Volume 14 | Issue 1 Article 6

1960

Recent Case Notes

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RECENT CASE NOTES

Constitutional Law — Corporations — Taxation of Interstate Commerce

The state of Minnesota brought suit against a foreign corporation to collect income taxes. In another action a foreign corporation brought suit against the State Revenue Commissioner of Georgia to recover income taxes paid by the corporation under protest. In both actions, the activity of the foreign corporation (not licensed to do business within the taxing state) was exclusively interstate, and the tax thereon was imposed upon the net income of the foreign corporation derived from interstate business within the taxing state. The taxing formulas were based upon that part of the corporation's total sales, tangible property, and payrolls, which existed within the taxing state. *Held*: Neither the commerce clause nor the due process clause of the federal constitution is violated by a non-discriminatory, properly apportioned state tax on net income from interstate operations of a foreign corporation, provided there is a "sufficient nexus" between the tax and the local activities of the corporation within the taxing state to support the tax. *Northwestern States Portland Cement Co. v. Minnesota; Williams v. Stockman Valves & Fittings, Inc.*, 358 U. S. 450 (1959).

A state tax cannot constitute a direct restriction upon interstate commerce,[1] nor be discriminatory, favoring purely local or intrastate activity,[2] nor be a tax upon the privilege of carrying on interstate commerce.[3] Moreover, "multiple taxation" of interstate commerce, *i.e.*, taxation of the same commerce by more than one state, may be discriminatory, since local commerce is not exposed to the same burden.[4] However, property of an interstate corporation may be taxed by the state in whose jurisdiction the property lies,[5] and non-discriminatory sales taxes on interstate transactions involving tangible personal property, have been held not to infringe upon

[1] Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887); see Gibbons v. Ogden, 22 U.S. 1 (1824).

[2] Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); Nippert v. City of Richmond, 327 U.S. 416 (1946).

[3] Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954); Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951).

[4] Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939); J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938).

[5] Minnesota v. Blasius, 290 U.S. 1 (1933); Mackay Tel. & Cable Co. v. City of Little Rock, 250 U.S. 94 (1919).

the commerce clause.[6] Moreover, a state properly may tax a corporation licensed to do business within the taxing state on dividends made payable to its stockholders that are derived from income attributable to the corporation's activities within the taxing state.[7] However, before any tax upon interstate commerce can be constitutional, the apportionment formula used must be reasonably related to the local activities of the taxpayer.[8]

In the *Railway Express* case, decided on the same day as the principal cases, the Court held that a tax on a foreign interstate express company, measured by gross receipts from operations within the taxing state and imposed in lieu of all other property taxes was valid.[9] Prior to this case it had been held that a franchise or excise tax cannot be imposed on a foreign corporation engaged exclusively in interstate commerce,[10] but a franchise tax upon a foreign corporation doing some intrastate business has been upheld.[11] Further, a franchise tax measured by capital assets within the state may, in place of a property tax, be enforced against a foreign corporation engaged exclusively in interstate commerce.[12]

A net income tax upon the interstate business of a *domestic* corporation is constitutional if it is only an incidental burden on interstate commerce,[13] but a tax on gross proceeds from the interstate business of a domestic corporation, or a foreign corporation licensed to do business within the taxing state, is unconstitutional as a direct burden on interstate commerce.[14] The theory of the distinction between a tax on gross income and one on net income is that a tax on gross income would be levied whether or not the business made a profit, whereas a tax on net income only affected a business if it

[6] McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940); Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1935).

[7] Wisconsin v. J. C. Penny Co., 311 U.S. 435 (1940).

[8] International Harvester Co. v. Evatt, 329 U.S. 416 (1947); Western Livestock v. Bureau of Revenue, 303 U.S. 250 (1938); Hans Rees' Sons v. North Carolina, 283 U.S. 123 (1931).

[9] Railway Express Agency v. Virginia, 358 U.S. 434 (1959).

[10] Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925); Cheney Bros. v. Massachusetts, 246 U.S. 147 (1918).

[11] International Shoe Co. v. Shartel, 279 U.S. 429 (1929).

[12] Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948); Postal Tel. Cable Co. v. Adams, 155 U.S. 688 (1895).

[13] International Harvester Co. v. Evatt, 329 U.S. 416 (1947); Memphis Gas Co. v. Beeler, 315 U.S. 649 (1942); Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920); United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918); Peck & Co. v. Collector, 247 U.S. 165 (1918).

[14] Joseph v. Carter & Weeks Stevedoring Co., 330 U.S. 422 (1947); Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917); see Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954).

made a profit from the interstate commerce.[15] In *Spector Motor Service, Inc. v. O'Conner*,[16] a non-discriminatory franchise tax was imposed upon a foreign corporation engaged exclusively in interstate commerce for the privilege of carrying on business within the state. The tax, based upon that part of the corporation's net income which was reasonably attributable to its business activities within the state, was held to be a tax upon the privilege of engaging in interstate commerce, and was declared to constitute a direct burden on interstate commerce since there was no local incident justifying the tax. However, the Supreme Court affirmed a California decision permitting that state to tax the net income derived from interstate commerce within California of a foreign corporation not licensed to do business within California and doing no intrastate business.[17]

The Court in the principal cases reasoned that businesses operating in interstate commerce should pay their fair share of the costs of the state government in return for the benefits they derive from within the taxing state.[18] This reasoning is consistent with the principle of taxing interstate income of domestic corporations, *viz.*, that the test for the validity of the tax imposed is the relationship between the commercial activity and the privileges and protections provided by a taxing state, coupled with the prohibitions against discrimination in favor of local commerce.[19] Although a tax substantially the same as the one in the instant case, *i.e.*, upon net income, has been upheld,[20] a similar tax was struck down as a burden upon interstate commerce, since it taxed the "privilege" of conducting interstate business.[21] The distinction between the instant cases and also the *West Publishing* case[22] and the *Spector* case may lie in the fact that the statute involved in the *Spector* case specifically stated that the tax was for the "privilege of carrying on . . . business within the state. . . ."[23] This distinction may be a false one since, in reality, a tax was levied upon the net income of a foreign corporation en-

[15] United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918); Note, 57 Mich. L. Rev. 903 (1959).

[16] Cases cited note 3 supra.

[17] West Publishing Co. v. McColgan, 27 Cal.2d 705, 166 P.2d 861, aff'd per curiam, 328 U.S. 823 (1946).

[18] 358 U.S. at 461-62.

[19] Cases cited note 13 supra.

[20] West Publishing Co. v. McColgan, 27 Cal.2d 705, 166 P.2d 861 (1946), aff'd per curiam, 328 U.S. 823 (1946).

[21] Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951).

[22] West Publishing Co. v. McColgan, 27 Cal.2d 705, 166 P.2d 861 (1946), aff'd per curiam, 328 U.S. 823 (1946).

[23] Conn. Gen. Stat. tit. 12 § 214 (1958).

gaged in interstate commerce in all three cases. Accordingly, if the doctrine of the *Spector* case is considered to be valid, the validity of a state's tax upon the interstate operations of a foreign corporation may well depend upon the manner in which the language in the statute is phrased.[24] If the tax is levied upon net income derived from within the state (assuming a proper apportionment formula) it will be upheld under the doctrine of the instant cases,[25] but if the same tax is cast in terms of a "privilege to do business," the doctrine of the *Spector* case will invalidate it.[26]

The instant cases raise the problem of what will meet the requirement of what the Court terms a "sufficient nexus." Precedent in the field of substantive jurisdiction over the person of a corporation may guide courts in determining whether there is sufficient activity within the taxing state to support the tax. However, it may be questionable whether sales solicited by traveling salesmen and mail order businesses will form the requisite "sufficient nexus." Another problem presented by the decision is a determination of what will be a fair and reasonable apportionment formula to avoid discrimination and multiple tax burdens. It is believed that the standardization of an apportionment formula among the states would solve most of the problems in apportionment as well as prevent any multiple taxation. This standardization could be accomplished by reciprocity (either by statute or agreement) among the states, or by congressional action under the federal government's power to regulate interstate commerce. Further, it may be argued that the decision will place a burden on free commerce by requiring small and medium-size businesses to keep financial records of their interstate business. The answer to this argument is that, since all businesses today are required to keep complete records, the added burden of separate records on interstate business may be only slight. Paramount in the face of these difficulties lies the equity that interstate business should pay its fair share of the costs of the state government in return for the benefits it derives from within the state. The commerce clause was not intended to give interstate commerce a competitive advantage over intrastate commerce, but only to prevent intrastate commerce from discriminating against interstate commerce.

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[24] See Note, supra note 15.

[25] See also West Publishing Co. v. McColgan, 27 Cal.2d 705, 166 P.2d 861 (1946), aff'd per curiam, 328 U.S. 823 (1946).

[26] See 358 U.S. at 458.

Constitutional Law — Freedom of Speech — Motion Picture Censorship

Petitioner, a distributor of motion picture films, was denied a license to exhibit publicly the film "Lady Chatterly's Lover" under a statute which precluded licensing of films portraying "acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior."[1] *Held*: The constitutional guaranties afforded by the first amendment (which rights are protected from state infringement by the fourteenth amendment) are not confined to the expression of conventional ideas, and advocacy of conduct proscribed by law is no justification for denying free speech when such advocacy falls short of incitement to act. *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684 (1959).

The freedoms of speech and press are shielded by the first amendment against federal governmental invasion,[2] and are among the fundamental personal rights and liberties protected against state infringement by the due process clause of the fourteenth amendment.[3] However, the freedoms of speech and press are not absolute and unqualified rights,[4] and a state, pursuant to its police power, may enact regulations which limit freedom of speech in order to promote the general welfare,[5] as well as to promote and advance public morals.[6] Nevertheless, the power of a state to abridge freedom of speech and press is rarely upheld; thus a state legislature may not, under the guise of its police power, arbitrarily or unnecessarily interfere with either freedom.[7] Moreover, an otherwise valid state statute must not be vague as to its specific prohibitions and standards for determination.[8]

The *Mutual Film* case,[9] the first Supreme Court decision to determine the constitutionality of motion picture censorship, upheld the

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[1] N.Y. Educ. Law § 122 (1953).

[2] Bridges v. California, 314 U.S. 252 (1941).

[3] Near v. Minnesota, 283 U.S. 697 (1931); Gitlow v. New York, 268 U.S. 652 (1925) (dictum).

[4] See Roth v. United States, 354 U.S. 476 (1957); Numer v. Miller, 165 F.2d 986 (9th Cir. 1948).

[5] Beauharnais v. Illinois, 343 U.S. 250 (1952).

[6] Winters v. New York, 333 U.S. 507 (1948).

[7] Feiner v. New York, 340 U.S. 315 (1951); cf. Terminiello v. Chicago, 337 U.S. 1 (1949).

[8] E.g., Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[9] Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230 (1915). It must be noted that this case concerned a freedom of speech protection of a state constitution. Since it was decided before Gitlow v. New York, 268 U.S. 652 (1925) (dictum), the first amendment at this time was not enforceable against the states via the fourteenth amendment.

denial of a license to a film distributor upon the basis of the interstate commerce clause and rejected the contention that motion pictures were within the protection of the first amendment freedom of speech. Although this case established a widely-followed constitutional pattern, it has now been overruled by the *Burstyn* case.[10] In retrospect, it would appear that such a reversal was inevitable due to a changing constitutional climate which produced two general standards for evaluating freedom of speech censorship.[11] One of these standards, formulated by Mr. Justice Holmes in the *Schenck* case,[12] is whether the words used were of such a nature as to create a clear and present danger of bringing about a substantive evil which Congress intended to prevent. However, it must be noted that this doctrine has not received express application by the Court so as to justify a restraint upon communication dealing with sex.[13] The other standard, "the reasonable man test," asks whether a reasonable man, when confronted with a statute alleged to infringe civil liberties, could have reached the legislature's conclusion as to the existence of a danger demanding that protective action be taken.[14] Moreover, in the interim between the *Mutual Film* and *Burstyn* cases, two important decisions strengthened the anti-censorship views. The first of these espoused the idea that prior restraints[15] were always illegal.[16] The second made it clear that motion pictures, like newspapers and radio broadcasts, were to be included within the protections afforded by the first amendment.[17] A more recent case, *Roth v. United States*,[18] has provided a third test for ascertaining the constitutionality of free speech censorship. In this case it was held that obscenity is not "speech" within the meaning of the first amendment and therefore

[10] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); United States v. Paramount Pictures, 334 U.S. 131 (1948).

[11] See Nimmer, The Constitutionality of Official Censorship of Motion Pictures, 25 U. Chi. L. Rev. 625 (1958).

[12] Schenck v. United States, 249 U.S. 47 (1919); accord, Yates v. United States, 354 U.S. 298 (1957).

[13] Comment, 59 Colum. L. Rev. 337, 344 (1959).

[14] See Meyer v. Nebraska, 262 U.S. 390 (1923); Lochner v. New York, 198 U.S. 45 (1905); Pritchett, Civil Liberties and the Vinson Court 28 (1954).

[15] Whereas prior restraint prevents the questionable medium of speech or press from ever reaching the public (generally by means of a licensing system), the doctrine of subsequent punishment imposes penal sanctions only upon the occurrence of an actual violation. Compare Saia v. New York, 334 U.S. 558 (1948) (requirement of special license for sound trucks held invalid), with Kovacs v. Cooper, 336 U.S. 77 (1949) (subsequent punishment for making "loud and raucous noises" upheld).

[16] Near v. Minnesota, 283 U.S. 697 (1931); but see Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) (limitation).

[17] United States v. Paramount Pictures, 334 U.S. 131 (1948). In effect, this decision overruled that part of the Mutual Film case which held that motion pictures were not within the protection of the first amendment.

[18] Cases cited note 4 supra.

the dissemination of obscene material can be restrained or punished without showing that dissemination would create a clear and present danger.[19] Accordingly, state regulation of communication that is not based on one of these grounds (the *Roth* holding or the clear and present danger test) is unconstitutional unless the restriction relates to how, when, or where the communication is made rather than to its contents.[20]

Unfortunately, other than overruling the *Mutual Film* decision, the Court in the *Burstyn* case (censorship of sacrilegious material not permitted) failed to pronounce a precedent-setting standard for future comparison since the Court did not clarify whether its holding was based on procedural due process (*i.e.*, "sacrilegious" is too vague a term) or upon a violation of the substantive rights included within the meaning of free speech (*i.e.*, "sacrilegious" failed to reflect a subject matter which permits the state's police power to infringe upon free speech).[21] Further, no Supreme Court decision since the *Burstyn* case has upheld a ban on a motion picture.[22] In three of the four such cases decided since that time, the Court (by per curiam memorandum decisions) apparently based its decisions on the vagueness issue.[23] Only the fourth seems to be based on the freedom of speech protection of the first amendment.[24] In regard to the Court's failure to clarify its substantive position, writers hoped that the next opinion on the subject would take a more objective approach;[25] however, such desires were unrealized in the instant case. Nevertheless, the opinion in the principal case does make two contributions: first, most of the Justices held that statutes which speak in terms of "favorable portrayal of acts of sexual immorality" are unconstitutional violations of the guarantee of freedom of speech since they do not come within the "obscene exception" of the *Roth* case; and secondly, the implication is made that the clear and present danger doctrine *is* applicable as a basis for the regulation of motion pictures of content relating to sexual activity.[26] Still, fundamental dissension within the Court prevented any uniform judicial interpretation. Thus, while some (Justices

[19] 354 U.S. at 485, 486.

[20] Comment, supra note 13, at 339.

[21] Casenote, 37 Texas L. Rev. 339 (1959).

[22] Casenote, 44 Cornell L.Q. 411 (1959).

[23] Commercial Pictures Corp. v. Regents of the Univ. of New York, 346 U.S. 587 (1955) (two cases); Gelling v. Texas, 343 U.S. 960 (1952).

[24] Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957).

[25] See, e.g., Nimmer, supra note 11, at 636: "But, until the Supreme Court renders another opinion in a motion picture case, (this) rationalization of the per curiam decisions is at best a reasoned conjecture."

[26] 360 U.S. at 689.

Black, Clark, Douglas and Stewart) thought the statute itself was unconstitutional, others (Justices Frankfurter, Harlan, and Whittaker) agreed that the statute was constitutional but was unconstitutionally applied to the facts. Further, there is complete lack of agreement as to the constitutionality of prior restraints. Only Justices Black and Douglas expressly concluded that prior restraint per se in the field of motion picture censorship is unconstitutional.[27] Thus, with five divergent concurring opinions, the instant case is not extremely significant in setting forth strong judicial precedent other than to demonstrate that within the present Court there are strongly held but vastly contrasting opinions and no indications of a compromise decision within the near future.

Mr. Justice Harlan (in his concurring opinion in the instant case)[28] accurately pinpoints the problem of the future when he states that unless the Court holds all censorship laws unconstitutional (a course from which the Court now carefully abstains), the courts must ultimately adjudicate the individual cases in this field on an *ad hoc* basis. Assuming that the latter alternative (which Mr. Justice Harlan favors) is adopted by the Court, there must be some indication as to whether the method of control will be prior restraint or subsequent punishment. Undoubtedly, if prior restraint is permitted, it will necessarily be limited to state legislation clearly based on the *Roth* "obscenity exception" or the clear and present danger doctrine. There is another possible irreducible minimum prerequisite for motion picture censorship; *viz.*, unless conduct seen on the screen would, if seen in real life, constitute "indecent exposure" (which is more capable of a precise standard), such conduct cannot be censored on the screen. Nevertheless, the additional protection possibly afforded public morals by requiring the licensing of all motion pictures does not justify the additional encroachments of this prior restraint on freedom of speech inherent in any licensing system, and subsequent punishment is definitely preferable. It must be concluded that the instant case has given no support for either of these alternatives and, considering the present improbability of Supreme Court unanimity on the subject, if any clarification of the law in this respect is forthcoming, it will be several years away.

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[27] Id. at 690, 697. If a motion picture is "obscene," prior restraint would be permitted since, under the Roth case, obscenity is not entitled to first amendment protection.

[28] 360 U.S. at 708.

Corporations — Stock Alienation Restrictions — Power of Directors To Restrict Issued Stock

The directors (two-thirds stockholders) of *D* corporation passed a bylaw giving the corporation the right of first refusal on all *outstanding,* previously unrestricted stock. The price to be paid upon exercise of this option was to be determined by independent appraisers. On the basis of this new bylaw, all outstanding unrestricted stock certificates were canceled and new stock certificates containing the imposed restriction were issued in their place. *P,* a minority stockholder of *D* corporation, refused to accept the new stock and brought an action contending that the restriction imposed without his consent was conversion of his stock. *Held*: The board of directors of a corporation cannot via bylaw amendment restrict alienability of previously unrestricted stock since the original issue creates a contract between the corporation and the shareholder and the shareholder has a "vested" right of free alienability. *Sandor Petroleum Corp. v. Williams,* 321 S.W.2d 614 (Tex. Civ. App. 1959) *error ref. n.r.e.*

Corporate stock, as a form of personal property[1] represented by a stock certificate,[2] generally includes the right of free alienation.[3] Early judicial opinion interpreted free alienation of corporate stock to mean absolute and unrestricted disposition.[4] However, as corporate law became more liberal, some limitations upon the free transferability of stock were permitted,[5] *e.g.,* a stockholder could be required to give the corporation the first option to purchase the stock.[6] These limited restrictions could be placed upon stock transferability through legislative act or amendment to the articles of incorporation.[7] The modern trend also permits restrictions by express contract among the stockholders or by a corporate bylaw.[8] Generally, all restrictions allow the corporate structure to regulate the admission

[1] Allen v. Biltmore Tissue Corp., 2 N.Y.2d 534, 141 N.E.2d 812 (1957).

[2] Gower, Some Contrasts Between British and American Corporation Law, 69 Harv. L. Rev. 1369 (1956).

[3] Chouteau Spring Co. v. Harris, 20 Mo. 382 (1855).

[4] Note, 63 Dick. L. Rev. 265 (1958).

[5] Ireland v. Globe Milling & Reduction Co., 19 R.I. 180, 32 Atl. 921 (1895); Brinkerhoff-Farris Trust & Sav. Co. v. Home Lumber Co., 118 Mo. 447, 24 S.W. 129 (1893).

[6] Douglas v. Aurora Daily News Co., 160 Ill. App. 506 (1911).

[7] Tracey v. Franklin, 30 Del. Ch. 407, 61 A.2d 780 (1948); Royal China, Inc. v. Regal China Corp., 279 App. Div. 515, 304 N.Y. 309, aff'd, 110 N.Y.S.2d 718, 107 N.E.2d 461 (1952); Casenote, 23 Tul. L. Rev. 569 (1949).

[8] See Coleman v. Kettering, 289 S.W.2d 953 (Tex. Civ. App. 1956); Annot., 61 A.L.R.2d 1318 (1958).

of new stockholders, a power similar to the control of a partnership over the admission of new partners.[9]

Fundamentally, there are three prerequsites which must be met in order for a corporation validly to restrict alienation of stock.[10] First, where a person becomes a stockholder he is generally subject to the statutes, charter, and bylaws existing at the time of incorporation,[11] *but* if he is not notified or informed as to the restriction on alienation, such existing restrictions are not binding upon him.[12] Thus, restrictions on the alienation of stock must be stated on the stock certificate itself in order to be valid,[13] on the theory that the stockholder is "notified" of the restriction when it so appears.[14] Accordingly, Texas requires that any restriction on alienation whether it is imposed by the charter or bylaws be stated either at length or in summary form on the stock certificate[15] in order for it to be binding upon innocent purchasers of the corporation's stock.[16] Moreover, the notice requirement is also the foundation for the "contract test" for determining the validity of a restriction on the alienation of stock.[17] This test is based on the theory that an agreement exists between the stockholder and the corporation which fixes the rights of the parties according to their "notice" of the restriction upon entering into the contract.[18] Second, a corporation must have the authority to impose restrictions on the stock. In Texas this authority, subject to the limitations of article 2.22B, is included in the authority to make bylaws,[19] which may be delegated by the shareholders to the directors.[20] The authority to adopt restrictions on alienation is important because it enables selective control of stock ownership.[21] The

[9] Allen v. Biltmore Tissue Corp., 2 N.Y.2d 534, 141 N.E.2d 812 (1957); Bloomingdale v. Bloomingdale, 107 Misc. 646, 177 N.Y.Supp. 873 (Sup. Ct. 1919); Model Clothing House v. Dickinson, 146 Minn. 367, 178 N.W. 957 (1920).

[10] Cataldo, Stock Transfer Restrictions and the Closed Corporation, 37 Va. L. Rev. 229 (1951).

[11] Palmer v. Chamberlin, 191 F.2d 532 (5th Cir. 1951); Allen v. Biltmore Tissue Corp., 2 N.Y.2d 534, 141 N.E.2d 812 (1957); Casenote, 38 Va. L. Rev. 103 (1952).

[12] Mancini v. Setaro, 69 Cal. App. 748, 232 Pac. 495 (Dist. Ct. 1924); Annot., 61 A.L.R.2d 1318, 1327 (1958); Cataldo, supra note 10, at 251.

[13] Uniform Stock Transfer Act § 15 (Every state, including Alaska and Hawaii, has either expressly adopted section 15 of the Uniform Act or incorporated its substance into a statute); Tex. Bus. Corp. Act art. 2.22A (Supp. 1958). See also note 16 infra.

[14] First Nat'l Bank v. Shanks, 34 Ohio Op. 359, 73 N.E.2d 93 (1945).

[15] Tex. Bus. Corp. Act art. 2.22A (Supp. 1958).

[16] Tex. Rev. Civ. Stat. Ann. art. 1358(15) (1943) (adopted from section 15 of the Uniform Stock Transfer Act).

[17] Bechtold v. Coleman Realty Co., 367 Pa. 208, 79 A.2d 661 (1951).

[18] Royal China, Inc. v. Regal China Corp., 379 App. Div. 515, 304 N.Y. 309, aff'd, 110 N.Y.S.2d 718, 107 N.E.2d 461 (1952).

[19] Tex. Bus. Corp. Act art. 2.22A (Supp. 1958).

[20] Tex. Bus. Corp. Act art. 2.23 (Supp. 1958); Slover, Drafting Articles of Incorporation under the Texas Business Corporation Act, 8 Baylor L. Rev. 127 (1956).

[21] Kretzer v. Cole Bros. Lightning Rod Co., 193 Mo. App. 99, 181 S.W. 1066 (1916).

third requisite is that the restriction must be reasonable and not contrary to public policy. Thus, an absolute restriction which categorically takes from the stockholder the right of transfer has been uniformly held unreasonable.[22] This third prerequisite is the basis for the "reasonableness test" which places a greater emphasis on the *reasonability* of the restriction rather than the *contractual* relations of the shareholder and the corporation.[23] These three prerequisites, including the "contract test" and the "reasonableness test", are mutually dependent to such an extent that in practice they are generally inseparable.[24]

The court in the instant case, apparently the first to decide the legality of imposing restrictions on alienation of previously issued unrestricted stock, reasoned that a contractual relationship had been established between the corporation and the shareholder when the stock was issued; therefore, the right of free alienation implicit in the original issue became vested and could not thereafter be infringed through a bylaw amendment.[25] This reasoning is analogous to the "vested rights" theory of accumulated but unpaid dividends on cumulative preferred stock.[26] Courts adopting this theory hold that the right of any preferred shareholder to accumulated but unpaid dividends cannot be taken from him either by corporate action through the board of directors, or by shareholder action through a charter amendment.[27] However, any formal merger may eliminate these rights.[28] One federal case applying Texas law has rejected this "vested rights" theory,[29] and the Texas Business Corporation Act specifically permits elimination of accumulated but unpaid dividends by charter amendment.[30] Accordingly, since Texas has rejected the concept of unalterable shareholder rights by contract in this analogous situation, the reasoning that a right of alienation is vested and thus, can never be subsequently restricted, may be regarded as questionable.[31]

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[22] Gould v. Head, 41 Fed. 240 (C.C.D. Colo. 1890); Baumohl v. Goldstein, 95 N.J.Eq. 597, 124 Atl. 118 (1924); Pelton v. Nevada Oil Co., 209 S.W.2d 645 (Tex. Civ. App. 1948) error ref. n.r.e.; Cataldo, supra note 10, at 233.

[23] See Huffman v. Sho-Me Power Co-op, 356 Mo. 832, 204 S.W.2d 276 (1947); Annot., 61 A.L.R.2d 1318 (1958).

[24] Dobry v. Dobry, ___ Okla. ___, 262 P.2d 691 (1953).

[25] See 321 S.W.2d at 618-19.

[26] Keller v. Wilson & Co., 21 Del. Ch. 391, 190 Atl. 115 (1936).

[27] Consolidated Film Indus., Inc. v. Johnson, 22 Del. Ch. 407, 197 Atl. 489 (1937); Keller v. Wilson & Co., supra note 26; contra, McNulty v. W. & J. Sloane, 184 Misc. 835, 54 N.Y.S.2d 253 (Sup. Ct. 1945); see generally Lattin, Corporations 502-07 (1959).

[28] Federal United Corp. v. Havender, 24 Del. Ch. 318, 11 A.2d 331 (1940).

[29] Ainsworth v. Southwestern Drug Corp., 95 F.2d 172 (5th Cir. 1938).

[30] Tex. Bus. Corp. Act art. 4.01B (11) (Supp. 1958).

[31] But see Bechtold v. Coleman Realty Co., 367 Pa. 208, 79 A.2d 661 (1951). Re-

Moreover, the court in the instant case reasoned that even though the Texas Business Corporation Act provides that an option of first refusal may be imposed by the bylaws,[32] that provision did not contemplate a subsequent bylaw amendment restricting alienability of outstanding stock.[33] Since courts have uniformly held that an option of first refusal (with the price to be set by impartial appraisers) is a reasonable restriction on alienation,[34] and since the act provides that a corporation may amend its bylaws "not inconsistent with . . . the laws of this state . . . ,"[35] this reasoning is less than convincing. However, notwithstanding this reasoning of the court, it seems that the stock could have been restricted validly by charter amendment. The act provides that the articles of incorporation may be amended "to change the . . . limitations and relative rights . . . of all or any part of its shares . . . ,"[36] "so long as . . . the articles . . . as amended contain only such provisions as might be lawfully contained in original articles of incorporation . . . ."[37] Thus, since a corporation may originally provide for an option of first refusal restricting the alienability of stock,[38] it would seem that previously unrestricted stock could be restricted by charter amendment. The measure of amendment is shareholder approval by two-thirds vote.[39] Therefore, the directors, as two-thirds stockholders, could have accomplished their desired result through amendment of the charter.

If the above action had been taken by the directors, acting as shareholders, the court could still have reasoned that the act does not contemplate this subsequent change even by charter amendment. However, since somewhat more significance is generally given to charter amendment than bylaw amendment, and since a vote of the shareholders (two-thirds) would be required, the court could easily have reached an opposite result. Therefore, the principal case should be regarded as authority only for the proposition that the board of directors may not by *bylaw* amendment restrict transferability of previously freely alienable stock. Restricting the alienability of stock, of course, has the greatest impact on closely-held corporations where control of shareholder identity is or may be significant. On this basis,

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strictions on stock cannot be eliminated by a majority of the shareholders via bylaw amendment since the restriction was a binding contract.

[32] Tex. Bus. Corp. Act art. 2.22A (Supp. 1958).

[33] See 321 S.W.2d 618.

[34] See, e.g., Coleman v. Kettering, 289 S.W.2d 953 (Tex. Civ. App. 1956).

[35] Tex. Bus. Corp. Act art. 2.02A (13) (Supp. 1958).

[36] Tex. Bus. Corp. Act art. 4.01B (7).

[37] Tex. Bus. Corp. Act art. 4.01A.

[38] Tex. Bus. Corp. Act art. 2.22B (3).

[39] Tex. Bus. Corp. Act art. 4.02A; cf. art. 4.03.

the opinion shows a general lack of insight into the fundamental relationship between shareholder and corporation, and an unwarranted strict construction of the Texas Business Corporation Act. If, under Texas law, rights to accrued but unpaid dividends on cumulative preferred stock may be eliminated by charter amendment, alienation rights, being no more sacrosanct, should similarly be subject to reasonable restriction subsequent to issuance of the stock.

Ronald Griesheimer

Criminal Law — Harmless Error — Jury Misconduct

D was convicted of the crime of statutory rape and sentenced to thirty years in prison. After the jury retired, some jurors made statements intimating that because of pardon, parole, or time off for good behavior, *D* would serve only one-third of his sentence. On appeal, *D* contended that consideration of the pardon and parole laws constituted jury misconduct and reversible error. *Held*: Jury consideration, during its deliberation, of the application of pardon and parole laws is not reversible error when the information received is an accurate statement of the law. *Salcido v. State*, — Tex. Crim. —, 319 S.W.2d 329 (1959).

It is well established in both civil and criminal cases that one seeking reversal must show that he was probably harmed by error in the trial court.[1] No fixed rule may be utilized in finding prejudicial error in criminal cases;[2] but more caution must be exercised than in civil cases before the courts are justified in finding error nonprejudicial,[3] and any error in a criminal case, other than a minor, technical one which does not affect the substative rights of an appellant, cannot be disregarded.[4]

If, after retiring, a jury receives new evidence damaging to the defendant a presumption of injury ordinarily applies,[5] but, if the information received relates to a question of the pardon and parole

[1] Tex. Rules Civ. Pro. Ann., rule 434 (1955); Pena v. State, 137 Tex. Crim. 311, 129 S.W.2d 667 (1939); Dakoff v. National Bank of Commerce, 254 S.W.2d 550 (Tex. Civ. App. 1952) error ref.

[2] Deming v. State, 235 Ind. 282, 133 N.E.2d 51 (1955).

[3] State v. Collins, 249 Iowa 989, 69 N.W.2d 31 (1955).

[4] State v. Nugent, 134 Iowa 237, 111 N.W. 927 (1907); see Hatley v. State, 151 Tex. Crim. 280, 206 S.W.2d 1017 (1947).

[5] Gilson v. State, — Tex. Crim. —, 145 S.W.2d 182 (1940); Pafford v. State, 138 Tex. Crim. 299, 135 S.W.2d 990 (1940); Brown v. State, 134 Tex. Crim. 275, 115 S.W.2d 646 (1938).

laws, the presumption of injury may be inapplicable, and the test is one of the accuracy of the information.[6] Accordingly, the primary question is whether the information received during deliberation was *untrue*,[7] even though in *Roberson v. State*[8] the court held that *untrue* information received by the jury regarding the parole laws was *not harmful*. Following the *Roberson* decision, the court in *Napier v. State*[9] held that *true* information received was *per se* not harmful. Thus, while earlier cases apply the more prevalent test of whether the information received caused substantial prejudice to the defendant *whether or not it was true*,[10] recent cases apparently base the test of harm upon the truth of the information received.[11] If the information received is *true*, then the defendant is not harmed.[12] Contrary to the *Roberson* case quoted therein, it was held in *Mays v. State*[13] that the receipt of *untrue* information was *per se* harmful to the defendant. In other cases the court has refused to instruct the jury regarding the parole laws,[14] and it has also been held improper for the attorneys to discuss the parole laws during the course of the trial.[15]

The court in the principal case articulates the rule promulgated in *Napier v. State*,[16] *viz.*, if the information received is true, then it is per se not harmful to the defendant. This reliance upon the truth of the information received by the jury in determining whether the defendant was prejudiced appears to be the result of dictum from the *Roberson* case. The phrase "was untrue or was harmful," though not in fact followed by the court in the *Roberson* case, has been relied upon and extended in later cases.[17] This rule seems to be a departure from the propositions that prejudice caused by the information received is to be scrutinized carefully in criminal cases[18] and

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[6] Cf. Mays v. State, ___ Tex. Crim. ___, 320 S.W.2d 13 (1959); Napier v. State, ___ Tex. Crim. ___, 314 S.W.2d 102 (1958).

[7] Roberson v. State, 160 Tex. Crim. 381, 271 S.W.2d 663 (1954) (dictum).

[8] Ibid.

[9] Cases cited note 6 supra.

[10] Simmons v. State, 156 Tex. Crim. 153, 239 S.W.2d 625 (1951); Plasentilla v. State, 152 Tex. Crim. 618, 216 S.W.2d 187 (1948); Price v. State, ___ Tex. Crim. ___, 199 S.W.2d 168 (1946); King v. State, 141 Tex. Crim. 257, 148 S.W.2d 199 (1941).

[11] See Mays v. State, ___ Tex. Crim. ___, 320 S.W.2d 13 (1959); Johnson v. State, ___ Tex. Crim. ___, 305 S.W.2d 606 (1957); Jackson v. State, 157 Tex. Crim. 323, 248 S.W.2d 748 (1952).

[12] Napier v. State, ___ Tex. Crim. ___, 314 S.W.2d 102 (1958).

[13] Cases cited note 6 supra.

[14] De La Rosa v. State, ___ Tex. Crim. ___, 317 S.W.2d 544 (1958); Prater v. State, 131 Tex. Crim. 35, 95 S.W.2d 971 (1936).

[15] Pena v. State, 137 Tex. Crim. 311, 129 S.W.2d 667 (1939).

[16] Cases cited note 6 supra.

[17] Cases cited note 6 supra.

[18] State v. Collins, 249 Iowa 989, 69 N.W.2d 31 (1955).

that each case must be examined individually to determine if substantial prejudice has resulted.[19] The anomolous situation may arise whereby a consideration of evidence is *harmless* error if it is received by the jury during deliberation and happens to be true. This result would be in conflict with the harmless error concept which regards error harmful if it is shown to prejudice substantially the defendant's right.[20] Thus, the recent trend culminating in the present case and *Mays v. State, viz.*, that the crucial element in determining whether substantial prejudice was caused lies in the *truth* of the information received, overlooks the fact that prejudice can be caused by the mere receipt of information regardless of its accuracy.[21]

The receipt of information regarding the pardon and parole laws by the jury during its deliberations is capable of being prejudicial regardless of the accuracy of the information received since jurors may be prompted by parole information to recommend longer sentences on the theory that the defendant would only serve a portion of any sentence given. This information could be prejudicial even though "true," since as a practical matter the defendant may have to serve the longer sentence. Further, the formulation of a rigid test based upon the truth of the information received leads to inequitable results. The complexity of the parole laws and the corresponding need for flexibility in their administration would not render feasible jury instruction as to these laws. Similarly, to instruct a jury not to consider them would, while making their consideration grounds for reversal on appeal, focus the individual juror's subjective attention upon the very information not to be considered. The better procedure would be for the court to abolish the rigid "truth test" and to give close scrutiny to each record which involves the possibility of prejudice in the jury's deliberations. This procedure would lead the court out of the confusion which seems to have resulted from the misinterpretation of the unfortunate "was untrue or was harmful" dictum of the *Roberson* case.

Alan D. Feld

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[19] See Deming v. State, 235 Ind. 282, 133 N.E.2d 51 (1955); State v. Nugent, 134 Iowa 237, 111 N.W. 927 (1907).

[20] See Roberson v. State, 160 Tex. Crim. 381, 271 S.W.2d 663 (1954); Simmons v. State, 156 Tex. Crim. 153, 239 S.W.2d 625 (1951); Price v. State, ___ Tex. Crim. ___, 199 S.W.2d 168 (1946).

[21] De La Rosa v. State, ___ Tex. Crim. ___, 317 S.W.2d 544 (1958); Pena v. State, 37 Tex. Crim. 311, 129 S.W.2d 667 (1939).

Evidence — Admissibility of Scientific Evidence — Tactograph

P brought suit for the wrongful death of her husband, who was killed when his automobile collided with *D*'s truck, alleging that *D*'s driver was negligent in failing to yield the right-of-way, failing to keep a proper lookout, and failing to operate his truck with proper lights. The trial court, over *P*'s objection, permitted *D* to introduce the truck's tactograph into evidence. (A tactograph is an instrument which records on a paper dial the speed of the vehicle on which it is installed at any given time.) *Held, reversed and remanded*: A "tactograph" is inadmissible where there is insufficient proof of its accuracy and where its relevance is not established. *Bell v. Kroger Co.*, — Ark. —, 323 S.W.2d 424 (1959).

The admissibility of scientific matter in evidence is not of recent origin. X-ray photographs, for example, were admitted as early as 1896.[1] Courts now permit a wide variety of scientific evidence to be admitted in evidence, *e.g.*, fingerprints,[2] results of the Harger breath test for determining intoxication,[3] blood test results,[4] urine analyses,[5] radar speedmeters,[6] speedometers,[7] and speed recorder tapes.[8] Generally, testimony based on scientific apparatus is admissible if (1) the apparatus is accepted as dependable in the field of science involved; (2) the particular apparatus used by the witness is in good condition for accurate work; and (3) the witness using the apparatus as the source of his testimony is qualified for its use by training and experience.[9] Moreover, even though the apparatus must be regarded as accurate and have gained general acceptance in the particular field in which it belongs,[10] the fact that some experts refuse to recognize it as dependable,[11] or that the instrument is not foolproof[12] does not preclude its admissibility. If there is any possibility of error, it affects the weight, rather than the admissibility, of the

[1] Smith v. Grant, 29 Chicago Legal News 145 (1896); see also Scott, X-ray Pictures as Evidence, 44 Mich. L. Rev. 773 (1946).
[2] People v. Jennings, 252 Ill. 534, 96 N.E. 1077 (1911).
[3] McKay v. State, 155 Tex. Crim. 416, 235 S.W.2d 173 (1950).
[4] Cortese v. Cortese, 10 N.J.Super. 152, 76 A.2d 717 (1950).
[5] State v. Stater, 242 Iowa 958, 48 N.W.2d 877 (1951).
[6] State v. Dantonio, 18 N.J. 570, 115 A.2d 35 (1955).
[7] City of Spokane v. Knight, 96 Wash. 403, 165 Pac. 105 (1917).
[8] Whitton v. Central of Georgia Ry., 89 Ga. App. 304, 79 S.E.2d 331 (1953).
[9] Wigmore, The Science of Judicial Proof 450 (3d ed. 1937). See also, Wilson v. State, — Tex. Crim. —, 328 S.W.2d 311, 313 (1959).
[10] Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923).
[11] McKay v. State, 155 Tex. Crim. 416, 235 S.W.2d 173 (1950).
[12] City of Spokane v. Knight, 96 Wash. 403, 165 Pac. 105 (1917).

evidence.[13] Further, the trial court has wide discretion in determining when the witness who utilizes the apparatus is an expert,[14] and the qualifications necessary for experts depend largely upon the subject under investigation.[15]

Instruments similar in mechanical operation to the tactograph have been held admissible, *e.g.*, discs of recorded conversations,[16] a speed-recorder tape taken off a train after a collision,[17] and motion picture films.[18] However, while several cases contain references to tactographs,[19] the direct question of their admissibility has never been decided.

The defendant in the instant case failed to prove that the particular tactograph which he sought to introduce was in accurate working order; moreover, the tactograph evidence was irrelevant because the plaintiff did not allege that the defendant's driver was speeding at the time of the accident. Under these facts the court's rejection of the tactograph was clearly correct.[20] Nevertheless, the importance of the instant case lies in the foundation which it may provide for the admissibility of a tactograph in future cases. Although the court did not discuss the scientific reliability of the tactograph, it seems to have assumed that the instrument possesses the requisite reliability and that it could be successfully introduced in a proper case.[21] A recent Texas decision contains a similar indication.[22] In the *Braun* case the court, applying the doctrine of spoliation,[23] held that from *D*'s failure to introduce the tactograph from his truck or to explain his failure to do so the jury could infer that the truck was travelling at an excessive rate of speed at the time of the accident.[24] The clear implication of this holding is that the court regarded the tactograph as an accurate speed recorder. Buttressing the argument that the instrument is reliable are the results of a recent accuracy check by the

[13] State v. Dantonio, 18 N.J. 570, 115 A.2d 35 (1955).
[14] 2 McCormick & Ray, Texas Law of Evidence § 1401 (2d ed. 1956).
[15] People v. Fiorita, 339 Ill. 78, 170 N.E. 690 (1930).
[16] Kilpatrick v. Kilpatrick, 123 Conn. 218, 193 Atl. 765 (1937).
[17] Whitton v. Central of Georgia Ry., 89 Ga. App. 304, 79 S.E.2d 331 (1953).
[18] Housewright v. State, 154 Tex. Crim. 101, 225 S.W.2d 417 (1950).
[19] State v. Dantonio, 18 N.J. 570, 115 A.2d 35 (1955); Cooper v. Hoegland, 221 Minn. 446, 22 N.W.2d 450 (1946); Union Transports, Inc. v. Braun, 318 S.W.2d 927 (Tex. Civ. App. 1958).
[20] Cf. Wigmore, op cit. supra note 9, at 450.
[21] 323 S.W.2d at 426-27.
[22] Union Transports, Inc. v. Braun, 318 S.W.2d 927 (Tex. Civ. App. 1958).
[23] The doctrine of spoliation creates a presumption that certain written instruments and other objects which are under a party's control would not have aided his case when he fails or refuses to produce such instruments or objects at the trial. See McCormick & Ray, op. cit. supra note 14, at § 103.
[24] Union Transports, Inc. v. Braun, 318 S.W.2d 927, 932 (Tex. Civ. App. 1958); see 1 McCormick & Ray, op. cit. supra note 14, at § 103.

National Truck Drivers Association,[25] which shows only a small variation between the speed recorded on a tactograph and that recorded by radar.

It seems reasonable that the tactograph will ultimately be accorded admissibility by the courts, although resolution of the question must, of course, await the presentation of a proper case. Utilization of the tactograph in tort litigation could be extensive, since many collision cases depend upon proof (or lack of proof) of speed as the controlling ground of negligence. The tactograph would be of considerable aid to juries in determining the negligence issues in these cases, and hence recognition of its admissibility would be a desirable and progressive development in the law of evidence.

Jay Ungerman

Evidence — Hearsay Rule — Admissibility of Hospital Records

An insurer appealed from a judgment for the beneficiary under two burial policies, both of which contained a provision declaring that the policy would not be in force unless delivered to the applicant while he was alive and in good health. In defense, the insurer had introduced at the trial evidence drawn from diagnostic recitations in hospital records tending to show that the deceased applicant had leukemia and thus was not in good health when the policies were delivered. This evidence was excluded as hearsay. *Held*: The Texas Business Records Act (which provides for the reception in evidence of entries made in the regular course of business) authorizes the admission of hospital records which include the diagnosis of leukemia. *Travis Life Ins. Co. v. Rodriquez*, 326 S.W.2d 256 (Tex. Civ. App. 1959) *error ref. n.r.e.*

The hearsay rule excludes evidence of a statement made out of court when such evidence is offered for the purpose of proving the truth of the previous statement.[1] The theory of the rule is that the truth of the statement cannot be substantially guaranteed since (1) the trier of the facts has no opportunity to determine the credibility of the maker of the statement, (2) the statement is not made under

[25] See N.T.D.A. Conducts Test, The National Truck Drivers Magazine, July, 1957.

[1] 1 McCormick & Ray, Texas Law of Evidence § 781 (2d ed. 1956).

oath, (3) there is no adequate opportunity for cross examination, and (4) there is no protection against inaccurate transmission.[2] However, many exceptions have been impressed upon the rule in situations where there is a substantial guarantee of the truth.[3] One such exception allows the admission of business records when they satisfy certain requirements.[4] The admissibility of business records initially was confined to those of a commercial nature, but the modern trend has been to include records of a non-commercial nature, such as hospital records.[5] Although the courts were slow to extend the common-law exception for business records to hospital and doctors' records, there was never much difficulty in admitting daily factual reports on the condition of the patient as long as the contents of such records were within the personal knowledge of the doctor or other hospital employee making the entry, and the records were kept for use in treating the patient.[6] Prior to the enactment of statutes in this area, physicians' reports of examination and treatment,[7] as well as diagnoses,[8] were held admissible in evidence, but only when verified by the persons making the entries.[9] This verification was required in an effort to guarantee the truthfulness of the record before it was admitted,[10] but the Federal Business Records Act[11] was enacted to abolish such technical requirements.[12] The reliability of the records is said to come from their source and origin and the nature of their compilation.[13] Specifically, it is often argued that the truthfulness of hospital records and physicians' reports is guaranteed by the fact that persons in the medical profession are generally of high character, the records are relied upon in matters of life and death, and they represent "automatic reflections of observations" on which competent doctors would not differ.[14] Consequently, many courts refuse to extend the exception to areas of complicated diagnoses such as psychiatry wherein the courts have felt there is too much conjecture for the resulting records to be admissible under the statute.[15]

[2] See 1 McCormick & Ray, op. cit. supra note 1, § 782.
[3] See 2 McCormick & Ray, op. cit. supra note 1, §§ 1381-84.
[4] See 2 McCormick & Ray, op. cit. supra note 1, §§ 1251-62. See also Ray, Three New Rules of Evidence, 5 Sw. L.J. 381 (1951). See notes 18-24 infra.
[5] Ray, Business Records—A Proposed Rule of Admissibility, 5 Sw. L.J. 33 (1951).
[6] 6 Wigmore, Evidence § 1707 (3d ed. 1940).
[7] Adler v. New York Life Ins. Co., 33 F.2d 827, 832 (8th Cir. 1929).
[8] New York Life Ins. Co. v. Bullock, 59 F.2d 747 (S.D. Fla. 1932).
[9] Grossman v. Delaware Elec. Power Co., 34 Del. 521, 155 Atl. 806 (1929).
[10] Globe Indemn. Co. v. Reinhart, 152 Md. 439, 137 Atl. 43 (1927).
[11] 49 Stat. 1561 (1936), 28 U.S.C. § 695 (1940).
[12] Ulm v. Moore-McCormack Lines, 115 F.2d 492 (2d Cir. 1940).
[13] Palmer v. Hoffman, 318 U.S. 109, 114 (1943).
[14] New York Life Ins. Co. v. Taylor, 147 F.2d 297, 303 (D.C. Cir. 1944).
[15] Id. at 303-05. See also Martinez v. Williams, 312 S.W.2d 742 (Tex. Civ. App. 1958); this view criticized in 2 McCormick & Ray, op. cit. supra note 1, § 1262.

The Texas Business Records Act[16] was fashioned after several "model" statutes in an effort to meet the demand for a progressive and simplified rule of evidence in regard to the admissibility of business records.[17] Notwithstanding a few modifications, the decisions pertaining to physicians' reports and hospital records under article 3737e indicate trends similar to those in decisions construing the federal statute and other "model" acts. All that need be proved under article 3737e is (1) that the record was made in the regular course of business[18] or regular organized activity (whether conducted for profit or not),[19] (2) that it was the regular course of that business for an employee or representative of such business with personal knowledge of the act, event or condition in question to make the record or to transmit information thereof to be included in the record,[20] and (3) that the record was made near enough in time to the act recorded to be fresh in the memory of those taking part in the act.[21] The person who actually makes the entry must either have personal knowledge of the act recorded or have the information concerning the act transmitted to him by a person who does have personal knowledge.[22] However, the identity of the record and the mode of its preparation may be proved by any qualified witness (*e.g.*, the entrant or custodian), and the fact that such witness has no personal knowledge of the contents of the record is not grounds for exclusion, but is only a factor in determining the weight and credibility of the record.[23] As an additional requirement of proof, it has been suggested in an analogous case that the employee or representative whose acts give rise to the business record must be shown to be professionally qualified before the record will be admitted.[24]

The decision in the instant case emphasizes the need for the exception to the hearsay rule in favor of non-commercial business records.[25] The court in the instant case distinguished *Pan American Ins.*

[16] Tex. Rev. Civ. Stat. Ann. art. 3737e (1951).

[17] Ray, supra note 5, at 44-45.

[18] Pan American Ins. Co. v. Couch, 305 S.W.2d 819 (Tex. Civ. App. 1957) error ref. n.r.e.

[19] Tex. Rev. Civ. Stat. Ann. art. 3737e § 4 (1951). See also Morris v. Ratliff, 291 S.W.2d 418 (Tex. Civ. App. 1956) error ref. n.r.e.

[20] Tex. Rev. Civ. Stat. Ann. art. 3737e § 1(b) (1951).

[21] Ray, supra note 4, at 384.

[22] Tex. Rev. Civ. Stat. Ann. art. 3737e § 1(b) (1951).

[23] Tex. Rev. Civ. Stat. Ann. art. 3737e § 2 (1951).

[24] See Hartman v. Harder, 322 S.W.2d 555 (Tex. Civ. App. 1959) construing article 3731*a*, holding that before the report of an official and employee of the Department of Public Safety concerning the alcoholic content of decedent's blood is admitted into evidence, it must be shown that they are chemists or specialists in determining percentage of alcohol in a sample of blood.

[25] See 2 McCormick & Ray, op. cit. supra note 1, § 1260.

Co. v. Couch[26] because the records there were not shown to have been made in the regular course of business, and therefore were correctly excluded.[27] Moreover, the court found it unnecessary to consider the problem which would be presented by records containing highly conjectural diagnoses since the disease involved here was leukemia. However, the court did conclude that the majority of the court in *New York Ins. Co. v. Taylor*[28] would have allowed the records in the instant case because, unlike the diagnosis of a psychoneurotic state, the diagnosis of leukemia is not one about which competent physicians would ordinarily differ. Accordingly, the opinion in the instant case does not indicate how the Texas courts would now decide a case involving records of controversial diagnoses, but it does indicate that the courts are fully aware of the practical value of admitting medical records under article 3737e.

The courts and the legislature must be constantly mindful of the need for modification of outmoded rules of procedure and irrational rules of evidence. The provisions of article 3737e and decisions like the one in the instant case indicate an increased awareness of this need with reference to hearsay evidence. Although the decision in the instant case is completely adequate within the fact situation, many problems such as the admission of records containing highly conjectural diagnoses still remain unsettled. It seems unlikely that sporadic judicial decisions can solve these problems as adequately as further legislation. In prescribing exceptions to the rule, the value of the rule itself should not be overlooked. Exceptions should be adopted only in cases where truthfulness can be assured to a substantial degree, but the hearsay rule with its exceptions should be flexible enough to meet the advancements in business practices, specifically in the field of medicine.

George Howard Nelson

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[26] 305 S.W.2d 819 (Tex. Civ. App. 1957) error ref. n.r.e.

[27] It seems evident that the court in the Pan American case did not hold that the mere fact that the doctor's report was hearsay made it inadmissible, for such a decision would conflict with the whole objective of article 3737e.

[28] 147 F.2d 297 (D.C. Cir. 1944).

Procedure — Special Issue Submission — Dual Submission of Ultimate Issues

The plaintiff's decedent was killed in a crossing accident with the defendant's train. The defendant alleged decedent's contributory negligence through violation of article 6701(d), section 86(c), (d),[1] which requires one approaching a crossing to stop when a train is within hazardous proximity, and not proceed until he can do so safely. The trial court submitted special issues inquiring whether decedent failed to keep a proper lookout to the west before he turned south, whether he failed to keep a proper lookout to the west while within 40 feet of the tracks, whether he looked west before attempting to drive across the tracks, whether he failed to see the train before driving upon the tracks, and whether he saw the train before driving upon the tracks. *Held*: "Shades" of proper lookout, even though ultimate in themselves, should not be submitted separately to the jury. *Texas & Pac. R.R. v. Snider*, — Tex. —, 321 S.W.2d 280 (1959) (dictum).

Special issue submission asks the jury a specific question on each controlling fact.[2] In general, only relevant, ultimate, and disputed fact issues supported by the pleadings should be submitted to the jury.[3] "Relevant" and "disputed" present few problems; however, Texas courts have experienced great difficulty in determining how "ultimate" an issue must be before it may be submitted to the jury.[4] The difficulty lies in distinguishing between "secondary root issues" and "evidentiary issues."[5] Though an absolute, precise criterion for determining which issues are "controlling" or "ultimate" is difficult,[6] generally an issue which, standing alone, could constitute an essential part of the plaintiff's cause of action or the defendant's affirmative defense will be considered ultimate, though this definition does not cover a rebuttal issue.[7] Thus, two problems arise in special issue submission, *viz.*, a question may be "too ultimate," or, conversely, a charge may contain so many issues that it becomes too voluminous to be practicable and results only in confusing the jury.[8]

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[1] Tex. Rev. Civ. Stat. Ann. (1948).

[2] Masterson, Preparation and Submission of Special Issues in Texas, 6 Sw. L.J. 163, 164 (1952); Speer, Law of Special Issues in Texas 17 (1931).

[3] 2 Frumer & Masterson, Texas Courts 250 (rev. ed. 1959); Speer, op. cit. supra note 2, at 20.

[4] 2 Frumer & Masterson, op. cit. supra note 3, at 251.

[5] Ibid.

[6] Suggs, Jury Submission Under the New Rules, 6 Dallas Bar Speaks 229, 250 (1941); Hodges, Special Issue Submission in Texas 100 (1959).

[7] Masterson, supra note 2, at 164.

[8] Ibid.

Assuming proper complaint is made in the trial court and that the harmless error rule is inapplicable, an issue which is too general,[9] or one which inquires about several different facts when each fact should be the basis of a separate special issue,[10] will be reversed on appeal. Further, trial courts properly may refuse to submit requested issues which are only evidentiary in nature,[11] although if a requested issue rejected by the trial court as evidentiary is found on appeal to be ultimate, the judgment will be reversed.[12] Although reversal frequently results from omission of an issue, it rarely results from submitting too many issues[13] since submission of too many issues is not ground for reversal when it is not proved that the jury was confused thereby.[14] Only one Texas case has been found reversing a judgment on the objection that a number of submitted special issues should have been submitted in a single group of questions.[15]

The court in the principal case stated that shades of proper lookout, even though ultimate in themselves, should not be submitted, but did not remand the case because this objection to submission of multitudinous special issues covering various phases of proper lookout was not preserved on appeal.[16] Each party, in preparing a requested charge, often includes too many issues presenting his various theories of recovery or defense on the theory that the greater number of issues he has included, the greater the probability that the jury will answer some of them favorably to him, and the more requests he has refused, the better his chances will be in claiming reversable error if the judgment is against him. Too often the trial judge prefers simply to grant the requests when in doubt or when no serious complaint is made,[17] and there is little incentive to avoid this multitudinous submission because the error involved is usually found to

[9] Blythe County Line Independent School Dist. v. Garrett, 232 S.W.2d 248 (Tex. Civ. App. 1950).

[10] Buss v. Shepherd, 240 S.W.2d 382 (Tex. Civ. App. 1951) error ref. n.r.e.

[11] Gillam v. Baker, 195 S.W.2d 826 (Tex. Civ. App. 1946) error dism. Also, several disputed evidentiary issues may be properly grouped together when they "add up" to an ultimate issue. See, e.g., Austin v. DeGeorge, 55 S.W.2d 585 (Tex. Civ. App. 1932) error dism.

[12] North Texas Traction Co. v. Bruce, 77 S.W.2d 889 (Tex. Civ. App. 1934) error dism.

[13] See, Suggs, op. cit. supra note 6.

[14] Tripp v. Watson, 235 S.W.2d 677 (Tex. Civ. App. 1951) error ref. n.r.e.; International Bhd. of Boilermakers, Iron Shipbuilders & Helpers of America v. Huval, 154 S.W.2d 233 (Tex. Civ. App. 1941), rev'd in part on other grounds, 140 Tex. 21, 166 S.W.2d 107 (1942).

[15] Texas & N.O.R.R. v. Pool, 263 S.W.2d 582 (Tex. Civ. App. 1954).

[16] 321 S.W.2d at 284.

[17] Hodges, op. cit. supra note 6, at 134.

be harmless[18] and hence non-reversable. The court in the principal case indicates that a case may be remanded if an appellate court finds that multitudinous questions as to a material matter confused the jury.[19] This indication is in accord with *Tripp v. Watson*[20] and *International Bhd. of Boilermakers, Iron Shipbuilders & Helpers of America v. Huval*[21] which, although commenting that repetition of issues should not be tolerated, did not reverse because it was not shown that confusion resulted. Moreover, trial judges will be assisted by rule 279,[22] which assures that judgments may not be reversed on appeal due to failure to submit various phases or different shades of one ultimate issue.

The process generally employed in preparing the charge tends to enhance rather than reduce the number of issues. The rules contemplate that special issue submission will simplify and be a more scientific approach to jury verdicts than the general charge. The court in the principal case indicates an attitude that more nearly corresponds with the theory of special issue submission and, in so doing, issues a stern warning that trial courts and litigants should reduce the number of issues in the charge by eliminating extra issues covering what is essentially a single fact. The court is to be commended for this position which may help to eliminate jury confusion resulting from multitudinous special issues and bring about less appellate reversals due to conflicts in answers to numerous special issues.

Henry Nuss, III

Procedure — Summary Judgment — Negligence Cases

P sued *D* for the wrongful death of her 15-year-old daughter who was killed when she fell from the front fender of *D*'s moving automobile. *D* moved for summary judgment contending that there was no material issue of fact, and that the decedent was contributorily negligent as a matter of law. *P* did not file counter affidavits, and the trial court sustained *D*'s motion for summary judgment.

[18] Tex. Rules Civ. Pro. Ann. rule 434 (1955); San Antonio Hermann Sons Home Ass'n v. Harvey, 256 S.W.2d 906 (Tex. Civ. App. 1953) error ref. n.r.e.; Tripp v. Watson, 235 S.W.2d 677 (Tex. Civ. App. 1951) error ref. n.r.e.

[19] 321 S.W.2d at 284.

[20] Cases cited note 14 supra.

[21] Cases cited note 14 supra.

[22] Tex. Rules Civ. Pro. Ann. (1955).

Held, reversed and remanded: Issues concerning negligence, heedlessness or reckless conduct, and proximate cause are deemed questions of "material fact" and are not the proper subject of a summary judgment. *Hammett v. Fleming*, 324 S.W.2d 70 (Tex. Civ. App. 1959) *error ref. n.r.e.*

A summary judgment may be granted in actions where there is no genuine issue of material fact and where the controversy has resolved itself into one purely of law.[1] A motion for summary judgment is presented in advance of a trial on the merits,[2] and the movant has the burden of establishing that no factual controversy exists and all that is involved is the application of the law to the facts.[3] Further, all doubts as to the existence of material facts are resolved against the movant.[4] The purposes of summary judgment proceedings are to expedite the administration of justice by avoiding needless trials,[5] to enable one to obtain a judgment promptly by preventing the interposition of untenable defenses which cause delay,[6] and to relieve the congested court dockets.[7] This procedure has been regarded as an extreme remedy,[8] and one to be cautiously invoked.[9] Nonetheless, a case may generally be decided on a motion for summary judgment if the situation would justify a directed verdict in so far as the facts are concerned.[10]

Summary judgment procedure theoretically is applicable to *all* civil actions with the exception of those actions which would be contrary

[1] Love v. United States, 122 Ct. Cl. 144, 104 F. Supp. 102 (1952); Gulbenkian v. Penn, 151 Tex. 412, 252 S.W.2d 929 (1952); Toliver v. Bergmann, 297 S.W.2d 208 (Tex. Civ. App. 1956).

[2] Dulansky v. Iowa-Illinois Gas & Elec. Co., 191 F.2d 881 (8th Cir. 1951); United States v. Seppa, 12 F.R.D. 251 (D. Minn. 1952); 4 McDonald, Texas Civil Practice in District and County Courts § 17.26 (1950).

[3] SMS Mfg. Co. v. U.S.-Mengel Plywoods, 219 F.2d 606 (10th Cir. 1955); Jindra v. Jindra, 267 S.W.2d 287 (Tex. Civ. App. 1954) error ref. n.r.e.; Lesikar v. Lesikar, 251 S.W.2d 555 (Tex. Civ. App. 1952) error ref. n.r.e.

[4] Heyward v. Public Housing Administration, 238 F.2d 689 (5th Cir. 1956); Jones v. Gonzales, 326 S.W.2d 634 (Tex. Civ. App. 1959) error ref. n.r.e.

[5] Marks Music Corp. v. Continental Record Co., 222 F.2d 488 (2d Cir.), cert. denied, 350 U.S. 861 (1955); Maxwell v. Maxwell, 292 S.W.2d 368 (Tex. Civ. App. 1956).

[6] Caylor v. Virden, 217 F.2d 739 (8th Cir. 1955); Boucher v. Texas Turnpike Authority, 317 S.W.2d 594 (Tex. Civ. App. 1958).

[7] Note, 36 Minn. L. Rev. 515, 518 (1952); Legislation, 33 St. John's L. Rev. 414, 415 (1959).

[8] Hunt v. Pick, 240 F.2d 782 (10th Cir. 1957); Warner v. First Nat'l Bank, 236 F.2d 853 (8th Cir.), cert. denied, 352 U.S. 927 (1956).

[9] Bowdidge v. Lehman, 252 F.2d 366 (6th Cir. 1958); Carantzas v. Iowa Mut. Ins. Co., 235 F.2d 193 (5th Cir. 1956); Gibler v. Houston Post Co., 310 S.W.2d 377 (Tex. Civ. App. 1958) error ref. n.r.e.; Kaufman v. Blackman, 239 S.W.2d 422 (Tex. Civ. App. 1951) error ref. n.r.e.

[10] Dewey v. Clark, 180 F.2d 766 (D.C. Cir. 1949); Friedman v. Thomas J. Fisher & Co., 88 A.2d 321 (D.C. Munic. Ct. App. 1952); McFarland v. Connally, 252 S.W.2d 486 (Tex. Civ. App. 1952); see Neigut v. McFadden, 257 S.W.2d 864 (Tex. Civ. App. 1953) error ref. n.r.e. But see authorities cited note 13 infra.

to public policy, *e.g.*, the policy against collusive divorces.[11] However, there is federal authority for the proposition that issues of negligence ordinarily are not susceptible of summary adjudication either for or against the claimant but should be resolved by a trial on the merits.[12] Thus, in federal negligence cases it has been held that even though the judge is of the opinion that he will subsequently direct a verdict, he should *ordinarily* hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment;[13] but, the federal courts will render a summary judgment for the defendant where the plaintiff's claim clearly lacks substance because there is a lack of negligence by defendant or the defendant's negligence does not rise to the degree of negligence necessary for recovery.[14] Moreover, where the plaintiff is the movant, a summary judgment has been granted in the federal courts if there is negligence per se.[15] Although the Texas summary judgment procedure[16] was adopted from the federal summary judgment procedure,[17] the Texas courts, in contrast with some federal decisions, have granted a summary judgment to the defendant on the issues of negligence in only one reported case.[18]

The court in the principal case seems to base its decision on the theory that, in an action of negligence, issues of fact are *always* presented which should be left to a jury.[19] Since the courts must rely on the facts of each case and the rules established by similar cases, they have a wide discretion in determining what is a controverted fact,[20] although the test for determining whether a fact is in controversy is applied more strictly in negligence cases than in other types of

[11] McDonald, Summary Judgments, 30 Texas L. Rev. 285 (1952); Comment, 2 Baylor L. Rev. 320, 322 (1950); 3 Barron & Holtzoff, Federal Practice and Procedure § 1231 (1958).

[12] Aetna Ins. Co. v. Cooper Wells Co., 234 F.2d 342 (6th Cir. 1956); 6 Moore's Federal Practice § 56:17(42) (2d ed. 1953).

[13] Kirkpatrick v. Consolidated Underwriters, 227 F.2d 228 (4th Cir. 1955); Pierce v. Ford Motor Co., 190 F.2d 910 (4th Cir. 1951).

[14] Roucher v. Traders & Gen. Ins. Co., 235 F.2d 423 (5th Cir. 1956); Surkin v. Charteris, 197 F.2d 77 (5th Cir. 1952); Wilkinson v. Powell, 149 F.2d 335 (5th Cir. 1945); Hufner v. Erie Ry. Co., 26 F. Supp. 855 (S.D.N.Y. 1939); Annot., 50 A.L.R.2d 1309 (1955).

[15] American Airlines, Inc. v. Ulen, 186 F.2d 529 (D.C. Cir. 1949).

[16] Tex. Rules Civ. Pro. Ann. rule 166-A (1955).

[17] Fed. R. Civ. P. 56.

[18] Perez v. Hernandez, 317 S.W.2d 81 (Tex. Civ. App. 1958) error ref. n.r.e. There have been no reported Texas cases found wherein a *plaintiff's* motion for summary judgment on the issues of negligence has been granted.

[19] 324 S.W.2d at 74.

[20] Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., 137 F.2d 871 (6th Cir. 1943), cert. denied, 320 U.S. 800 (1943); Burkett v. Panama City Coca-Cola Bottling Co., 93 So. 2d 580 (Fla. 1957).

actions.[21] Courts have relied on various reasons for denying a summary judgment in negligence cases, *e.g.*, the difficulty of getting any significant agreement as to the facts because summary judgment denies a party the right to cross-examine witnesses,[22] the view that the "reasonable man" test should be left to the jury even when the facts are undisputed,[23] and the theory that a party should not be denied his day in court.[24] While the movant has the burden of showing that there is no disputed material fact alleged by the opposing party,[25] in a Texas negligence case even meeting this burden may not be sufficient to entitle him to a summary judgment.

Under the present law in Texas it seems futile to move for a summary judgment in a negligence case. The overcautious approach of the courts in summary judgment proceedings has, for all practical purposes, excepted negligence cases from a procedure made applicable to *all* civil actions by the rules of procedure. Thus, even though a directed verdict may be granted later on the same evidence, some courts would rather have the case tried in the courtroom atmosphere than grant the motion for summary judgment. This approach, whether justified or not, seems inconsistent with the purpose of the summary judgment proceedings, and has resulted in uncertainty as to when the procedure is applicable. If the object of the summary judgment procedure is to be effectuated, this uncertainty should be removed by the courts relaxing their extremely cautious approach to summary judgment in negligence cases or by amending the summary judgment procedure so as to exclude negligence cases. It is believed that the former solution should be adopted, for it is becoming imperative that a method be provided for reducing the presently congested court dockets.

David E. Varner

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[21] Alabama Great Southern R.R. v. Louisville & Nashville R.R., 224 F.2d 1 (5th Cir. 1955); Estepp v. Norfolk & W. Ry., 192 F.2d 889 (6th Cir. 1951); Pattison v. Highway Ins. Underwriters, 292 S.W.2d 694 (Tex. Civ. App. 1956) error ref. n.r.e.; Loud v. Sears, Roebuck & Co., 262 S.W.2d 548 (Tex. Civ. App. 1953).

[22] Roucher v. Traders & Gen. Ins. Co., 235 F.2d 423 (5th Cir. 1956); Dulansky v. Iowa-Illinois Gas & Elec. Co., 191 F.2d 881 (8th Cir. 1951); Dunn v. Tillman, 255 S.W.2d 933 (Tex. Civ. App. 1953); Bauman, A Rationale of Summary Judgment, 33 Ind. L. J. 467, 499 (1958).

[23] Ramsouer v. Midland Valley Ry., 135 F.2d 101 (8th Cir. 1943); Bimberg v. Northern Pac. Ry., 217 Minn. 187, 14 N.W.2d 410 (1944); see Allen v. F.W. Woolworth Co., 315 S.W.2d 612 (Tex. Civ. App. 1958) error ref. n.r.e.; Bauman, supra note 22; 3 Barron & Holtzoff, op. cit. supra note 11.

[24] Union Transfer Co. v. Riss & Co., 218 F.2d 553 (8th Cir. 1955); Ford v. Luria Steel & Trading Corp., 192 F.2d 880 (8th Cir. 1951); see Loud v. Sears, Roebuck & Co., 262 S.W.2d 548 (Tex. Civ. App. 1953).

[25] O'Quinn v. Scott, 251 S.W.2d 168 (Tex. Civ. App. 1952) error ref. n.r.e.

Taxation — Texas Inheritance Tax — Transfers Taking Effect at Death

The settlor created an irrevocable trust reserving the income for her life and retaining a power to invade the corpus if necessary for her support. Upon the settlor's death the trust was to terminate, and the corpus and undistributed income were to be distributed in the following manner: to the settlor's daughter if living; if the daughter was not living, to the petitioner, the daughter's husband at the time the trust was created; if the petitioner was not living, then to the settlor's heirs. After the daughter's death, the petitioner remarried and was divorced just before the settlor died. Since it was held that the petitioner's remarriage, notwithstanding his subsequent divorce, removed him from a lower tax bracket afforded a "husband of a daughter"[1] and placed him into a higher tax bracket applicable to persons unrelated to the settlor,[2] the petitioner contended that for purposes of the Texas inheritance tax, his status should be determined as of the time of the execution of the trust instrument (at which time he was clearly the husband of the settlor's daughter). *Held*: For inheritance tax purposes, the status of an irrevocable trust beneficiary who has an alternative contingent remainder[3] is to be determined at the time of the settlor's death rather than at the time of the execution of the trust instrument. *Cahn v. Calvert*, — Tex. —, 321 S.W.2d 869 (1959).

The transfer of an irrevocable trust with a life income reserved by the settlor which takes effect in possession or enjoyment at or after the settlor's death is included within the settlor's estate for federal estate tax purposes,[4] and a beneficiary of the trust is taxed for state inheritance tax purposes according to the portion of the trust received by him.[5] This statement reflected the unquestioned law prior to 1930, but in that year, the famous decision in *May v. Heiner*[6] excluded such a trust from the federal estate tax based on the reasoning that since the trust was irrevocable, the interest in it passed upon its execution, and nothing remained to be transferred upon the settlor's

[1] Tex. Rev. Civ. Stat. Ann. art. 7118 (1951) ("Class A").
[2] Tex. Rev. Civ. Stat. Ann. art. 7122 (1951) ("Class E").
[3] Alternative because two contingent events were necessary before petitioner could take an interest in the trust property—the death of the settler before the death of petitioner's wife, and the death of petitioner's wife before his death.
[4] Int. Rev. Code of 1954 § 2037; First Trust Co. v. Kelm, 105 F. Supp. 667 (D. Minn. 1952).
[5] Tex. Rev. Civ. Stat. Ann. art. 7118 (1951); In re Townsend's Estate, 349 Pa. 162, 36 A.2d 438 (1944); In re Leffmann's Estate, 312 Pa. 236, 167 Atl. 343 (1933).
[6] 281 U.S. 238 (1930).

death. This was the Supreme Court's view whether the beneficial interest created was vested or contingent.[7] When some state courts refused to apply the *May v. Heiner* principle to state inheritance tax cases involving trusts with life incomes retained,[8] there resulted a serious conflict of authority which was not resolved until the Court abruptly overruled itself in *Commissioner v. Estate of Church*.[9] The Texas case of *Bethea v. Sheppard*,[10] is representative of near-unanimous state court views approving the opinion in the *Church* case. Since *May v. Heiner* stressed the time of execution of the irrevocable trust instrument as the moment when all interest in the trust passed, while the *Church* case relied on the settlor's death as the time of passing of the trust property, the emergence of the latter case as the prevailing view[11] has provided strong support for the idea that the incidence of a state inheritance tax on an irrevocable trust beneficiary is at the time of the settlor's death rather than the time of execution of the trust instrument.[12]

Texas has a scaled inheritance tax with rates and exemptions based on the taxpayer's relationship to the deceased.[13] Unlike the federal estate tax which is imposed upon the right of the grantor to transfer property, a state inheritance tax is levied upon the right to receive or succeed to the possession or enjoyment of property and is assessed against the beneficiary of the estate.[14] Regarding the time when the incidence of the tax is determined, the most important factor is whether the interest is vested or contingent at the time of execution of the trust instrument.[15] The decisions are practically unanimous that the incidence of a tax upon a transfer of an interest in an irrevocable trust (when settlor retains a life income) is at the time of the settlor's death whenever the interests created thereby remain *contingent* in title until the time of the settlor's death.[16] The more

[7] Compare Burnet v. Northern Trust Co., 283 U.S. 782 (1931) with May v. Heiner, 281 U.S. 238 (1930).

[8] See Blodgett v. Guaranty Trust Co., 114 Conn. 207, 158 Atl. 245 (1932), aff'd, 287 U.S. 509 (1933).

[9] 335 U.S. 632 (1949).

[10] 143 S.W.2d 997 (Tex. Civ. App. 1940) error ref.

[11] See authorities cited notes 16 and 18 infra.

[12] See Mahany, Texas Taxes 869 (1946).

[13] Tex. Rev. Civ. Stat. Ann. art. 7117-7122 (1951).

[14] Bethea v. Sheppard, 143 S.W.2d 997, 1002 (Tex. Civ. App. 1940) error ref.

[15] Rottschaefer, Taxation of Transfers Taking Effect at Grantor's Death, 26 Iowa L. Rev. 541 (1941). However, it should be pointed out that the recent trend is toward stressing the time of the actual passing of economic benefits in determining when the incidence of the tax occurs. See authorities cited note 19 infra.

[16] Miller v. Connelly, 142 Conn. 144, 112 A.2d 202 (1955); People v. Northern Trust Co., 330 Ill. 238, 161 N.E. 525 (1928); In re Bass' Estate, 200 Okla. 14, 190 P.2d 800 (1947); Hickox v. Boyd, ___ Tenn. ___, 321 S.W.2d 549 (1959); Bethea v. Sheppard, 143 S.W.2d 997 (Tex. Civ. App. 1940) error ref.

difficult problem results from interests that are vested at the time of execution of the trust instrument. A widely-accepted earlier view held that such a transfer was governed in all respects by the circumstances involved when the instrument of transfer was executed.[17] The more recent cases which have established a contrary view in holding that the time of settlor's death controls (and this may now be called the majority view)[18] have undoubtedly been influenced by the present trend toward placing emphasis upon the shifting of economic benefits as the significant factor in determining when the incidence of the tax actually occurs.[19]

Since the court in the principal case reasoned that a beneficiary who has only an alternative contingent remainder in an irrevocable trust at the time of execution does not have a sufficiently vested interest to enable a determination of his taxable status until the settlor's death, their opinion coincides with the near-unanimous view and also with the case of first impression on this point in Texas, *Bethea v. Sheppard*.[20] An important factor in the court's opinion is that they explicitly refrain from stating what would be their holding in a case in which the trust beneficiary had a vested rather than a contingent remainder.[21] However, a logical analysis of the vested remainder issue reveals that just as with the contingent remainder, death of the settlor is the all-important event.[22] This analysis is based on the reasoning that an estate is "vested" when there is an immediate fixed right of present *or* future enjoyment.[23] There is a vesting in interest *and* possession when a fixed right of present enjoyment exists, but a vesting in interest alone when a present right of *future* enjoyment exists.[24] Consequently, the creation of an irrevocable trust (including a vested remainder) produces a vesting in interest, and vesting in possession occurs upon the death of the settlor.[25] Thus, it is death which is the operative event that brings about the vesting in possession and coming into enjoyment and so perfects the full

[17] E.g., Chambers v. Gibb, 186 Cal. 196, 198 Pac. 1032 (1921); In re Meehan's Estate, 100 Misc. 246, 166 N.Y.S. 623 (1917); In re Houston's Estate, 276 Pa. 330, 120 Atl. 267 (1923).

[18] See, e.g., Rising's Estate v. State ex rel. Benson, 186 Minn. 56, 242 N.W. 459 (1932); CCH Inh., Est. & Gift Tax Rep. (7th ed.) ¶ 1560 D (1950).

[19] In re Kohrs' Estate, 122 Mont. 145, 199 P.2d 856 (1948); In re Wallace's Estate, 131 Ore. 597, 282 Pac. 760 (1929).

[20] 143 S.W.2d 997 (Tex. Civ. App. 1940) error ref.

[21] 321 S.W.2d at 872.

[22] In re Kohrs' Estate, 122 Mont. 145, 199 P.2d 856 (1948).

[23] Hignett v. Sherman, 75 Colo. 64, 224 Pac. 411 (1924).

[24] Ziegler v. Love, 185 N.C. 40, 115 S.E. 887 (1923).

[25] Blodgett v. Guaranty Trust Co., 114 Conn. 207, 158 Atl. 245 (1932), aff'd, 287 U.S. 509 (1933).

fee simple title in the remainderman.[26] Had the court pursued this rationale, there would be little question as to how Texas would hold when a vested remainder is created by the execution of an irrevocable trust. Since our inheritance tax is an excise upon the right to receive, and a tax imposed upon transfers intended to take effect in possession or enjoyment at or after death is a tax upon a transfer used as a substitute for testamentary dispositions, the logic of making the moment of death the time for determining status becomes apparent.[27]

The earlier view which accrued a tax for inheritance tax purposes at the time of the execution of the trust instrument may be said to accord more nearly with the technical interpretation of the language of the taxing provisions than does the view which accrues the tax at the time of the settlor's death. Further, a determination of the beneficiary's taxable status at the time of the execution of the trust instrument is in keeping with the probable intent of the settlor. On the other hand, the emphasis recently placed upon the shifting of economic benefits as the significant factor in determining questions of taxation has strengthened judicial support of the majority view that the settlor's death is the time for tax accrual, and it is unfortunate that the Texas Supreme Court based its decision solely upon the older standard, *i.e.*, the distinction between vested and contingent remainders. Moreover, it is quite clear that the settlor's death was the intended prerequisite to the estate's coming into being for the beneficiary, and effected the transmission from the dead to the living which satisfied the terms of the taxing act and justified the tax imposed. Although the court in the instant case states that it will not decide at this time how it would hold in a case concerning an irrevocable trust with a beneficiary having a vested interest at the time the trust was created, it can be expected that the majority view would be adopted and the "passing" referred to in the Texas statutes would occur at the time of death.

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[26] Rising's Estate v. State ex rel. Benson, 186 Minn. 56, 242 N.W. 459 (1932).
[27] See Crocker v. Shaw, 174 Mass. 266, 54 N.E. 549 (1899).

Torts — Negligence — Guest Statute

Shortly after *P* accepted a ride in *D's* automobile, *D* began to drive at an excessive speed and *P* became afraid for her safety. When the car went off the road and overturned, *P* was injured. At the trial *P* introduced evidence that, although she repeatedly protested and demanded to be let out of the car, her pleas were ignored. The court not only charged the jury on gross negligence (required under the Florida guest statute) but also on simple negligence, on the theory that if *P* had reasonably protested and demanded to be let out of the car, the jury could find that she was not a guest within the meaning of the statute. The jury brought in a general verdict for *P*. *Held*: When a guest, who consents to ride in an automobile with no prior knowledge or suspicion of the driver's intoxication or improper driving habits, becomes afraid for his safety because of the driver's dangerous driving, and protests to the driver and demands to be let out of the automobile, his status is no longer that of a guest; accordingly, the driver owes the passenger the duty of reasonable care for his safety. *Andrews v. Kirk*, 106 So. 2d 110 (Fla. App. 1958).

At common law the driver of a vehicle owed to passengers the duty of reasonable care in the operation of the vehicle, and was liable to them for injuries proven to be the proximate result of his negligence.[1] However, more than ordinary negligence has been a case-law requirement in some states, on the theory that the guest is a mere licensee,[2] or that the driver owes only the duty of a gratuitous bailee.[3] Moreover, about half the states have adopted a so-called guest statute, changing the common-law rule by requiring a greater degree of fault before a guest can recover from his host, *e.g.*, gross negligence,[4] wilful and wanton misconduct,[5] or heedlessness or reckless disregard for the rights of others.[6] The intention of the various legislatures in enacting these statutes was to prevent the seemingly unfair result of a guest recovering from his host for ordinary negligence,[7] and the desire to prevent collusive lawsuits between an insured host and his passenger.[8] These statutes typically bring "guests" and "passengers with-

[1] Perkins v. Galloway, 194 Ala. 265, 69 So. 875 (1915); Central Copper Co. v. Klefisch, 34 Ariz. 230, 270 Pac. 629 (1928); Bauer v. Griess, 105 Neb. 381, 181 N.W. 156 (1920).

[2] Wilder v. Steel Products Co., 57 Ga. 255, 195 S.E. 226 (1938).

[3] Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917).

[4] Vt. Stats. Ann. tit. 23 § 1491 (1959).

[5] Wyo. Stats. Ann. § 31-233 (1957).

[6] Tex. Rev. Civ. Stat. Ann. art. 6701b (1948); see Note, 1 Wyo. L.J. 182 (1947).

[7] Koger v. Hollahan, 144 Fla. 779, 198 So. 685 (1940).

[8] Johnson v. Smither, 116 S.W.2d 812 (Tex. Civ. App. 1938) error dism.; Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936).

out payment" within their application, but provide little or no further definition of a guest.[9] Courts generally agree that a passenger paying some compensation may be a guest, as where he merely contributes to the expenses of a pleasure trip;[10] conversely, even if the passenger confers some definite and tangible benefit on the owner, not necessarily money, as where he is a prospective purchaser from the owner, he may not be a guest.[11]

In jurisdictions which have a guest statute, protests and demands to be let out of the car, made by one who began the journey as a guest, have met with divergent treatment by the courts. The fact that a guest protested to the host about his improper driving has been held to be evidence of wilfull and wanton misconduct;[12] other courts have held that mere protest without a demand to leave the car does not change the passenger's status.[13] In some states, including Texas, protests by a guest go to the question of showing lack of contributory negligence or assumption of risk, but do not alter the guest status of the passenger.[14] In cases where *both* a protest and a demand to be let out of the car have been made, some courts have avoided the question of a change of status of the passenger by finding the protest and demand evidence of gross negligence.[15] Moreover, it has been held that a passenger's guest status is not changed where his request to be released was based on convenience rather than fear of injury.[16]

In the principal case, since the court had to affirm or reject the trial court's charge on simple negligence, it was directly confronted with the question of whether the status of a passenger may be changed. In upholding the charge, the court reasoned that neither the wording of the statute nor the policy behind it required a construction that all invited riders must come within the statute. Further, the court held that the words "guest" and "passenger," as used in the statute,[17] are synonymous to the extent that they imply the voluntary participation of the rider, *i.e.*, with his consent or not under duress. In the

[9] See Note, 3 Wyo. L.J. 225 (1949).

[10] Barnard v. Heather, 135 Neb. 513, 282 N.W. 534 (1938); Young v. Bynum, 260 S.W.2d 696 (Tex. Civ. App. 1953).

[11] McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909 (1937); Dahl v. Moore, 101 Wash. 503, 297 Pac. 218 (1931).

[12] Jones v. Melvin, 293 Mass. 9, 199 N.E. 392 (1936).

[13] Wachtel v. Block, 43 Ga. App. 756, 160 S.E. 97 (1931); Schlacter v. Harbin, 273 Mich. 465, 263 N.W. 431 (1935); Hayes v. Brower, 39 Wash.2d 372, 235 P.2d 482 (1951).

[14] Napier v. Mooneyham, 94 S.W.2d 564 (Tex. Civ. App. 1936) error dism.; see Taylor v. Taug, 17 Wash.2d 533, 136 P.2d 176 (1943).

[15] Berman v. Berman, 110 Conn. 169, 147 Atl. 568 (1929); Manser v. Eder, 263 Mich. 107, 248 N.W. 563 (1933).

[16] See, e.g., Vance v. Grohe, 223 Iowa 1109, 274 N.W. 902 (1937).

[17] Fla. Stat. Ann. § 320.59 (1958).

instant case, the Florida court, the third to decide this precise question, adopted the holding in *Blanchard v. Ogletree*,[18] which allowed a change in status brought about by the protest and demand to be let out under similar circumstances. The principal case, however, expressly conditions the limits of permissible changes in status to situations in which the passenger can prove that he had no advance notice of conditions which would produce improper driving, that his protests to the manner of driving were ignored, and that his demands to be let out because of a real and reasonable fear of injury were refused by the driver. Neither a protest alone nor a request based on reasons of convenience where there is no reason for the guest to fear bodily harm is sufficient. These cases are contrary to *Akins v. Hemphill*,[19] which did not allow a change of status in a fact situation which had all of the elements of the principal case and which met the strict limitations enumerated. The Washington court in *Akins* relied on its earlier opinion in *Taylor v. Taug*[20] (in which the guest knew the host was intoxicated before she entered the car and there was no evidence showing that the host heard the demand to be released), particularly the language in *Taylor* where the court said that "the only purpose of the consideration of the question of protest was whether or not the evidence showed the guest was guilty of contributory negligence in riding with a reckless driver . . . . When Appellant accepted a ride with respondent, she became a guest for the entire journey. To hold otherwise would nullify the plain meaning of the host-guest statute."[21] Washington allows recovery only if the accident was "intentional,"[22] and the *Akins* court, admitting the harshness of their rule, seems to be preoccupied with the danger of collusion.[23]

As limited, the decision in the present case provides a workable rule of recovery for those who enter a car as a guest and later wish to withdraw, but cannot because of their lack of control of the situation. After an injury under such circumstances, a passenger cannot be morally wrong, or "biting the hand that feeds him," if he seeks recovery from the driver, having both given warning of impending danger and withdrawn his consent. Objective evidence is necessary for recovery, which reduces the opportunity for collusion, but the fact that the possibility for colluison exists or is made easier by the

[18] 41 Ga. App. 4, 152 S.E. 116 (1930).
[19] 33 Wash.2d 735, 207 P.2d 195 (1949).
[20] 17 Wash. 2d 533, 136 P.2d 176 (1943).
[21] 136 P.2d at 179.
[22] Akins v. Hemphill, 33 Wash. 2d 735, 207 P.2d 195 (1949).
[23] See also Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936).

rule in the principal case[24] does not outweigh the desirability of permitting a change in status where the passenger has shown that he tried to exercise his right to be released and that he had reasonable cause for fear of bodily harm. Accordingly, since the concept of a guest is based on a consensual relationship which no longer exists, the rule in the principal case, permitting recovery for ordinary negligence, seems to be the better reasoned rule.[25]

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[24] For example, the host could *agree* that his guest made protests and demands.

[25] For a thorough analysis of the Texas Guest Statute, see Comment, 14 Sw. L.J. 72 (1960).