.D.N.Y. 1949).

The old distinctions between libel and slander have been justified for two reasons: (1) a defamatory writing usually indicates greater malice and deliberation by the defendant than mere oral statements and (2) written defamation is more often disseminated widely and therefore is the more damaging tort. The principal case seems to extend the traditional rule by emphasizing the aspect of wider publication. This would seem proper, for when defamatory matter is broadcast, whether read from a script or spontaneously interjected, the resultant damage suffered by plaintiff is identical. "It is not the writing that contains the sting but the audible words." Donnelly, *Defamation by Radio*, 34 IOWA L. REV. 12 (1948). The importance of permanence as an essential element of libel was minimized and correctly so, for that element is merely a factor in assessing plaintiff's damage rather than the heart of the action. That permanence of form has not always been essential is demonstrated in *Schultz v. Frankfort Maine Acc. and Plate Glass Ins. Co.*, 151 Wis. 537, 139 N.W. 386 (1913), where it was held that conspicuous shadowing was in the nature of libel because of great damage to plaintiff's reputation.

Similar reasoning indicates that whether defamation be read from a script or ad-libbed, resultant damage to plaintiff's reputation is precisely the same and only addiction to an ancient, outmoded rule could compel a modern court to classify such extemporaneous defamation as slander. Modern media of communication make it possible for information to be disseminated widely and quickly; therefore the only logical theory on which it may be held that written defamation *alone* results in greater financial liability and allows judgment without proof of special damages is that the writing is more indicative of malicious intent. It is suggested that the presence or absence of malice should not be considered of such importance because the damages inflicted will be the same regardless of malice; and absent a proper case for exemplary damages, the general policy of the law of torts is to compensate the injured party rather than punish the wrongdoer. It is believed that the principal case has correctly adopted the logical, more enlightened rule for this branch of the law of torts.

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