



1960

Recent Case Notes

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Recommended Citation

James L. Collins, et al., *Recent Case Notes*, 14 Sw L.J. 390 (1960)
<https://scholar.smu.edu/smulr/vol14/iss3/5>

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RECENT CASE NOTES

Constitutional Law — Equal Protection — Venue Statute Discrimination Against Foreign Corporations

Defendant, a foreign insurance corporation licensed to do business in Texas, was sued in a county where it had a resident agent. This county was *not* the county in which the cause of action arose, nor where the company's principal place of business was located, nor that in which plaintiff resided. Defendant appealed from the trial court's order denying its plea of privilege to be sued in the county of its principal place of business. The contention on appeal was that the Texas venue statute, which permitted suit against foreign corporations in any county where an agent resided but allowed suits against domestic corporations in a narrower venue area, was unconstitutional as to foreign corporations as a denial of the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution. *Held*: Subdivision 27 of the venue statute is unconstitutional in so far as it extends permissible limits of venue against a foreign corporation in excess of the limits prescribed for domestic corporations. *Fireman's Fund Ins. Co. v. McDaniel*, 327 S.W.2d 358 (Tex. Civ. App. 1959).

Since foreign corporations are not considered "citizens" within the meaning of the privileges and immunities clause of the United States Constitution,¹ states may impose reasonable restrictions upon the right of a foreign corporation to do business within a state.² Accordingly, a state may require the corporation to secure a license to do business and deny the use of state courts to foreign corporations which fail to secure the requisite license.³ However, once licensed to do business within the state, a foreign corporation is entitled to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.⁴ Equal protection

¹ *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936). Although not "citizens" under the privileges and immunities clause, they are considered "persons" under the equal protection clause. *Id.* at 244; *Edwards v. Leaver* 102 F. Supp. 698 (D. R.I. 1952).

² *Worcester Felt Pad Corp. v. Tucson Airport Authority*, 233 F.2d 44 (9th Cir. 1956); *Kentucky Straight Creek Coal Co. v. Commonwealth*, 304 Ky. 247, 200 S.W.2d 470 (1947).

³ *Woods v. Interstate Realty Co.* 337 U.S. 535 (1949).

⁴ *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926); *Southern Ry. v. Greene*, 216 U.S. 400 (1910); *United States Borax & Chem. Corp. v. Carpentier*, 14 Ill.2d 111, 150 N.E.2d 818 (1958).

does not mean identical treatment with domestic corporations;⁵ all that is required is that any distinctions made in dealing with foreign corporations as a class must be based on differences that bear a reasonable relation to the classification imposed.⁶ Procedural statutes are no exception,⁷ and as long as fundamental rights are protected, states may permit foreign corporations to be sued in different forums than those in which domestic corporations may be sued.⁸ Moreover, differences in venue between domestic and foreign corporations are immaterial as long as the differences do not work injustice to either type of corporation as a class.⁹

The Texas venue statute¹⁰ provides that no suit may be brought against a defendant other than in the county of his domicile unless the action falls within one of the enumerated subdivisions.¹¹ When a defendant files a timely plea of privilege, the burden is on the plaintiff to show the propriety of maintaining venue in the county where the suit is then pending.¹² This burden is met when the plaintiff shows that the suit falls within one of the subdivision exceptions in the venue statute.¹³ Until amended in 1943, foreign and domestic corporations were subject to identical exceptions to the basic venue rule that a corporation was to be sued in the county where its principal office was situated.¹⁴ These exceptions provided that a corporation (foreign or domestic)¹⁵ could be sued either in the county where the cause of action arose or in any county where an agent resided.¹⁶ However, subdivision 23 was amended in 1943 to restrict suit against a domestic corporation to "the county

⁵ *Allied Stores, Inc. v. Bowers*, 358 U.S. 522 (1959); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949).

⁶ *Allied Stores, Inc. v. Bowers*, *supra* note 5; *Southern Ry. v. Greene*, 216 U.S. 400 (1910); *Mims v. City of Ft. Worth*, 61 S.W.2d 539 (Tex. Civ. App. 1933).

⁷ *Kentucky Fin. Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544 (1923). Venue distinctions between individuals and corporations are generally held constitutional as a reasonable classification where corporations may be sued in the county where the cause of action arose, although the same venue setting is denied in suits against individuals. *Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1931); *Grayburg Oil Co. v. Powell*, 118 Tex. 354, 15 S.W.2d 542 (1929).

⁸ *Bain Peanut Co. v. Pinson*, *supra* note 7; accord, *Dohany v. Rogers*, 281 U.S. 362 (1930).

⁹ *Phillips Petroleum Co. v. Smith*, 177 Okla. 539, 61 P.2d 184 (1936).

¹⁰ Tex. Rev. Civ. Stat. Ann. art. 1995 (1950).

¹¹ Tex. Rev. Civ. Stat. Ann. art. 1995 subd. 23, 27 (1950) (applying to domestic and foreign corporations respectively).

¹² 1 McDonald, *Texas Civil Practice* § 4.03 (1950).

¹³ *Id.* at § 4.55.

¹⁴ Tex. Rev. Civ. Stat. Ann. art. 1995 subd. 23, 27 (1950).

¹⁵ *Pittsburg Water Heater Co. v. Sullivan*, 115 Tex. 417, 282 S.W. 576 (1926); *Shamrock Oil & Gas Corp. v. Todd*, 166 S.W.2d 766 (Tex. Civ. App. 1942). These cases held that there is no distinction between foreign and domestic corporations as to venue subdivisions.

¹⁶ Tex. Rev. Civ. Stat. Ann. art. 1995 subd. 23, 27 (1950).

in which plaintiff resided at the time the cause of action or part thereof arose, provided such corporation . . . has an agency or representative in such county; or, if . . . no agency or representative in the county in which plaintiff resided . . . then . . . in the county nearest that in which plaintiff resided . . . in which the corporation . . . then had an agency. . . ."¹⁷ Thus, the reference to the second alternative, *viz.*, suit in *any* county where an agent resided, was deleted; therefore, venue against a domestic corporation was restricted geographically to the county of plaintiff's residence or the county nearest in reference thereto.¹⁸ However, under subdivision 27, which by its terms is applicable only to foreign corporations, suit may be brought in *any* county where its agent resides.¹⁹ Another distinction in classification between domestic and foreign corporations which has arisen since the 1943 amendment lies in the necessity to prove a cause of action as a venue fact.²⁰ Although a cause of action must always be *alleged* in a venue hearing,²¹ there have been many cases since the 1943 amendment which have held that no cause of action need be proved when venue is maintained against a *foreign* corporation under that part of subdivision 27 which permits suit to be brought in a county where the corporation has a resident agent.²² However, a cause of action *must* be proved by a preponderance of the evidence in order to maintain venue against *domestic* corporations other than in the county of the corporation's principal office.²³

The court in the principal case reasoned that since neither the geographical limitation nor the requirement of proof of a cause of action, applicable to domestic corporations, restricted a plaintiff in a suit against a foreign corporation under subdivision 27, an arbitrary classification existed against foreign corporations which denied them equal protection of the laws.²⁴ Other cases involving

¹⁷ Tex. Rev. Civ. Stat. Ann. art. 1995 subd. 23, as amended, Acts 1943, 48th Leg., c.228, p. 1.

¹⁸ *Ibid.*

¹⁹ Tex. Rev. Civ. Stat. Ann. art. 1995 subd. 27 (1950); 1 McDonald, *op. cit. supra* note 12, at § 4.30.

²⁰ 1 McDonald, *op. cit. supra* note 12, at 399.

²¹ See *Jefferies v. Dunklin*, 131 Tex. 289, 115 S.W.2d 391 (1938); but see, Comment, 6 Sw. L.J. 258 (1952).

²² *Andretta v. West*, 318 S.W.2d 768 (Tex. Civ. App. 1958) error ref. n.r.e.; *Centex Paving Co. v. Underwood Oil Co.*, 314 S.W.2d 409 (Tex. Civ. App. 1958) error dism.; *Pacific Fin. Corp. v. Ramsey* 305 S.W.2d 297 (Tex. Civ. App. 1957); *Southwestern Greyhound Lines v. Day*, 238 S.W.2d 258 (Tex. Civ. App. 1951).

²³ *Lloyds Cas. Insurer v. McCrary*, 149 Tex. 172, 229 S.W.2d 605 (1950); *Victoria Bank & Trust Co. v. Monteith* 138 Tex. 216, 158 S.W.2d 63 (1941); *Lanark Corp. v. Conover*, 321 S.W.2d 930 (Tex. Civ. App. 1959) error dism.

²⁴ 327 S.W.2d at 366, 367.

geographical venue distinctions between domestic and foreign corporations (or corporations and individuals) have held there was no denial of equal protection on the theory that equal protection does not depend on a mere difference in venue forum but depends on whether equal laws prevail in the forum which the state has provided.²⁵ However, in these cases venue was extended only to one additional county,²⁶ whereas, in the principal case the extension involved as many counties as there were agents.²⁷ In the principal case the court relied mainly on the reasoning of *Power Mfg. Co. v. Saunders*,²⁸ a decision which held an Arkansas venue statute unconstitutional because suits against foreign corporations could be filed in any county in the state at the plaintiff's discretion, whereas, suits against domestic corporations had to be filed in a county where the corporation had a place of business or in which its chief officer resided. Although the principal case possibly does not show geographic discrimination to as great an extent as *Power Mfg. Co. v. Saunders*, any arbitrary discrimination is sufficient to satisfy the test for a violation of the fourteenth amendment.²⁹ Moreover, the principal case is apparently the first decision concerning the issue of arbitrary discrimination because of a distinction between foreign and domestic corporations in the necessity of proving a cause of action. Defendant contended alternatively that subdivision 27 had been impliedly amended to require the cause of action *and* an agent to be in the same county as that where suit is brought when a foreign corporation is sued outside the county of its residence, thus, making the venue requirements the same for both foreign and domestic corporations.³⁰ This proposition was based on a reading of the 1943 amendment in the light of article 1532 of the civil statutes and article 8.02 of the 1955 Business Corporation Act (which together state that foreign corporations shall enjoy all the rights and privileges of domestic corporations but no greater rights or privileges).³¹ Necessary to this contention was the premise, accepted by some writers in the field of venue, that subdivision 23 applied to both foreign and domestic corporations and that subdivision 27 was merely an additional venue section for

²⁵ See *Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1930); *Cincinnati St. Ry. v. Snell*, 193 U.S. 30 (1904).

²⁶ *Ibid.*

²⁷ 327 S.W.2d at 366, 367.

²⁸ 274 U.S. 490 (1927).

²⁹ See *Patton v. United States*, 281 U.S. 276 (1930); *Looney v. Crane Co.*, 245 U.S. 178 (1917).

³⁰ 327 S.W.2d at 364.

³¹ *Ibid.*

foreign corporations.³² The court correctly determined that this premise was deducted from dicta in several cases,³³ and therefore subdivision 23 applied to domestic corporations alone.³⁴

No reasonable distinction can be made between foreign and domestic corporations on which to base an almost unlimited geographic distinction in venue requirements, and the variance in the proof of the cause of action is an even more fundamental right which alone would probably be classed as an arbitrary discrimination. Therefore, based on the principle set forth in *Power Mfg. Co. v. Saunders*, it would seem that the decision in the principal case is clearly correct. This raises the question, however, of where foreign corporations can be sued after this decision. The court clearly declared subdivision 27 unconstitutional only to the extent it conflicts with subdivision 23. Therefore, it would seem that foreign corporations can be sued in the county where the cause of action arose, where it has its principal office, or if there is no agent or representative in the state, in the county where the plaintiff resides. Thus, suits against foreign corporations are still authorized in substantially the same counties as suits against domestic corporations, and it appears that plaintiffs will not suffer from lack of forums in which to sue a foreign corporation. Now, however, possible discrimination appears against *domestic* corporations when suit is sought in the county of plaintiff's residence. Domestic corporations may be sued in the plaintiff's county of residence if an agent resides there, whereas foreign corporations may be sued in plaintiff's county of residence only if the cause of action arose there or if the corporation is totally unrepresented in the state. To alleviate the discrimination it seems that the only practical solution is legislative action giving foreign and domestic corporations identical treatment under the venue statute.

James L. Collins

Evidence—Judicial Notice—Radar

Defendant was convicted of violating maximum speed laws. The basis of the conviction was a radar unit reading with respect to his speed. There was testimony that the radar unit had been set up and tested, but there was no evidence of the results of the test. *Held*: Where a conviction for speeding rests upon the reading of a radar

³² 1 McDonald, *op. cit.* supra note 12.

³³ 327 S.W.2d at 366.

³⁴ *Ibid.*

unit, failure to prove the accuracy of that radar unit on location is reversible error. *Wilson v. State*, —Tex. Crim.—, 328 S.W.2d 311 (1959).

The doctrine of judicial notice recognizes that certain facts may be so notorious or their existence so easily ascertained that proof of such will not be required.¹ While there is strong authority to the contrary,² the majority of jurisdictions support the view that when judicial notice of a fact is taken, evidence to the contrary is inadmissible, and the judge is required to instruct the jury that the fact is to be accepted as true.³ Judicial notice usually will be taken of scientific facts either notoriously true or capable of demonstration by authoritative sources.⁴ Courts have judicially noticed certain scientific facts, *e.g.*, the results of blood grouping tests in questions of paternity,⁵ X-ray photographs,⁶ fingerprints,⁷ speedometer readings,⁸ disc recordings,⁹ the arching propensity of electricity,¹⁰ the intoxicating character of various beverages,¹¹ the liquid character of alcohol and ether at ordinary room temperatures,¹² and certain passages in recognized books.¹³ Some courts, however, have refused to take judicial notice of such

¹ *Miller v. Texas N.O.R.R.*, 83 Tex. 518, 18 S.W. 954 (1892); 1 McCormick & Ray, Texas Law of Evidence § 151 (2d ed. 1956).

² *Ohio Bell Tel. v. Public Util. Comm'n*, 301 U.S. 292 (1937) (dictum in opinion by Cardozo, J.); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (dictum in opinion by L. Hand, J.); See also Thayer, Evidence 308-09 (1898); 9 Wigmore, Evidence § 2567 (3d ed. 1940).

³ *Lane v. Sargent*, 217 Fed. 237 (1st Cir. 1914); *People v. Mayes*, 113 Cal. 618, 45 Pac. 860 (1896); *State v. Main*, 69 Conn. 123, 37 Atl. 80 (1897); *State ex rel. Landis v. Thompson*, 121 Fla. 561, 164 So. 192 (1935); *Commonwealth v. Marzynski*, 149 Mass. 68, 21 N.E. 228 (1889); *State v. Cromwell*, 6 N.J. Misc. 221, 140 Atl. 429 (Sup. Ct. 1928).

⁴ *Cantrell v. Board of Sup'rs*, 87 Cal. App. 2d 471, 197 P.2d 218 (1948); *Roberts v. Wofford Beach Hotel*, 67 So. 2d 670 (Fla. 1953); *Kennedy v. Parrott*, 243 N.C. 355, 90 S.E. 2d 754 (1956); *Kennedy v. General Geophysical Co.*, 213 S.W.2d 707 (Tex. Civ. App. 1948) error ref. n.r.e.

⁵ *Jordan v. Mace*, 144 Me. 351, 69 A.2d 670 (1949) (accepted to disprove paternity, but not to prove it); *Cortese v. Cortese*, 10 N.J. Super. 152, 76 A.2d 717 (Super. Ct. 1950) (accepted to disprove paternity, but not to prove it).

⁶ *Prescott & N. W. R.R. v. Franks*, 111 Ark. 83, 163 S.W. 180 (1914); *Texas Employers Ins. Ass'n. v. Crow*, 148 Tex. 113, 221 S.W.2d 235 (1949); *Houston & T. C. R.R. v. Shapard*, 54 Tex. Civ. App. 596, 118 S.W. 596 (1909), error ref.

⁷ *People v. Jennings*, 252 Ill. 534, 96 N.E. 1077 (1911); *State v. Cerciello*, 86 N.J.L. 309, 90 Atl. 1112 (Ct. Err. & App. 1914).

⁸ *People v. Sarver*, 205 Misc. 523, 129 N.Y.S.2d 9 (Ct. Spec. Sess. 1954); *City of Spokane v. Knight*, 96 Wash. 403, 165 Pac. 105 (1917).

⁹ *Gotthelf v. Hillcrest Lumber Co.*, 280 App. Div. 668, 116 N.Y.S.2d 873 (1952).

¹⁰ *Pasco v. Southern Cal. Edison Co.*, 102 Cal. App. 2d 254, 227 P.2d 555 (1951).

¹¹ *Skaggs v. State*, —Okla. Crim.—, 276 P.2d 267 (1954) (gin); *Latta v. State*, 19 Okla. Crim. 441, 200 Pac. 551 (1921) (whiskey); *Cox v. State*, 3 Okla. Crim. 129, 104 Pac. 1074, 105 Pac. 369 (1909) (beer).

¹² *Bridgeport Brass Co. v. Bostwick Lab.*, 181 F.2d 315 (2d Cir. 1950).

¹³ *Application of Norris*, 179 F.2d 970 (C.C.P.A. 1950) (quotation from chemical textbook authority); *United States Fid. & Guar. Co. v. Rochester*, 281 S.W. 306 (Tex. Civ. App.), *aff'd*, 115 Tex. 404, 283 S.W. 135 (1926) (on the subject of electricity).

facts, holding them admissible to be considered by the fact finder in determining the particular issue if (1) the scientific apparatus producing the facts is accepted as dependable in the field of science involved; (2) the particular apparatus used 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.¹⁴ Most courts are in agreement that certain scientific facts, *e.g.*, the results of lie detector tests¹⁵ and sodium pentothal¹⁶ (truth serum) tests, not only will be denied judicial notice, but will not be admitted into evidence, reasoning that the reliability of such tests is not established with a sufficient degree of accuracy in the particular field of science.¹⁷

The early cases on radar speedmeters refused to take judicial notice of their readings,¹⁸ but admitted them in evidence upon proof of (1) the accuracy of the general principles of radar by expert testimony, (2) the particular unit's accuracy at the time in question, and (3) the qualifications to operate the unit of the witness seeking to testify as to the reading of the unit regarding the defendant's speed.¹⁹ The courts began to modify their requirements with the New Jersey decision of *State v. Dantonio*,²⁰ where the court stated that there would be no need for expert testimony as to the accuracy of the scientific principles of radar if the particular unit in question were properly set up and tested by the police officers in charge. Subsequently, New York²¹ and Nebraska²² courts followed the same reasoning. However, for the first time in *People v. Magri*,²³ the courts completed the change in their requirements by giving express recognition to the applicability of the doctrine of judicial notice to radar readings. The present rule is that the results of radar will be judicially

¹⁴ Wigmore, *The Science of Judicial Proof* 450 (3d ed. 1937).

¹⁵ *Davis v. State*, 165 Tex. Crim. 456, 308 S.W.2d 880 (1958); *Stockwell v. State*, 164 Tex. Crim. 656, 301 S.W.2d 669 (1957); *Peterson v. State*, 157 Tex. Crim. 255, 247 S.W.2d 110, 248 S.W.2d 130 (1952). See also Notes, 33 Tul. L. Rev. 880 (1959).

¹⁶ *Lindsey v. United States*, 237 F.2d 893 (9th Cir. 1956); *People v. McNichol*, 100 Cal. App. 2d 554, 224 P.2d 21 (1950); *Henderson v. State*, 94 Okla. Crim. 45, 230 P.2d 495 (1951).

¹⁷ *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923).

¹⁸ *People v. Beck*, 205 Misc. 757, 130 N.Y.S.2d 354 (Sup. Ct. 1954); *People v. Offermann*, 204 Misc. 769, 125 N.Y.S.2d 179 (Sup. Ct. 1953).

¹⁹ *State v. Moffitt*, 48 Del. 210, 100 A.2d 778 (1953); *People v. Torpey*, 204 Misc. 1023, 128 N.Y.S.2d 864 (Monroe County Ct. 1953); *People v. Katz*, 205 Misc. 522, 129 N.Y.S.2d 8 (Ct. Spec. Sess. 1954); *People v. Sarver*, 205 Misc. 523, 129 N.Y.S.2d 9 (Ct. Spec. Sess. 1954); *Hardaway v. State*, 202 Tenn. 94, 302 S.W.2d 351 (1957).

²⁰ 18 N.J. 570, 115 A.2d 35 (1955).

²¹ *People v. Nasella*, 3 Misc. 2d 418, 155 N.Y.S.2d 463 (New York City Ct. 1956); *People v. Sachs*, 1 Misc. 2d 148, 147 N.Y.S.2d 801 (New York City Ct. 1955).

²² *Peterson v. State*, 163 Neb. 669, 80 N.W.2d 688 (1957); *Dietz v. State*, 162 Neb. 80, 75 N.W.2d 95 (1956).

²³ 3 N.Y.2d 562, 147 N.E.2d 728, 170 N.Y.S.2d 335 (1958).

noticed if it is established that the particular unit in question was accurate and was properly operated at the time the defendant's speed was recorded.²⁴

The court's holding in the principal case is sound; for radar readings to be admitted in evidence or judicially noticed, the particular unit must be proven accurate.²⁵ A conviction based on the readings of a unit, the accuracy of which has not been established, will require reversal.²⁶ Although the principal case does not reach the issue of judicial notice, the court does indicate that the results of radar will be judicially noticed as true if there is proof of the accuracy of the unit in question and that the unit was operated by one qualified by training and experience.²⁷ If this is true, Texas will be in accord with the majority of other jurisdictions which have considered the problem.²⁸

²⁴ *United States v. Dreos*, 156 F. Supp. 200 (D. Md. 1957); *Everight v. City of Little Rock*, —Ark.—, 326 S.W.2d 796 (1959); *State v. Graham*, 322 S.W.2d 188 (Mo. Ct. App. 1959); *People v. Dusing*, 5 N.Y.2d 126, 155 N.E.2d 393, 181 N.Y.2d 493 (1959); *People v. Duskin*, 11 Misc. 2d 945, 174 N.Y.S.2d 527 (Nassau County Ct. 1958); *People v. Wylie*, 13 Misc. 2d 310, 179 N.Y.S.2d 901 (Niagara County Ct. 1958); *People v. Jones*, 10 Misc. 2d 1067, 171 N.Y.S.2d 325 (New York City Ct. 1958); *City of E. Cleveland v. Ferrell*, 168 Ohio St. 298, 154 N.E.2d 630 (1958). Note also that some states have taken a different approach to the evidentiary effect of radar readings by enacting statutes providing for the radar unit's readings to be taken as prima facie evidence of the defendant's speed. Me. Rev. Stat. Ann. ch. 431, § 113-A (1958); Md. Ann. Code art. 35, § 91 (1953); N.D. Rev. Code § 0315 (1955); Va. Code Ann. § 46.1-198 (1950); W. Va. Code Ann. § 1721 (338a) (1957).

²⁵ *People v. Charles*, 15 Misc. 2d 401, 180 N.Y.S.2d 635 (Orange County Ct. 1958); *Kopper, Symposium: Radar Speedmeters — The Scientific Reliability of Radar Speedmeters*, 16 Md. L. Rev. 1, 14 (1956). But note that the mere fact that the test is made by a person not skilled in electronics is not of sufficient import to render the evidence inadmissible. *State v. Moffitt*, 48 Del. 210, 100 A.2d 778 (1953).

²⁶ *Royals v. Commonwealth*, 198 Va. 876, 96 S.E.2d 812 (1957). All convictions to date have been based on a showing of the particular unit's accuracy. See, e.g., *State v. Dantonio*, 18 N.J. 570, 115 A.2d 35 (1955); *People v. Wylie*, 13 Misc. 2d 310, 179 N.Y.S.2d 901 (Niagara County Ct. 1958); *People v. Katz*, 205 Misc. 522, 129 N.Y.S.2d 8 (Ct. Spec. Sess. 1954); *People v. Sarver*, 205 Misc. 523, 129 N.Y.S.2d 9 (Ct. Spec. Sess. 1954).

²⁷ 328 S.W.2d 311, at 313. The issues of accuracy of the unit and operation by one qualified by training and experience may be fact questions to be decided by the jury. Upon establishment of these two factors the radar readings, generally, will be conclusive on the issue of the defendant's speed. *Everight v. City of Little Rock*, —Ark.—, 326 S.W.2d 796 (1959); *State v. Moffitt*, 48 Del. 210, 100 A.2d 778 (1953); *People v. Dusing*, 5 N.Y.2d 126, 155 N.E.2d 393, 181 N.Y.S.2d 493 (1959); *People v. Wylie*, 13 Misc. 2d 310, 179 N.Y.S.2d 901 (Niagara County Ct. 1958); *People v. Katz*, 205 Misc. 522, 129 N.Y.S.2d 8 (Ct. Spec. Sess. 1954); *People v. Sarver*, 205 Misc. 523, 129 N.Y.S.2d 9 (Ct. Spec. Sess. 1954); *People v. Jones*, 10 Misc. 2d 1067, 171 N.Y.S.2d 325 (New York City Ct. 1958); *People v. Nasella*, 3 Misc. 2d 418, 155 N.Y.S.2d 463 (New York City Ct. 1956); *People v. Sachs*, 1 Misc. 2d 148, 147 N.Y.S.2d 801 (New York City Ct. 1955). Contra: *State v. Dantonio*, 18 N.J. 570, 115 A.2d 35 (1955); *State v. Graham*, 322 S.W.2d 188 (Mo. Ct. App. 1959); *Hardaway v. State*, 202 Tenn. 94, 302 S.W.2d 351 (1957).

²⁸ *United States v. Dreos*, 156 F. Supp. 200 (D. Md. 1957); *Everight v. City of Little Rock*, —Ark.—, 326 S.W.2d 796 (1959); *State v. Graham*, 322 S.W.2d 188 (Mo. Ct. App. 1959); *People v. Dusing*, 5 N.Y.2d 126, 155 N.E.2d 393, 181 N.Y.S.2d 493 (1959); *People v. Magri*, 3 N.Y.2d 562, 147 N.E.2d 728, 170 N.Y.S.2d 335 (1958);

The prevailing authority,²⁹ accepting the view that radar readings should be accorded judicial notice, will expedite trials by doing away with the necessity of proving the accuracy of the general principles of radar in every case. Moreover, the defendant will still be accorded sufficient protection since he may prevent judicial notice by showing that the particular instrument in question was inaccurate or that the operator of the unit was inexperienced. With over five hundred police departments in forty-three states utilizing radar to aid in law enforcement³⁰ and the increasing number of automobiles and super-highways across the nation, such a result is a desirable and progressive step forward in the law.

Jay Ungerman

Fire Insurance — Measure of Recovery — Depreciation and Partial Losses

Plaintiff procured from Defendant a Texas Standard Policy of Insurance, insuring his house against loss by fire and additional named perils including windstorm and hail. The policy provided that the insurer's liability should not exceed (1) the actual cash value of the property at time of loss ascertained with proper deduction for depreciation, nor (2) the cost to repair or replace the property with material of "like kind and quality" within a reasonable time after loss.¹ Plaintiff's roof was partially damaged, allegedly by windstorm, hail, and rain. In a suit by Plaintiff to recover the full cost of repairs, Defendant contended that the replacement cost of any damaged property should be subject to a depreciation charge under the terms of the policy. *Held*: Under a Texas Standard Fire Policy of Insurance an insured is entitled to recover the full cost of repair for a partial loss without a deduction for de-

People v. Duskin, 11 Misc. 2d 945, 174 N.Y.S.2d 527 (Nassau County Ct. 1958); People v. Wylie, 13 Misc. 2d 310, 179 N.Y.S.2d 901 (Niagara County Ct. 1958); People v. Jones, 10 Misc. 2d 1067, 171 N.Y.S.2d 325 (New York City Ct. 1958); City of E. Cleveland v. Ferrell, 168 Ohio St. 298, 154 N.E.2d 630 (1958).

²⁹ *Ibid.*

³⁰ Comment, 23 Tenn. L. Rev. 784 (1955).

¹ "Subject to article 6.13 of the Texas Insurance Code, 1951, liability hereunder shall not exceed the actual cash value of the property at the time of loss, ascertained with proper deduction for depreciation; nor shall it exceed the amount it would cost to repair or replace the property with material of like kind and quality within a reasonable time after the loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture; nor shall it exceed the interest of the insured, or the specific amounts shown under 'amount of insurance.'"

preciation even though the damage can be repaired only by use of new materials. *Gulf Ins. Co. v. Carroll*, 330 S.W.2d 227 (Tex. Civ. App. 1959).

Generally, a fire insurance contract is one of indemnity,² and the form of each policy is prescribed by statute.³ The measure of recovery, according to the terms of most policies,⁴ is the "actual cash value" of the property destroyed.⁵ "Actual cash value" is not an absolute term, but varies with the nature of the loss and the surrounding circumstances.⁶ As applied to *personalty*, "market value" is usually of primal importance in ascertaining "actual cash value,"⁷ although the two terms are not necessarily synonymous.⁸ Computation of the "actual cash value" of *buildings*, on the other hand, usually begins with replacement cost.⁹ Typically, a building is sold either in connection with land or to be removed from land.¹⁰ Since land is an uninsured factor and the market value of a building sold for removal is usually far below its real or intrinsic value, market value is rarely conclusive evidence of the "actual cash value" of buildings.¹¹ Where total loss is involved, the established principle is that "actual cash value" is replacement cost at the time of loss minus actual physical depreciation.¹² Moreover, several cases have held that obsolescence,¹³ inability to use the property,¹⁴ and similar factors should also be taken into consideration. These cases emphasize that every fact and circumstance which would logically aid a correct estimate of the loss, including the economic value of the property, should be considered in determining "actual cash value."¹⁵

There is a conflict of authority as to the proper measure of re-

² Bonbright & Katz, Valuation of Property to Measure Fire Insurance Losses, 29 Colum. L. Rev. 857 (1929). An exception is the valued policy under which the measure of recovery is the valuation stated in the policy.

³ 1 Bonbright, Valuation of Property 362, 367 (1937).

⁴ There are 48 jurisdictions, including Texas, which follow the 1943 New York Standard Form.

⁵ Bonbright, *op. cit. supra* note 3, at 368. Although the New England form, followed by Massachusetts, New Hampshire, and Minnesota simply refers to "actual value," the courts do not appear to have made any distinction in interpreting the two terms. *Kingsley v. Spofford*, 298 Mass. 469, 11 N.E.2d 487 (1937).

⁶ *National-Ben Franklin Fire Ins. Co. v. Short*, 207 Okl. 673, 252 P.2d 495 (1953).

⁷ *Texas Moline Plow Co. v. Niagara Fire Ins. Co.*, 87 S.W. 192 (Tex. Civ. App. 1905) error ref.

⁸ *Southern Nat'l Ins. Co. v. Wood*, 133 S.W. 286 (Tex. Civ. App. 1910).

⁹ Goldin, *Principles of the New York Standard Fire Insurance Policy* 67 (1938).

¹⁰ *Britven v. Occidental Ins. Co.*, 234 Iowa 682, 13 N.W.2d 791, 793 (1944).

¹¹ *Ibid.*

¹² Bonbright & Katz, *supra* note 2. A loss is said to be total when there is left standing no portion which a prudent man, uninsured, would use as the basis for restoration.

¹³ *McAnarney v. Newark Fire Ins. Co.*, 247 N.Y. 176, 159 N.E. 902 (1928).

¹⁴ *Board of Educ. v. Hartford Fire Ins. Co.*, 124 W. Va. 163, 19 S.E.2d 448 (1942).

¹⁵ *McAnarney v. Newark Fire Ins. Co.*, 247 N.Y. 176, 159 N.E. 902 (1928).

covery when the loss is partial. The "actual cash value" of the part destroyed, historically, has been measured by either the cost of repairs minus depreciation,¹⁶ or the difference between the value immediately before the damage and the value immediately thereafter.¹⁷ In many cases, the effect of the difference-in-value rule has been virtually the same as that of the cost-of-repair rule since cost of repair is often the best evidence of the difference in value.¹⁸ Probably the most significant development in the partial loss cases has been the emergence of the view that the measure of recovery may be the cost of repairs without any depreciation allowance.¹⁹ The first case expressing this position was *Fedas v. Insurance Co.*²⁰ The *Fedas* case was followed by a Montana decision, *McIntosh v. Hartford Fire Ins. Co.*,²¹ in which the court refused to allow a depreciation charge, thereby awarding the insured the full cost of repairs with new material. Although the court in *McIntosh* quoted extensively from *Fedas*, its decision was based primarily upon a statute²² which was interpreted as prohibiting any deduction for depreciation. However, even in the absence of statutory provisions, several later cases have followed the *Fedas* and *McIntosh* decisions.²³ Court divergence regarding depreciation, as applied to partial losses, stems both from differing concepts of indemnity and from differing interpretations as to the effect of the repair clause of the liability provision, (" . . . nor shall it exceed the amount it would cost to repair or replace the property with material of like kind and quality within a reasonable time after the loss . . ."). The cases which permit the deduction of depreciation regard the repair clause as a limitation upon the amount which may be recovered rather than as an independent and controlling measure of damages.²⁴ These cases reason that inasmuch as the fire insurance contract is one of indem-

¹⁶ See *Smith v. Allemannia Fire Ins. Co.*, 219 Ill. App. 506 (1920).

¹⁷ See *Citizens Ins. Co. v. Foxbilt, Inc.*, 226 F.2d 641, 644 (8th Cir. 1955); *Voges v. Mechanics Ins. Co.*, 119 Neb. 553, 230 N.W. 105 (1930).

¹⁸ Note, 49 Colum. L. Rev. 818 (1949).

¹⁹ *Ibid.*

²⁰ 300 Pa. 555, 151 Atl. 285 (1930).

²¹ 106 Mont. 434, 78 P.2d 82 (1938).

²² Mont. Rev. Codes Ann. § 8157 (1921): "If there is no valuation in the policy, the measure of indemnity in an insurance against fire is the expense, at the time the loss is payable of replacing the thing lost or injured, in the condition in which it was at the time of the injury. . . ." This section is now found in § 40-904 (1947).

²³ *Glens Falls Co. v. Gulf Breeze Cottage, Inc.*, 211 La. 765, 38 So. 2d 828 (1949); *Third Nat'l Bank v. American Equitable Ins. Co.*, 27 Tenn. App. 249, 178 S.W.2d 915 (1943).

²⁴ *McAnarney v. Newark Fire Ins. Co.*, 247 N.Y. 176, 159 N.E. 902 (1928); *Citizens Sav. Bank & Trust Co. v. Fitchburg Mut. Fire Ins. Co.*, 86 Vt. 267, 84 Atl. 970, 972 (1912).

nity, the insured should incur neither economic gain nor harm from the loss. Therefore, a deduction for depreciation is necessary to prevent the insured from deriving benefit from a loss.²⁵ On the other hand, the cases adhering to the opposite view regard the clause as a substantive measure of recovery, reasoning that if depreciation is deducted from the cost of repairs, the sum recovered will be insufficient to allow completion of the repairs, and hence will not furnish the indemnity contracted for in the policy.²⁶ This view has been reinforced in some cases²⁷ by applying the rule of construction that a contract is to be construed most strongly against the one who prepared it.²⁸

The instant case, one of first impression in Texas, follows the *Fedas* line of decisions. The first and second clauses of the liability provision were construed as being disjunctive—the first clause to be applied to total and the second clause to partial losses.²⁹ Although the court did not specifically so hold, it seems apparent that it construed “materials of like kind and quality” to relate to quality and suitability or fitness for purpose used rather than as referring to parts of like age, use, and condition.³⁰ The court adopted the rationale of *Third Nat'l Bank v. American Equitable Ins. Co.*,³¹ viz., that a depreciation deduction from the cost of repairs reduces the recovery to an amount insufficient to complete the repairs, thereby falling short of the indemnity required by the policy. The court refused to accept the analogy, suggested by Defendant, between the liability provision in automobile collision policies³² and the provision at issue in the principal case. The Texas courts have interpreted the automobile insurance liability provision to require consideration of the depreciation element.³³ Since both of the provisions apply to property coverage, and since the rationale of the instant case seems to be based on the indemnity principle underlying the contract

²⁵ See authorities note 24 supra.

²⁶ *Glens Falls Co. v. Gulf Breeze Cottage, Inc.*, 211 La. 765, 38 So. 2d 828 (1949); *Fedas v. Ins. Co.*, 300 Pa. 555, 151 Atl. 285 (1930); *Third Nat'l Bank v. American Equitable Ins. Co.*, 27 Tenn. App. 249, 178 S.W.2d 915 (1943).

²⁷ *Farber v. Perkiomen Mut. Ins. Co.*, 370 Pa. 480, 88 A.2d 776 (1952).

²⁸ Apparently ignoring the fact that the state legislatures, not the insurer, prescribe the form of the standard fire insurance policy.

²⁹ But see *Voges v. Mechanics Ins. Co.*, 119 Neb. 553, 555, 230 N.W. 105, 107 (1930).

³⁰ The few cases which have construed this phrase have made similar constructions. See *North River Ins. Co. v. Godley*, 55 Ga. App. 52, 189 S.E. 577 (1936); cf. *Maryland Motor Car Ins. Co. v. Smith*, 254 S.W. 526 (Tex. Civ. App. 1923).

³¹ 27 Tenn. App. 249, 178 S.W.2d 915 (1943).

³² “. . . shall in no event exceed what it would then cost to repair or replace . . . with others of the like kind and quality. . . .”

³³ *Roberdeau v. Indemnity Ins. Co. of No. Am.*, 231 S.W.2d 948 (Tex. Civ. App. 1950) error ref. n.r.e.

rather than on its specific wording, the analogy would appear to be pertinent. It would seem that the same theory of indemnity should be applicable to all partial property losses.

The basic conflict in this area is rooted in differing concepts of indemnity. Courts which construe the repair clause as a substantive measure of damages view indemnity as the replacement of an asset to its prior use value; whereas, the construction that the repair clause is only a limitation on recovery is grounded in a conception of indemnity as compensation for the loss of an asset as an item of objectively determinable value. The latter construction seems more preferable; first, because the use of the words "not to exceed" implies that the measure of damages is not necessarily synonymous with the cost of repairs; and secondly, because the clause appears in a provision which is otherwise solely devoted to limiting the liability of the insurance company. Probably the real problem is the effort of the courts to formulate an absolute rule, for even though both rules may be logical in certain situations, it is questionable whether either would result in true indemnity under *all* circumstances. Assume, for example, that a building with an actual cash value of \$10,000 is almost totally destroyed and that, because of the high cost of labor and material, it would cost \$15,000 to repair the building. Since "to indemnify" means that the insured should incur neither gain nor loss, a refusal to deduct depreciation would more than indemnify the insured since it would place him in a better economic position than before the fire. Moreover, it would result in the anomaly of the insured's being able to recover more for a partial loss than he could for a total one. On the other hand, assume that the repairing involves only the replacement of a few floor boards. A deduction for depreciation would leave the insured with an amount insufficient to repair the damage, and in these circumstances there is no countervailing consideration that recovery of the full cost of repair would put the insured in a better position than he was before the loss. Perhaps, in this situation, a refusal to allow depreciation would more nearly result in true indemnity. It would seem that a more flexible rule requiring depreciation deduction, if the repair would place the insured in a better position but denying such deduction if the repair merely places the insured in the same position that he was in before the loss, would be preferable. Such a rule would not do violence to the terms of the contract, for the recovery would never exceed the cost to repair with materials of like kind and quality. If the insured desires more exten-

sive coverage, he has the privilege of purchasing replacement insurance.³⁴

Earldean V. S. Robbins

Labor Law — Arbitration and Award — Arbitrator's Power To Make Remedial Order

The Company, over protests of the Union, assigned the wrong employee to do overtime work. Subsequently, the Company admitted its error but, despite the insistence of the Union, refused to pay the employee who had been deprived of overtime for the time he should have been allowed to work. The steps of the grievance procedure were pursued to arbitration, with the result that the Company offered "make-work" overtime for the aggrieved employee, but asserted a policy of paying only for work performed.¹ The Union asked for arbitration under a contract clause providing for the arbitration of "differences relating to the interpretation or performance" of the agreement. The agreement did not contain an express provision conferring authority on the arbitrator to prescribe remedies for violations. Moreover, under the contract the Union reserved a conditional right to strike. The conditions were full compliance with the grievance procedure, 60-day notice thereafter of intention to strike, and approval of the proposed strike by the union membership by a secret vote. The Company agreed to arbitrate the question of violation, but refused to arbitrate the question of the appropriate remedy, contending that in the absence of a specific contractual provision the arbitrator could have no power to override the Company's policy. Subsequently, the Union sued for specific performance of the arbitration provision, contending that under the general arbitration clause the Company was under a duty to arbitrate both the violation and the appropriate remedy. *Held*: Where a collective bargaining agreement provides for arbitration of differences over performance and interpretation of the contract without mention of remedies for violation, but leaves the union a qualified right to strike, authority of the arbitrator to award damages will not be implied if such remedy would contra-

³⁴ Replacement insurance will also pay the difference between indemnity received for the loss or damage to the old building and the cost of rebuilding or repairing with new materials. Texas Physical Loss Form No. 148-A.

¹Although the company had apparently pursued the policy previously, it is not clear from the decision whether the company had clearly enunciated the policy before the dispute in question.

vene a management policy. *Refinery Employees Union v. Continental Oil Co.*, 268 F.2d 447 (5th Cir.), cert. denied, 361 U.S. 896 (1959).

At common law, agreements to arbitrate future disputes were classified as attempts to deprive the courts of jurisdiction and therefore were not specifically enforceable.² However, once a dispute had gone to arbitration and an award had been made, the parties were held to be bound by it.³ In 1925 the United States Arbitration Act reversed this approach and provided for enforcement of prospective arbitration contracts in federal courts.⁴ However, that act expressly excludes contracts of employment from its provisions.⁵ Section 301(a) of the Taft-Hartley Act provides for suits by and against labor organizations to enforce collective bargaining contracts in a federal district court without regard to the amount in controversy or diversity of citizenship.⁶ *Textile Workers Union v. Lincoln Mills*⁷ was the first case to decide that executory contracts to arbitrate disputes arising out of collective bargaining agreements are specifically enforceable in the federal courts under section 301.⁸ The purpose of this decision was to enforce the congressional policy of giving sanctions to agreements to arbitrate labor disputes.⁹ Accordingly, a union is given standing to enforce the arbitration clause of a contract against a company even though the employees as individuals may receive the ultimate benefits.¹⁰ It follows that

² *Oskaloosa Sav. Bank v. Mahaska County State Bank*, 205 Iowa 1351, 219 N.W. 530 (1928).

³ *Ibid.*

⁴ 43 Stat. 883 (1925) (now 9 U.S.C.A. § 1 (1947)).

⁵ 43 Stat. 883 (1925) (now 9 U.S.C.A. § 1 (1947)).

⁶ Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C.A. § 185(a) (1952). The L.M.R.A. applies only to industries affecting interstate commerce. The United States Arbitration Act, 61 Stat. 669, 9 U.S.C.A. § 1 (1947), provides a guiding analogy in suits under section 301. *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953); see *Engineers Ass'n v. Sperry Gyroscope Co.*, 25 F.2d 133 (2d Cir. 1957). But see *Local 149, American Fed'n of Technical Eng'rs v. General Elec. Co.*, 250 F.2d 922 (1st Cir. 1957). However, the Arbitration Act does not control the Taft-Hartley Act, 61 Stat. 136, 29 U.S.C.A. §§ 141-97 (1947). *General Elec. Co. v. Local 205, United Elec. Workers*, 353 U.S. 547 (1957). Moreover, the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C.A. §§ 101-15 (1932), does not conflict with section 301. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 458 (1957).

⁷ *Supra* note 6.

⁸ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). The court stated that the federal judiciary should develop a body of substantive law on collective bargaining agreements in which federal interpretation of federal law was to govern. 353 U.S. at 457. In developing this body of law the courts are to draw on provisions and policies of the L.M.R.A. and general legal principles. See 353 U.S. at 456-57.

⁹ *Ibid.*

¹⁰ *A. L. Kornman Co. v. Amalgamated Clothing Workers*, 264 F.2d 733 (6th Cir. 1959) (vacation pay); *Textile Workers Union v. Cone Mills Corp.* 268 F.2d 920 (4th Cir. 1959) (unemployment benefits).

an arbitrator's award authorized by the contract now may be specifically enforced by the union in a federal court.¹¹

Arbitration clauses do not necessarily include all disputes which may arise between the parties, *i.e.*, some differences may be subject to grievance procedure but not to arbitration.¹² The court is to decide whether a dispute is arbitrable under the contract,¹³ unless the contract leaves the question to the arbitrator.¹⁴ In ordinary commercial contracts the arbitrator's power to interpret the contract is not held to be power to award damages,¹⁵ but arbitrators in labor cases have long assumed that they had the implied power to make awards,¹⁶ either of money damages¹⁷ or of other suitable relief.¹⁸ State courts do not always share the labor arbitrators' views on the question.¹⁹ Labor contracts in which "all disputes" between the parties are to be arbitrated have been held to confer upon the arbitrator the power to make a money award even though that power is not specifically granted.²⁰ On the basis of the statement in *Lincoln Mills* that the arbitration clause was the quid pro quo for the no-strike clause,²¹ one court has held that a contract containing *both* clauses is enforceable by damages awarded by an arbitrator even though no specific power to award damages is given the arbitrator by the contract.²²

The court in the principal case reasoned that the parties should not be forced to arbitrate upon that which they had not expressly agreed to arbitrate, and hence the arbitrator had no implied power

¹¹ *A. L. Kornman Co. v. Amalgamated Clothing Workers*, supra note 10.

¹² *Engineers Ass'n v. Sperry Gyroscope Co.*, 251 F.2d 133 (2d Cir. 1957).

¹³ *International Union, UAW v. Benton Harbor Malleable Indus.*, 242 F.2d 536, 539 (6th Cir.), cert. denied, 355 U.S. 814 (1957); *Local 149, American Fed'n of Technical Eng'rs v. General Elec. Co.*, 251 F.2d 133 (2d Cir. 1957).

¹⁴ *International Union, UAW v. Benton Harbor Malleable Indus.*, supra note 13. However, the question of whether the contract leaves the determination of arbitrability to the arbitrator is for the courts to decide. *Employees Labor Ass'n v. Procter & Gamble Mfg. Co.*, 172 F. Supp. 210 (D. Kans. 1959).

¹⁵ *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 169 N.E. 386 (1929).

¹⁶ *Phillips Chem. Co.*, 17 Lab. Arb. 721 (1951) (overtime); *United States Rubber Co.*, 13 Lab. Arb. 839 (1949) (same); *International Harvester Co.*, 9 Lab. Arb. 894 (1947) (piece rates).

¹⁷ *Ibid.*

¹⁸ *Celanese Corp.*, 24 Lab. Arb. 168 (1954) (overtime; awarded equivalent work at same pay).

¹⁹ See *Guidry v. Gulf Oil Corp.*, 320 S.W.2d 691 (Tex. Civ. App.), rev'd on other grounds, —Tex.—, 327 S.W.2d 406 (1959); *Lone Star Cotton Mills v. Thomas*, 227 S.W.2d 300, 307 (Tex. Civ. App. 1949). But see *Niles-Bement-Pond Co. v. Local 403, UAW*, 140 Conn. 32, 97 A.2d 898 (1953); *Samuel Adler, Inc. v. Local 584, Int'l Bhd. of Teamsters*, 282 App. Div. 142, 122 N.Y.S.2d 8 (1953).

²⁰ *Local 130, Int'l Bhd. of Elec. Workers v. Mississippi Valley Elec. Co.*, 175 F. Supp. 312 (E.D. La. 1959).

²¹ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

²² *Local 130, Int'l Bhd. of Elec. Workers v. Mississippi Valley Elec. Co.*, 175 F. Supp. 312 (E.D. La. 1959).

to award a remedy of damages.²³ Since *Lincoln Mills* authorized the development of federal substantive law under section 301 to be drawn from appropriate sources, the court in the principal case looked to a 1929 commercial dispute²⁴ and two state labor cases²⁵ to support this principle and declined to follow a sizable body of decisions by experienced labor arbitrators.²⁶ It is generally conceded that commercial decisions lack sufficient similarity to labor problems to be valid as precedent in labor cases.²⁷ This dissimilarity is based on the theory that commercial contracts usually cover a single transaction between parties relatively independent of each other while labor contracts concern the prospective government of an entire industrial operation and a large number of mutually dependent parties.²⁸ Historically, arbitrators have tended to take this difference into account more often than have courts, possibly due to greater familiarity with the nature of the differences.²⁹ However, the reasoning in the principal case that the contract was not to have internal sanctions gains some support from the union's retention of the right to strike, but this reasoning deprives the contract of sanctions which contribute to industrial peace.³⁰ A similar case has distinguished the principal case on the ground that the arbitrator must have power to enforce the agreement by appropriate sanctions since the union had agreed not to strike.³¹ The other basis for the decision is more questionable. The court's fear of forcing the company to alter its policy of no-work—no-pay seems to allow company policy to override the purposes of the collective bargaining agreement, especially if the policy were established by unilateral decision. If, however, the policy had attained the status of a past practice impliedly merged into the contract by long usage and acceptance, the court may have treated the matter as a case in which one party was challenging that to which it had impliedly agreed by its conduct.

The strict construction applied by the court ignores a fun-

²³ 268 F.2d 447, 455.

²⁴ *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 169 N.E. 386 (1929).

²⁵ *Guidry v. Gulf Oil Corp.*, 320 S.W.2d 691 (Tex. Civ. App.) rev'd on other grounds, —Tex.—, 327 S.W.2d 406 (1959); *Lone Star Cotton Mills v. Thomas*, 227 S.W.2d 300 (Tex. Civ. App. 1949).

²⁶ See cases *supra* note 16.

²⁷ Cox, *Reflections on Labor Arbitration*, 72 Harv. L. Rev. 1482, 1489 (1959). But it is not implied that all commercial contracts relate to situations sufficiently similar that the interpretation of one will necessarily aid the interpretation of another.

²⁸ *Id.* at 1490-91.

²⁹ Cox, *supra* note 27, at 1487-89.

³⁰ See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

³¹ *Local 130, Int'l Bhd. of Elec. Workers v. Mississippi Valley Elec. Co.*, 175 F. Supp. 312 (E.D. La. 1959).

damental purpose of arbitration, *i.e.*, to resolve ambiguities in the collective bargaining agreement. In view of the prevailing practice of arbitrators to give appropriate relief (although not always damages) for breach of labor contracts, the presumption should be that the parties intended the arbitrator to have power to give relief unless the power is expressly denied. The court's approach would discourage good faith compliance with the contract since the party who believed a contractual provision might be strictly construed in its favor would be tempted to pursue its own ends until a court decided the question. The resulting absence of prompt sanctions may well lead to a severe narrowing of the scope of labor arbitration unless union negotiators successfully insist upon express provisions granting arbitrators broad remedial powers. Since much of the reasoning of the court could as well be applied to grievances arising from discharge without cause, unauthorized work by supervisors, disregard of seniority in promotion, or contracting out of work in violation of an agreement, the burden of enforcing a great deal of the modern collective bargaining contract may come to rest upon the courts or upon economic pressure by the parties. This result would seem to conflict with the policy of the *Lincoln Mills* case, *viz.*, that industrial peace can be more effectively achieved through enforcement of arbitration contracts. The fact that this policy is thwarted by a narrow construction of the contract rather than by a narrow construction of the statute does not change the result.

Elwood B. Hain, Jr.

Oil and Gas — Leases — Implied Covenants

Plaintiff, lessor of thirty-one adjacent oil and gas leases covering about 90,000 acres, sued Defendant, owner of the oil rights under these leases, seeking to enforce the implied covenant or covenants for adequate exploration and development insofar as oil is concerned. The oil and gas rights had been separated at least fifteen years earlier and gas was subsequently fully developed, but no owner of the oil rights had drilled prior to the institution of this suit. Two of the one hundred fourteen wells drilled by the gas lessee had oil "shows"; and Defendant had, over a period of two years after the filing of this suit and three years after Plaintiff's first demand, drilled eight wells, six of which produced in paying quantities and seven of which were in a limited area. The trial court held for

Plaintiff by ordering Defendant to commence drilling exploratory wells under a yearly schedule established by the court, or surrender certain amounts of acreage, or pay certain sums to the lessor in lieu of drilling. *Held, affirmed*: Under certain facts, implied covenants to explore, develop, and produce can be shown to have been breached without requiring the lessor to show that drilling exploratory wells will probably be profitable to the lessee. *Sinclair Oil & Gas Co. v. Masterson*, 271 F.2d 310 (5th Cir. 1959).

Recognizing that lessors enter into oil, gas, and mineral leases in the expectation of production and royalty income,¹ the courts early found implied covenants in the lease contracts.² Absent any express drilling provisions,³ it is well settled that a lessee has a duty to drill diligently all necessary wells to secure oil and gas once either has been discovered in paying quantities, for the mutual advantage of both lessor and lessee.⁴ The hypothetical reasonably prudent operator is the standard generally used to determine if a particular operator of a particular lease is obligated to conduct further drilling.⁵ This standard requires that a lessee drill those wells which a prudent operator would drill after the mythical operator has carefully weighed all relevant factors,⁶ e.g., nature of the property involved, general conditions prevailing in the industry, and any other business consideration that may relate to his decision.⁷ Courts have often stated that a prudent operator acts with the interests of both the lessor and himself in mind,⁸ and that he is under no duty to operate at a loss merely to benefit his lessor.⁹ The majority of decisions place the burden of proof on the lessor to establish that a prudent operator should continue drilling,¹⁰ and this burden of proof includes a showing that the lessee can probably expect a reasonable profit

¹ *Gulf Prod. Co. v. Kishi*, 129 Tex. 487, 492, 103 S.W.2d 965, 968 (1937).

² *Kleppner v. Lemon*, 176 Pa. 502, 35 Atl. 109 (1896).

³ *W. T. Waggoner Estate v. Sigler Oil Co.*, 118 Tex. 509, 19 S.W.2d 27 (1929).

⁴ *Rhoads Drilling Co. v. Allred*, 123 Tex. 229, 70 S.W.2d 576 (1934); *Grubb v. McAfee*, 109 Tex. 527, 212 S.W. 464 (1919). Lessees are required to use all legitimate means to have the maximum possible recovery of the minerals. *Livingston Oil Corp. v. Waggoner*, 273 S.W. 903 (Tex. Civ. App. 1925) error ref.

⁵ *Brown, The Implied Covenant For Additional Development*, 13 Sw. L.J. 149, 155 (1959).

⁶ *Hays v. Bowser*, 110 W. Va. 323, 158 S.E. 169 (1931).

⁷ *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801 (8th Cir. 1905); See *Walker, The Nature of Property Interests Created by an Oil and Gas Lease in Texas*, 11 Texas L. Rev. 399, 422-26 (1933).

⁸ *Merrill, Covenants Implied in Oil and Gas Leases* § 75 (1st ed. 1926).

⁹ *Empire Gas & Fuel Co. v. Haggard*, 152 Okla. 35, 3 P.2d 675 (1931); *Texas Pac. Coal & Oil Co. v. Barker*, 117 Tex. 418, 6 S.W.2d 1031 (1928); *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S.E. 124 (1912).

¹⁰ *Brown*, supra note 5, at 174.

after the required costs of drilling and production have been met.¹¹

Some courts, however, have held that implied drilling covenants were shown to be breached without the lessor showing that the lessee can reasonably expect profit from further drilling.¹² These decisions usually have extreme factual situations, *e.g.*, an unreasonable time has lapsed since the lessee last drilled,¹³ existing wells are yielding very little production,¹⁴ the lessee has manifested an intent to do no further drilling,¹⁵ a large tract is being held by production from a small area,¹⁶ or there appears to be a prospect of production although the amount thereof is not shown.¹⁷ It is said that such facts indicate that the lessee is holding the lease for speculative purposes only¹⁸ without due consideration of the interests of the lessor,¹⁹ thus evidencing a *prima facie* case of breach although the lessor has not shown that the lessee may reasonably expect profit from further drilling.²⁰ This theory in turn requires the lessee to justify his inactivity by showing there can be no reasonable expectation of profit from additional drilling.²¹ However, if the delay has been unconscionable, it has been held that even a showing of no reasonable expectation of profit by the lessee will not aid him, and conditional cancellation of the undeveloped portions of the lease has been granted on the theory that it is inequitable for the lessee to prevent the lessor from obtaining additional wells through some other operator.²² Removing the burden of proof as to the probability of profit from the lessor in these instances has caused some authorities to contend that a separate implied covenant of exploration exists apart from that of development.²³ It appears that this proposed

¹¹ Fort Worth Nat'l Bank v. McLean, 245 S.W.2d 309 (Tex. Civ. App. 1951) error ref. *n.r.e.*; Summers, Oil and Gas § 414 (perm. ed. 1959).

¹² Sauder v. Mid-Continent Petroleum Corp., 292 U.S. 272 (1934).

¹³ Doss Oil Royalty Co. v. Texas Co., 192 Okla. 359, 137 P.2d 934 (1943).

¹⁴ Colpitt v. Tull, 204 Okla. 289, 228 P.2d 1000 (1950); McKenna v. Nichlos, 193 Okla. 526, 145 P.2d 957 (1944). Oklahoma appears to be the leading state in granting lessors relief without requiring them to prove a reasonable expectation of profit from future drilling.

¹⁵ Magnolia Petroleum Co. v. Wilson, 215 F.2d 317, 3 O. & G. Rep. 2065 (10th Cir. 1954); Nunley v. Shell Oil Co., —La.—, 76 So. 2d 111, 4 O. & G. Rep. 236 (1954).

¹⁶ Ezzell v. Oil Associates, 180 Ark. 802, 22 S.W.2d 1015 (1930). Partial cancellation was granted where two wells (one being a dry hole) were drilled on a 1,170 acre lease over a period of eight years.

¹⁷ Standard Oil Co. v. Giller, 183 Ark. 776, 38 S.W.2d 766 (1931).

¹⁸ Brown, *supra* note 5, at 160.

¹⁹ Merrill, 4th Annual Rocky Mountain Mineral Law Inst. 205, 216 (1958).

²⁰ Doss Oil Royalty Co. v. Texas Co., 192 Okla. 359, 137 P.2d 934 (1943).

²¹ *Ibid.*

²² Sand Springs Home v. Clemens, 276 P.2d 262 (1954); See Discussion Note, 6 O. & G. Rep. 833, 834 (1956).

²³ See Meyers, The Implied Covenant of Further Exploration, 34 Texas L. Rev. 553 (1956).

covenant would not allow the lessee to exercise the same caution as in developing operations since it is argued that prudent operators often drill exploratory wells with no reasonable expectation of profit.²⁴ This proposition has been vigorously attacked,²⁵ and the recent Texas Supreme Court decision of *Clifton v. Koontz*²⁶ expressly rejects it.

The principal case is the first decision applying Texas law which clearly grants a lessor relief for breach of implied drilling covenants without the lessor showing that profit can be reasonably expected from further drilling. This decision may also be construed as acknowledging the existence of an implied exploration covenant as distinguished from the implied covenant to develop²⁷ because the court refers to implied *covenants* of exploration and development throughout the opinion.²⁸ Recognizing that the immense tract and the lapse of time are facts which distinguish the principal case from the *Clifton* case, yet the court appears to misconstrue the *Clifton* decision with respect to the existence of an exploration covenant. The Texas Supreme Court in the *Clifton* decision declined to rule on whether a showing that profit can be reasonably expected is necessary to prove a breach of the *development* covenant when production from a small area is holding vast acreage under lease or where an unreasonable length of time has elapsed since the last drilling.²⁹ The supreme court then turned to the question of whether an implied covenant to explore exists apart from that of development and answered this question in the negative, stating that prior Texas cases treat "the covenant of development as covering all additional drilling requirements after production is once obtained on the lease," with the exception of offset

²⁴ *Id.* at 557.

²⁵ Brown, *supra* note 5; Brown, The Proposed New Covenant of Further Exploration: Reply to Comment, 37 Texas L. Rev. 303 (1959).

²⁶ —Tex.—, 325 S.W.2d 684 (1959), noted, 14 Sw. L.J. 283 (1960).

²⁷ Willingham v. Bryson, 294 S.W.2d 421 (Tex. Civ. App. 1956), noted, 11 Sw. L.J. 380 (1957), is the only Texas decision granting relief to a lessor for breach of an implied exploration covenant after production granting paying quantities had been obtained. The court stated that proof of a breach of the exploration covenant did not require a showing that profit can reasonably be expected from further drilling, but the court also found that the evidence supported a breach of the implied covenant to develop. This holding as to the exploration covenant has been expressly overruled in *Clifton v. Koontz*, *supra* note 26. It has been contended that *Perkins v. Mitchell*, 153 Tex. 368, 268 S.W.2d 907 (1954), granted relief to a lessor without requiring that he prove a probability of profitable production from further drilling, *Meyers*, *supra* note 23, at 580, but issue has been taken with this view of the case. Brown, *The Law of Oil and Gas Leases* 342 (1958).

²⁸ 271 F.2d at 313, 320, 321, 323, 324.

²⁹ —Tex.—, 325 S.W.2d at 696.

wells to prevent drainage.³⁰ This language indicates that exploratory wells in Texas must be obtained by a lessor under the development covenant complete with its prudent operator standard. The court in the instant case, interpreting the *Clifton* decision as to the exploration covenant as being limited to its facts, declined to follow it, and stated that the facts at hand were "within the ambit of *Sauder v. Mid-Continent*,"³¹ a landmark *development* case³² involving exploratory wells.³³ The lessee in the principal case was currently maintaining drilling operations and the lessee's officers in *Sauder* stated they had no intention to drill in the near or remote future;³⁴ otherwise, the facts of the two cases are similar in that an unreasonable time had elapsed since the last drilling. The clearly stated issue of the *Sauder* case is a breach of the implied development covenant;³⁵ yet, the court in the principal case ruled that the lessee has not complied with implied covenants of exploration-development.³⁶

In answer to the question left open in the *Clifton* decision as to whether probability of profit from further drilling must be shown to indicate a breach of the *development* covenant when a large tract is involved or an unreasonable time has elapsed since the last drilling, the instant case may be construed as authority which does not require such a showing by the lessor. This conclusion in regard to the development covenant, although supported by the court's acknowledgement of the *Sauder* case as precedent, may be questioned because the prudent operator standard was not discussed and an exploration covenant was frequently mentioned. Moreover, it appears that relief was granted the lessor, not because of a breach of the development covenant nor an exploration covenant alone, but rather for a breach of both covenants. Although the result reached appears correct under the facts, it is questionable whether this case can be reconciled with the statements of law set forth in the *Clifton* decision. The Texas Supreme Court there struck down the proposed exploration covenant and did not limit its ruling to the facts. The *Clifton* decision settles the issue of the existence, or rather *non-exist-*

³⁰ *Ibid.*

³¹ 271 F.2d at 321.

³² *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272 (1934).

³³ Brown, *The Proposed New Covenant of Further Exploration: Reply to Comment*, 37 *Texas L. Rev.* 303, 319 (1959).

³⁴ *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 280 (1934). This fact, not present in the principal case, has been submitted as being the turning point of the *Sauder* case because such an attitude did not comply with the prudent operator standard by definition, viz., one who acts with regard to the interests of both lessor and lessee. Brown, *supra* note 33, at 319.

³⁵ 292 U.S. at 278.

³⁶ 271 F.2d at 321.

ence of the proposed exploration covenant in Texas; yet, the principal decision tends to confuse by implying that an exploration covenant may exist in certain factual situations. This decision, although not binding on Texas courts, carries certain weight as being a federal court's interpretation of Texas law under the *Clifton* case. As to the future, it has been argued that courts should search for substance rather than form in implied covenant litigation, *viz.*, pay more attention to doing justice to the parties rather than attempting to establish general rules which fail in a particular application.³⁷

Charles R. Johnson

Procedure—Discovery—List Of Witnesses Obtained After Cause of Action Arises

Plaintiff was injured while a passenger on Defendant transit company's bus. After the accident the bus driver passed out cards to his passengers in order to secure the names of those who might be potential witnesses. This list of voluntarily submitted names was then given to Defendant's trial attorney, Ladon, the relator in this action. Plaintiff filed a "motion for discovery" under Texas Rule 167¹ in an attempt to inspect and copy this list of witnesses. Upon hearing the motion, the trial judge ordered Ladon to surrender this list to Plaintiff. Ladon refused, and was held in contempt.² *Held: Relator released:* Rule 167, relating to discovery and production of documents, does not require an attorney to surrender a list of witnesses obtained *subsequent to* an accident. *Ex parte Ladon*, —Tex. —, 325 S.W.2d 121 (1959).

Under the common-law system of adversary proceedings, one side could be in possession of material facts which, if undisclosed, would result in an unfair trial or injustice to the parties.³ Because of this contentious theory, some device was necessary to permit one

³⁷ Merrill, *supra* note 19, at 243.

¹ Tex. Rules Civ. Pro. Ann. rule 167 (1957).

² Appeal in Texas before a final judgment may be taken only in three situations, namely, orders granting or refusing temporary injunctions, appointing receivers, and determining pleas of privilege. *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641 (1933); Tex. Rev. Civ. Stat. Ann. arts. 2008, 2250, 4662 (1958). Thus, the cumbersome procedure of contempt due to a refusal to comply with the discovery order is used to test the validity of the order because a direct appeal from an interlocutory order is not permitted unless the order falls within one of the three named exceptions. A change allowing a fourth exception to the rule in the case of a discovery order would seem more in keeping with the theory of the new rules.

³ Freedman, *Discovery as an Instrument of Justice*, 22 Temp. L.Q. 174 (1949).

side of a lawsuit to obtain information which lay beyond its reach, but which was necessary to the preparation of its case.⁴ The device employed has been a motion for discovery, which is a court order requiring any party to the suit to produce relevant information for the uninformed party's use.⁵ Thus, the purpose of discovery has been to provide effective machinery for ascertaining relevant facts and to expedite a determination of each controversy on its merits,⁶ although an often utilized purpose is to obtain *evidence* for use at the trial rather than information to aid in its preparation.⁷ Discovery, along with depositions,⁸ physical examinations,⁹ and pre-trial procedure,¹⁰ are the customary examples of "rational means" to discover facts *before* the trial.¹¹ Accordingly, discovery affords opportunity for settlement in lieu of litigation, or, if settlement fails, makes the subsequent verdict in the cause to be one of fact and not one of confusion or surprise.¹² However, two conditions have been uniformly imposed upon the right of discovery. First, the matters into which inquiry is made must be relevant to the controversy in question; and, secondly, the subject matter of the inquiry must not be privileged.¹³ Federal courts have shortened trials immeasurably and made for speedier and more fairly disclosed settlements through their discovery rule,¹⁴ as have the nine states which have enacted similar procedures.¹⁵ However, discovery has been criticized as a principle which places a premium on laziness and penalizes diligence,¹⁶ *e.g.*, the testimony of an expert witness is obtainable by discovery;¹⁷ or as a force which reduces an adversary

⁴ 3 McDonald, *Texas Civil Practice* 836 (1950).

⁵ Dawson, *Old Rights of Discovery in Modern Federal Court Practice*, 24 *Ill. L. Rev.* 666 (1930).

⁶ *Mackerer v. New York Cent. Ry.*, 1 *F.R.D.* 408 (E.D. N.Y. 1940); Holtzoff, *Twelve Months Under the New Rules of Civil Procedure*, 26 *A.B.A.J.* 45 (1940).

⁷ Alexander, *A Bill of Discovery*, 2 *Texas L. Rev.* 483, 485 (1924). In 1957 the supreme court created rule 186a which specifically authorizes depositions for the sole purpose of discovery as well as for use as evidence.

⁸ Rules 186-215a, *Tex. Rules Civ. Pro. Ann.* (1957); Masterson, *Adversary Depositions and Admissions Under Texas Practice*, 10 *Sw. L.J.* 107 (1956).

⁹ Since the repeal under pressure in 1941 of rule 168, which authorized trial courts to order physical examinations where the physical condition was in controversy, Texas courts have had no power to order the physical examination of a party without his consent. *Kirby Lumber Corp. v. Overstreet*, 262 *S.W.2d* 805 (Tex. Civ. App. 1953) error ref.

¹⁰ Rules 166-75, *Tex. Rules Civ. Pro. Ann.* (1957).

¹¹ *Krook v. Blomberg*, 95 *N.H.* 170, 59 *A.2d* 482 (1948).

¹² 1 *Belli*, *Modern Trials* 89 (1954).

¹³ *Freedman*, *supra* note 3, at 175.

¹⁴ *Fed. R. Civ. P.* 34; *Belli*, *op. cit. supra* note 12, at xxxv.

¹⁵ See *Notes*, 68 *Harv. L. Rev.* 673 (1955).

¹⁶ *McCarthy v. Palmer*, 29 *F. Supp.* 585 (E.D. N.Y.), *aff'd*, 113 *F.2d* 721 (2d Cir. 1939), *cert. denied*, 311 *U.S.* 680 (1940).

¹⁷ *Sachs v. Aluminum Co. of America*, 167 *F.2d* 570 (6th Cir. 1948).

proceeding to the status of an administrative hearing.¹⁸ Accordingly, courts have imposed certain protective measures upon discovery to prevent possible abuse.¹⁹ "Fishing expeditions" are not allowed²⁰ unless the court is satisfied that there is reasonable certainty that relevant information will be obtained.²¹ Federal courts do not permit discovery in certain types of admiralty suits,²² nor to certain office files.²³ The attorney-client privilege likewise guards against possible abuse.²⁴ However, the best guard against misuse is the federal court-applied "work product of the lawyer" standard,²⁵ which keeps counsel from prying into his opponent's brief case.

The Texas discovery rule²⁶ provides that, upon showing of good cause by any party, the court may order production for inspection of documents, papers, books, or other tangible objects which are not privileged and which are material to any action pending in the court. However, the rule contains a proviso which prohibits discovery of written communications passing "between agents or representatives or the employees of either party to the suit, or communications between any party and his . . . employees, where made subsequent to the occurrence . . . upon which the suit is based, and made in connection with the prosecution, investigation or defense of such claim. . . ."²⁷ Moreover, an amendment to the rules in 1957 brought Texas in line with a 1948 amendment to the federal rules, further restricting rule 167 by denying discovery where it would result in undue annoyance, embarrassment, oppression, and expense to the one against whom it is directed.²⁸ Under this rule "good cause" is determined by an exercise of trial court discretion,²⁹ and abuse of discretion in either granting³⁰ or denying³¹ a motion for discovery is difficult to establish on appeal.

In reaching the result in the instant case the court relied

¹⁸ Hawkins, *Attorney-Client Privilege*, 14 Texas B.J. 217 (1951).

¹⁹ *Vargos v. Clark*, 8 F.R.D. 635 (D. D.C. 1949).

²⁰ Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 Mich. L. Rev. 205, 219 (1942).

²¹ Freedman, *supra* note 3, at 175.

²² *Shelton v. United States*, 27 F. Supp. 801 (S.D. N.Y. 1939); *The Dalzellace*, 10 F. Supp. 434 (S.D. N.Y. 1934).

²³ *In Re Hyde*, 149 Ohio 407, 79 N.E.2d 224 (1948).

²⁴ Hawkins, *supra* note 18, at 245.

²⁵ *Hickman v. Taylor*, 329 U.S. 495 (1947).

²⁶ *Tex. Rules Civ. Pro. Ann. rule 167* (1957).

²⁷ This proviso, which is not found in federal rule 34, was drafted by the Rules Committee and is found only in Texas.

²⁸ *Tex. Rules Civ. Pro. Ann. rule 186b* (1957).

²⁹ *Robb v. Gilmore*, 302 S.W.2d 739 (Tex. Civ. App. 1957) error ref. n.r.e.

³⁰ *Hastings Oil Co. v. Texas Co.*, 149 Tex. 416, 234 S.W.2d 389 (1950).

³¹ See, *Geo. S. May Co. v. Stephens Lumber Co.*, 301 S.W.2d 294 (Tex. Civ. App. 1957).

heavily upon a Rules Committee interpretation of rule 167 in a hypothetical situation virtually identical to the instant case.³² This interpretation of the discovery proviso would also seemingly prohibit the use of either a deposition or subpoena duces tecum to secure a list of witnesses since the exact proviso in rule 167 exists in these two procedures restricting their use.³³ Accordingly, it may be questioned whether a party may ever obtain a list of witnesses in his opponent's possession.³⁴ Under federal rule 34, absent the proviso but applying the "work product of the lawyer" protective standard,³⁵ the discovery of a list of witnesses as in the instant case would *not* have been prevented.³⁶ There is no legitimate reason involving justice which would place a list of witnesses in the hands of one party and out of the reach of the other.³⁷ Under the Texas proviso there remain further unanswered questions, *e.g.*, as to the proper interpretation of the words "subsequent" and "investigation."³⁸ If Plaintiff in the instant case had died *after* the list was made, would the decision in the principal case extend to deny discovery? Since an action for wrongful death does not accrue until the instant of death,³⁹ it may be argued that the list would be obtainable.

The structure of the Texas proviso has resulted in a decision that is not in conformity with the purpose of discovery, and which may result in serious injustice where the list of witnesses is the only means available to secure persons to substantiate a cause of action. A more practical rule should give broader discretion to the trial judge, and yet prevent prying into the opposing party's brief case. The federal "work product" rule has provided adequate protection without this burdensome proviso. A legislative change would place Texas discovery procedure more in accord with the combined

³² Civil Procedure, 9 Texas B.J. 319 (1946).

³³ Some, however, believe this may still be possible since rule 186a is broader in some aspects than rule 167. Thode, *Some Reflections on the 1957 Amendments to the Texas Rules of Civil Procedure Pertaining to Witnesses at Trial, Depositions, and Discovery*, 37 Texas L. Rev. 33, 38-40 (1957); Notes, 38 Texas L. Rev. 642, 644 (1960).

³⁴ The only possible rule which would allow discovery of a list of witnesses seems to be the general Bill of Discovery, rule 737. However, this use of rule 737 has never been tested in a court action. Since it is a separate lawsuit, appeal would be immediate after ruling, thus eliminating the clumsy "contempt" procedure. See *supra*, note 2.

³⁵ See *Hickman v. Taylor*, 329 U.S. 495 (1947).

³⁶ *Atlantic Greyhound Corp. v. Lauritzen*, 182 F.2d 540 (6th Cir. 1950); *Wilson v. David*, 21 F.R.D. 217 (W.D. Mich. 1957); *Viront v. Wheeling & L.E. Ry.*, 10 F.R.D. 45 (N.D. Ohio 1950); see also *Reynolds v. Boston & Maine Transp. Co.*, 98 N.H. 251, 98 A. 157 (1953).

³⁷ Thode, *supra* note 33, at 40.

³⁸ Cf. Notes, 35 Texas L. Rev. 598, 600 (1957); Thode, *supra* note 33, at 39.

³⁹ Tex. Rev. Civ. Stat. Ann. art. 5526(7) (1958); *Hunnington v. Walker's Austex Chili Co.*, 285 S.W.2d 255 (Tex. Civ. App. 1955) error ref.

principles of speed and justice which form the very basis of the discovery rule. Perhaps the supreme court will continue the reform begun in 1957⁴⁰ by substituting the "work product" rule for the present proviso of rule 167.

Henry Nuss, III

Taxation—Life Insurance—Proceeds From Policies Owned By Corporation

The president-shareholder of a closely-held corporation secured an insurance policy on his own life, naming the corporation beneficiary and reserving to it the right to change the beneficiaries. Pursuant to a predetermined plan, the corporation became the owner of the policy, paid all premiums, and named Plaintiff and other shareholders as beneficiaries. On the death of the officer the Commissioner of Internal Revenue concluded that the proceeds received by Plaintiff were taxable as a dividend. The Tax Court sustained the Commissioner against Plaintiff, who did not report the proceeds received from the insurance company as income. *Held*: When a president of a closely-held corporation obtains a life insurance policy on himself, naming the corporation beneficiary and reserving to it the right to change the beneficiaries, and subsequently the corporation becomes the owner of the policy, pays all premiums, and names certain of its shareholders as beneficiaries, the insurance proceeds received by the shareholder by reason of the death of the insured are not taxable as a corporate dividend. *Ducros v. Commissioner*, 272 F.2d 49 (6th Cir. 1959).

Life insurance policies on a corporate officer can be assigned to the corporation¹ as long as it is not a cover for a "wager policy."² Section 22(b)(1)(A) of the Internal Revenue Code of 1939, now Section 101(a)(1) of the 1954 Code, exempts from taxation amounts received under a life insurance policy paid by reason of the death of the insured. Hence, a corporation, having an insurable interest in the life of its officers,³ is not taxed on the proceeds it

⁴⁰ E.g., the amendment to rule 186b; 20 Texas B.J. 187 (1957).

¹ *Lincoln Nat'l Life Ins. Co. v. Scales*, 62 F.2d 582 (5th Cir. 1933).

² *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457 (1877).

³ It is generally against public policy for one who has no insurable interest to be the owner of a policy on the life of another person. *Peoples Life Ins. Co. v. Whiteside*, 94 F.2d 409 (5th Cir. 1938). A person has an insurable interest in his own life and may legally name whomever he pleases as beneficiary under a policy on his life. *Lawrence v. Traveler's Ins. Co.*, 6 F. Supp. 428 (E.D. Pa. 1934). For a basic definition and discussion

receives upon the death of an insured officer.⁴ However, if those proceeds are subsequently distributed to the shareholders of the corporation, they are taxed to the shareholders as a dividend to the extent the corporation has earnings and profits.⁵

Business purchase agreements, which commonly utilize the insurance fund as the source of the purchase price for the interest of a deceased owner, are usually employed in partnerships and closely-held corporations.⁶ Difficult tax problems concerning corporations have arisen as a result of the payment of insurance premiums and the handling of proceeds. Outstanding among the arguments of the Commissioner in these cases is the theory of constructive dividends.⁷ In *Casale v. Commissioner*,⁸ which involved a deferred compensation agreement between the corporation and its president, with the corporation being both the owner and beneficiary of the policy of insurance, the court held that the policy was a corporate asset. Hence, the payment of the premiums by the corporation did not constitute a dividend to the president-shareholder of the corporation.⁹ *Prunier v. Commissioner*¹⁰ represents a like holding with reference to a stock retirement plan in a closely-held corporation. The constructive dividend theory was again rejected in *Sanders v. Fox*¹¹ which dealt with a stock redemption agreement between the shareholders of a closely-held corporation. In that case the taxpayer designated the beneficiaries, but the proceeds were made subject to the agreement of the corporation to retire the stock of the deceased shareholder. The court held that the benefits of the investment in the policy went to the corporation as owner of the policy, with the taxable benefits received by the shareholder, e.g., a guaranteed minimum price for his stock, being contingent and incapable of determination until the stock was redeemed. Yet,

of "insurable interest," see *Warnock v. Davis*, 104 U.S. 775 (1881). For a discussion of the insurable interest of a corporation in its shareholders and officers, see 2 Appleman, *Insurance Law and Practice* §§ 871-72 (1941, Supp. 1957). See also Harnett, *Taxation of Life Insurance* 53-56 (1957).

⁴ *United States v. Supplee-Biddle Hardware Co.*, 265 U.S. 189 (1924).

⁵ *Cummings v. Commissioner*, 73 F.2d 477 (1st Cir. 1934). See also *Golden v. Commissioner*, 113 F.2d 590 (3d Cir. 1940).

⁶ See Note, 71 Harv. L. Rev. 687 (1958).

⁷ See Note, 40 Va. L. Rev. 43 (1954).

⁸ 247 F.2d 440 (2d Cir. 1957).

⁹ The court stated that the retirement agreement at most gave the taxpayer an unsecured claim under his contract which might even be subordinated to the claims of other creditors in the event of insolvency of the corporation. See *Pepper v. Litton*, 308 U.S. 295 (1939).

¹⁰ 248 F.2d 818 (1st Cir. 1957). See *Mannheimer & Friedman, Stock Retirement Agreements*, 28 *Taxes* 423, 425 (1950).

¹¹ 253 F.2d 855 (10th Cir. 1958).

it seems settled that if the taxpayer obtains a policy, naming himself or his specific designees as beneficiaries, and the corporation pays the premiums, those premiums will be taxable to the taxpayer since the policy would then be *his* asset.¹² The Commissioner has acquiesced in the theories adopted in the *Casale*, *Prunier*, and *Sanders* cases.¹³

The constructive dividend theory has been argued by the Commissioner in many areas with varying degrees of success.¹⁴ The instant case represents an effort by the Commissioner to have the theory, which has been relatively unsuccessful as to *premium* payments, adopted as to the *proceeds* of insurance policies. This question was before the court in *Doran v. Commissioner*¹⁵ where the proceeds were payable to trustees (officers of the corporation) as beneficiaries and owners of the policies to be used by them to purchase the stock of any shareholder who died. The court held that the proceeds were not dividends since the corporation was neither owner nor beneficiary of the policies, even though it did have the right to change the beneficiaries. However, the corporation in the instant case was the owner of the policy in addition to having the power to change the beneficiaries. The avoidance of a second tax may have been the policy reason for the decision in the *Doran* case, but this is hardly a sound explanation for the decision in the instant case since the payment of premiums by the corporation in the instant case would not be taxable dividends under the accepted rule.¹⁶ Further,

¹² *Paramount-Richards Theatres v. Commissioner*, 153 F.2d 602 (5th Cir. 1946). See also *Burnet v. Wells*, 289 U.S. 670 (1933); *Yuengling v. Commissioner*, 69 F.2d 971 (3d Cir. 1934).

¹³ Rev. Rul. 59-184, 1959-1 Cum. Bul. 65 (1959).

¹⁴ The following are among the most frequently occurring transactions that may give rise to the receipt of constructive dividends by the shareholder: See Brafford, *The Constructive Receipt of Dividends by Stockholders of a Closely-Held Corporation*, published in three parts; Part I, 46 Ky. L.J. 515 (1958); Part II, 47 Ky. L.J. 17 (1958); Part III, 47 Ky. L.J. 378 (1959):

- (1) stockholder advances and loans to the corporation, 46 Ky. L.J. 520-31 (1958) (Part I);
- (2) advances and loans by the corporation to some or all of the stockholders, 46 Ky. L.J. 531-42 (1958) (Part I);
- (3) compensation paid to stockholder-officers of the corporation, 47 Ky. L.J. 17-30 (1958) (Part II);
- (4) rentals and royalties paid to stockholders, 47 Ky. L.J. 30-37 (1958) (Part II);
- (5) distributions of property and bargain sales and purchases, 47 Ky. L.J. 37-46 (1958) (Part II);
- (6) bargain use of corporate property, 47 Ky. L.J. 378-81 (1959) (Part III);
- (7) payments on behalf of the stockholder by the corporation, 47 Ky. L.J. 381-86 (1959) (Part III); and
- (8) purchase of insurance by the corporation upon the lives of the stockholders, 47 Ky. L.J. 386-95 (1959) (Part III).

¹⁵ 246 F.2d 934 (9th Cir. 1957).

¹⁶ See note 13 *supra*. There was no holding as to the taxation of the premium payments as dividends in the *Doran* case, but it is evident that they would be considered dividends

the court in the *Doran* case implied that if the corporation had been named beneficiary and had used the proceeds to buy the stock for the remaining shareholders, the surviving shareholders would have realized a dividend from the corporation for the full amount of the proceeds. This result was also implied in the *Sanders* case.

The courts have repeatedly affirmed the rule that in tax cases the form of the transaction will not control where the transaction is one which does not vary in substance the control or change the flow of economic benefits.¹⁷ The fundamental inquiry is whether the taxpayer has really received income.¹⁸ It seems evident that the courts in the *Casale*, *Prunier*, and *Sanders* cases have failed to adhere to this rule. The reasoning as to proceeds in the *Doran* case seems to be correct, but the court in the instant case seems to ignore the substance of the transaction when it holds that the proceeds were not dividends to the shareholders since the corporation had no control over the proceeds,¹⁹ for when the right to change the beneficiary is retained, the named beneficiary has only an expectancy²⁰ and not a vested interest.²¹ Thus, the naming of Plaintiff as beneficiary by the owner-corporation amounted to nothing more than a revocable assignment of the corporation's right to receive those proceeds. This situation is analogous to that in *Harrison v. Schaffner*,²² where the court held that an assignment of trust income by a beneficiary for a term was, in point of substance, a method of tax avoidance that would not prevent the income from being taxed to the beneficiary. That court distinguished *Blair v. Commissioner*,²³ where the income was assigned for life with no retention of control by the assignor. This line of cases seems analogous to the instant case since here the corporation, under the guise of insurance formality, is using its ownership of the policy and control of the proceeds to effectuate a dividend distribution in substance. Although the corporation did not have control over the time at which the proceeds would vest, the control it had

since the corporation was neither owner nor beneficiary of the policy but paid the premiums with a charge to surplus.

¹⁷ *Higgins v. Smith*, 308 U.S. 473 (1940). See *Commissioner v. Court Holding Co.*, 324 U.S. 331 (1945); *Weiss v. Stearn*, 265 U.S. 242, 254 (1924). See also 3 P-H Fed. Taxes ¶¶ 21,210; 21,212; 21,213; 21,221; 21,222 (1960).

¹⁸ *Lewis v. O'Malley*, 140 F.2d 735 (8th Cir. 1944).

¹⁹ 272 F.2d at 51 (1959).

²⁰ *Doering v. Buechler*, 146 F.2d 784 (8th Cir. 1945). This is true even though the beneficiary pays the premiums. *Minning v. Prudential Ins. Co. of America*, 88 Ohio App. 339, 95 N.E.2d 269 (1950).

²¹ *State Life Ins. Co. v. Mitchell*, 126 F.2d 867 (8th Cir. 1942); *Oetting v. Sparks*, 109 Ohio St. 94, 143 N.E. 184 (1923).

²² 312 U.S. 579 (1941).

²³ 300 U.S. 5 (1937).

through the ownership of the policy and the right to change the beneficiaries at will seems to be almost complete control in reality. It may also be argued with some force that when such control is held by a closely-held corporation it is of little significance in economic reality whether the corporation or the shareholders exercise the control, since the control of management by the shareholders will avoid the possibility that there will be a change of beneficiaries adverse to their interests in the policy; whereas the shareholders-beneficiaries may be more or less at the mercy of management in the publicly-held corporation. However, looking at the control which the corporation has retained over the policy, the fact that the corporate assets (the insurance proceeds) are payable to the shareholders directly by the insurance company does not seem to "vary the control or change the flow of economic benefits" from the corporation to the shareholders.

Although the instant case, in rejecting the constructive dividend theory as to the payment of proceeds, is in harmony with the *Casale*, *Prunier*, and *Sanders* cases which reject the theory as to the payment of premiums, the policy outlined in all these decisions seems to be in conflict with the established rule that substance will control over the form of the transaction. Such conflicts between legal form and economic reality must be resolved with the realization that taxation is a practical field of law in which the niceties of legal form have often been considered relatively unimportant, especially when used as a cover for a plan of tax avoidance. If there is no consistency with which the courts can apply such a doctrine, the better solution may be in specific legislation, at least with reference to tax consequences of business purchase agreements funded by insurance.

George Howard Nelson

Taxation—Oil And Gas Depletion— Economic Interest

The taxpayer entered into a series of "legal relationships" with leasehold owners of undeveloped oil and gas leases in the La Gloria Field area. In exchange for 50% of the heavier hydrocarbons "contained in all gas to be produced from said leases" the taxpayer agreed to unitize the area (3 units), construct a cycling plant, drill sufficient gas wells to produce a predetermined amount of gas per

day, and process gas from the field. The leasehold owners were to own the wells, casing equipment, and top well connections and were to have full and complete control of the operation of the wells. The taxpayer obtained a special order from the Railroad Commission of Texas which permitted the cycling of gas, *i.e.*, separation of heavier hydrocarbons from the gas and injection of the residue gas into the reservoir under pressure. Pursuant to these agreements, the taxpayer expended approximately \$5,452,000, which it contended was a capital investment in the minerals in place entitling it to a deduction from gross income for depletion of its 50% interest in the heavier hydrocarbons. However, the taxpayer did not contend that its depletable income encompassed the proceeds from the sale of gas extracted from units outside the 3 units in the La Gloria Field area which constituted 20% of its gross income. The district court upheld the taxpayer's contention and the Government appealed. *Held*: Where a taxpayer does not acquire by investment any interest in minerals in place, it has no economic interest in minerals which will entitle it to a deduction for depletion. *Scofield v. La Gloria Oil & Gas Co.*, 268 F.2d 699 (5th Cir. 1959), *cert. denied*, 361 U.S. 933 (1960).

Section 611 of the Internal Revenue Code permits a deduction from gross income for the depletion of mineral deposits.¹ This deduction provides for a return of the taxpayer's investment as the mineral deposits are exhausted by production.² In the early cases the taxpayer's right to the depletion deduction was based upon the legal formalism of his interest in the property, *e.g.*, fee ownership.³ However, in 1933 the Supreme Court in *Palmer v. Bender*⁴ enunciated the concept of the "economic interest in minerals" in order to afford uniform treatment for depletion deduction purposes to the various interests in oil and gas property.⁵ In that case the Court did

¹ Int. Rev. Code of 1954, § 611.

² *United States v. Ludey*, 274 U.S. 295, 302 (1927); *Breeding & Burton*, *Taxation of Oil and Gas Income* 161-65 (1954); *Fiske*, *Federal Taxation of Oil and Gas Transactions* § 7.01 (1959); *Miller*, *Oil and Gas Federal Income Taxation* 9 (3d ed. 1957); *Comment*, 3 *So. Tex. L.J.* 344 (1958).

³ *Weiss v. Mohawk Mining Co.*, 264 Fed. 502 (6th Cir.), *cert. denied*, 254 U.S. 637 (1920); *I.T.* 1920 III-1 *Cum. Bull.* 188, 190 (1924); 4 *Mertens*, *Federal Income Taxation* § 24.20 (1954); *Sneed*, *The Economic Interest—An Expanding Concept*, 35 *Texas L. Rev.* 307, 309-18 (1957). See *Burnet v. Harmel*, 287 U.S. 103, (1932); *Aikman*, *Economic Interests of Purchasers and Processors of Natural Gas*, N.Y.U. 17th Annual Inst. on Fed. Tax. 473 (1959).

⁴ 287 U.S. 551 (1933).

⁵ *Id.* at 555; *Hogan v. Commissioner*, 141 F.2d 92 (5th Cir.), *cert. denied*, 323 U.S. 710 (1944); *Paulston*, *Tax Consequences of "Net Profits Interests" in Oil and Gas Transactions*, P-H Oil and Gas Taxes ¶ 1009 (1958); *Comment*, 24 *Tul. L. Rev.* 112 (1949).

not consider a fee owner as the only possessor of an economic interest. Rather, the Court stated that a taxpayer would be entitled to the depletion deduction whenever he acquired by investment any interest in minerals in place, and secured, by any form of legal relationship, income from the extraction of minerals.⁶ In later decisions the Court narrowly construed the language of *Palmer v. Bender*⁷ by interpreting the requisite of an interest by investment in the minerals in place as "ownership,"⁸ e.g., a processor must have control over production to have an economic interest.⁹ In 1940 the Court further qualified the concept by requiring that a holder of an economic interest look solely to the extraction of minerals for a return of his capital.¹⁰ From these decisions it appeared that a "net profits" interest was not sufficient to constitute an economic interest in minerals. However, in two later "net profits" cases the Court held that a lessor, lessee, or transferee had an economic interest if he had a "possibility of profit" dependent solely upon the extraction of minerals by the use of his rights to control certain aspects of production.¹¹ Moreover, in a recent case the Court held that an *upland owner*, whose property was *indispensable* to the extraction of adjacent offshore oil deposits, was entitled to the deduction for depletion.¹²

The first of two requirements for an economic interest is that the taxpayer must acquire by investment an interest in the minerals in place.¹³ To ascertain if a gas processor has an interest by investment in the minerals in place the courts have examined the precise

⁶ *Palmer v. Bender*, 287 U.S. 551, 557 (1933); Treas. Reg. § 1.611-1(b) (1960); Fiske, *supra* note 2, at § 2.02.

⁷ *Ibid.*

⁸ Sneed, Another Look at the Economic Interest Concept, *Southwestern Legal Foundation 10th Annual Inst. on Oil & Gas L. & Tax.* 353, 359 (1959). See *Helvering v. Elbe Oil Land Dev. Co.*, 303 U.S. 372, 374-75 (1938) (where taxpayer sold property for 1/3 of net profits from minerals, he divested himself of all interest in oil and gas in place); *Helvering v. O'Donnell*, 303 U.S. 370 (1938) (where taxpayer sold stock in corporation which owned the minerals for 1/3 of net profits from an oil and gas lease, this was a personal covenant by vendee and did not give taxpayer an interest by investment in minerals); *Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938); *Thomas v. Perkins*, 301 U.S. 655 (1937) (holder of an oil payment had an economic interest).

⁹ *Helvering v. Bankline Oil Co.*, *supra* note 8, at 368.

¹⁰ *Anderson v. Helvering*, 310 U.S. 404, 412-13 (1940).

¹¹ *Burton-Sutton Oil Co. v. Commissioner*, 328 U.S. 25, 34-35 (1946) (assignee of contract to develop oil land was permitted a deduction from gross income for net profits paid to the grantor of the assignor); *Kirby Petroleum Co. v. Commissioner*, 326 U.S. 599, 604 (1946) (owner of land who leased it and retained a net profits interest had an economic interest). Paulston, *supra* note 5, at ¶ 1009.4.

¹² *Commissioner v. Southwest Exploration Co.*, 350 U.S. 308 (1956), noted, 10 Sw. L.J. 333 (1956).

¹³ *Id.* at 314; *Palmer v. Bender*, 287 U.S. 551 (1933); Treas. Reg. § 1.611-1(b) (1960).

legal form or nature of the processing agreement.¹⁴ Accordingly, in *Signal Gasoline Corp. v. Commissioner*¹⁵ the court in reviewing a casinghead gas contract concluded that although there was no actual conveyance of minerals in place to the processor, its method of operation, *i.e.*, the use of gas lifts, rodless pumps, and compressors to extract the casinghead gas from its position in the earth, constituted an interest by investment in the minerals in place.¹⁶ However, in *Helvering v. Bankline Oil Co.*¹⁷ the Supreme Court determined that the gas processor was not entitled to the depletion deduction since his agreement to purchase gas at the wellhead gave him only an economic *advantage* and *not* an economic *interest*.¹⁸ The Court reasoned that inasmuch as the processor was not conveyed minerals in place and had no control over production, it had not acquired by investment any interest in the minerals in place.¹⁹ Subsequently, the Tax Court in *Edward J. Hudson*²⁰ held that a processor, who was assigned 50% of the heavier hydrocarbons *in place*, possessed an interest by investment in the minerals in place.²¹

The second requirement for an economic interest is that the taxpayer must look *solely* to income which is derived from the extraction of minerals for a return of his capital.²² Accordingly, where the taxpayer could receive income from either the oil and gas produced *or* from the sale of the fee title to the land, he did not have a depletable economic interest since the amount of his return was not directly conditioned upon the contingencies of production.²³ Therefore, if capital is returnable from some source other than

¹⁴ Aikman, *supra* note 3; see *Signal Gasoline Corp. v. Commissioner*, 66 F.2d 886, 888 (9th Cir. 1933).

¹⁵ *Id.* at 886.

¹⁶ *Signal Gasoline Corp. v. Commissioner*, 66 F.2d 886, 889 (9th Cir. 1933). However, in *Signal Gasoline Corp. v. Commissioner*, 77 F.2d 728 (9th Cir. 1935), cert. denied, 296 U.S. 657 (1936) the Court determined that the depletion deduction would be on the value of the natural product, *i.e.*, wet gas at the mouth of the well, rather than from proceeds of the sale of gas; thus, the processor here could not obtain the deduction for the depletion of his income. See *Brea Cannon Oil Co. v. Commissioner*, 77 F.2d 67 (9th Cir.) cert. denied, 296 U.S. 604 (1935); Miller, *Gas Processing Plant Depletion*, 7 *Oil & Gas Tax Q.* 215, 220-25 (1958).

¹⁷ 303 U.S. 362 (1938).

¹⁸ *Id.* at 367-68. See McDowell, *Depletable Interests: Economic Interests v. Economic Advantage*, N.Y.U. 18th Annual Inst. on Fed. Tax. 517 (1960).

¹⁹ *Helvering v. Bankline Oil Co.*, 303 U.S. 362, 368 (1938).

²⁰ 11 T.C. 1042 (1948), *aff'd*, *Hudson Eng'r Corp. v. Commissioner*, 183 F.2d 180 (5th Cir. 1950).

²¹ *Id.* at 1049.

²² *Commissioner v. Southwest Exploration Co.*, 350 U.S. 308, 314 (1956); *Anderson v. Helvering*, 310 U.S. 404 (1940); *Palmer v. Bender*, 287 U.S. 551 (1933); *Treas. Reg. § 1.611-1(b)* (1960).

²³ *Anderson v. Helvering*, *supra* note 22, at 412.

production, the court will not attempt to allocate the depletion allowance between the different sources.²⁴

In the principal case a majority of the court examined the processing agreement and concluded that the processor merely had purchased a share of the liquid product *to be produced* and was not conveyed any present interest in the minerals in place.²⁵ Moreover, since the processor did not reserve any right to control the operation of the wells, the majority reasoned that it did not acquire by investment any interest in the heavier hydrocarbons in place.²⁶ Judge Brown (dissenting) reasoned that not only was La Gloria actually engaged in production, but also that La Gloria's processing activities were *indispensable* to production; therefore, it had acquired by investment an interest in the gas in place.²⁷ However, the majority pointed out that in the analogous *Bankline*²⁸ case the Supreme Court had not considered "indispensability" to production as conferring upon the processor an interest by investment in the minerals in place.²⁹ If La Gloria were engaged in production, as the majority implies,³⁰ then the *Bankline*³¹ case is distinguishable since Bankline was only the recipient of gas under a contract.³² By way of dictum the majority noted that the processor received 20% of its income from units outside the La Gloria Field area; therefore, inasmuch as it did not look to the extraction of minerals from any single producing property for recoupment of its large investment, it could not have an economic interest.³³ The majority reasoned that if the processor made a substantial investment for the purpose of extracting minerals from several producing units, each having entirely unrelated reserves, then its fortunes would not rise and fall in the same way as the lease owner's when new reservoirs were

²⁴ Bergen, Oil and Taxes—Some Problems and Proposals, 26 So. Cal. L. Rev. 396, 413 (1953).

²⁵ 268 F.2d at 707; Branscomb, Recent Developments in Oil and Gas Taxation, Southwestern Legal Foundation 11th Annual Inst. on Oil & Gas L. & Tax. 615 (1960); Miller, Gas Processing Plant Depletion, 9 Oil & Gas Tax Q. 1, 4, 18 (1959). The principal case was also discussed by Simon, La Gloria Decision Shifts Depletion But Doesn't Say Where Manufacturing Begins, 11 J. Tax. 176 (1959).

²⁶ Id. at 707.

²⁷ 268 F.2d at 713-16.

²⁸ Helvering v. Bankline Oil Co., 303 U.S. 362 (1938).

²⁹ 268 F.2d at 707.

³⁰ Id. at 708. This question of whether or not the processor was a producer was left unanswered by the majority except for the statement made in footnote 4 at 708, that if they had found an economic interest they would have determined that production ended at the fractionator. See also Mountain Producers Corp. v. Commissioner, 303 U.S. 376 (1938) (oil refiner was regarded as a producer and thus had an economic interest); G.C.M. 22730, 1941-1 Cum. Bull. 219; Miller, *supra* note 16, at 228-30.

³¹ Helvering v. Bankline Oil Co., 303 U.S. 362 (1938).

³² Id. at 367.

³³ 268 F.2d at 708-09.

discovered or when the present reservoirs ran dry.³⁴ It is this dictum which provides one of the singular features of the principal case. If this dictum is adopted, a gas processor may never be able to acquire a sufficient economic interest for depletion purposes since few processors look to income from only one field to recoup their investment.³⁵

It appears from the principal case that if a processor is to acquire by investment an economic interest in the minerals he must (1) be in the chain of title, *i.e.*, possess a legal or equitable property interest in the minerals lasting for the productive life of the property; or (2) have substantial control and beneficial enjoyment of the income from the mineral deposit. Thus, this decision indicates a retreat from the economic realities of a transaction and a return to the formalism of the "ownership" doctrine. It is this writer's opinion that the decision of the principal case is inconsistent with *Commissioner v. Southwest Exploration Co.*³⁶ The processing arrangement in the principal case was as indispensable to the production of gas as was the use of the upland owner's adjacent property in the *Southwest Exploration*³⁷ case. The fact is that without La Gloria's cycling plant the gas could not be produced without waste, and this would violate Texas law.³⁸ Unfortunately, the denial of certiorari by the Supreme Court has postponed the solution of this confusing situation. Therefore, until the situation is clarified, it is recommended that if a processor wishes to obtain the depletion deduction it should insist upon formal conveyances of a property interest in the minerals in place, or it should require substantial control over the production of the well.³⁹

David E. Varner

Torts — Protection of Property — Weather Modification

A group of cotton farmers employed Defendant, a weather modification company, to seed clouds above and in the vicinity of Plaintiffs' lands in an attempt to prevent hail damage to the farmers'

³⁴ *Ibid.*

³⁵ Branscomb, *supra* note 25, at 626-29.

³⁶ 350 U.S. 308 (1955).

³⁷ *Ibid.*

³⁸ Tex. Rev. Civ. Stat. Ann. art. 6008 (1949).

³⁹ The effect of such a provision in the processing agreement may be nullified if the dictum of the principal case, regarding the second requirement of an economic interest, is accepted by the courts.

crops. Plaintiffs sought an injunction claiming Defendant's activities diminished and prevented precipitation in any form, and thus damaged Plaintiffs' ranching operations. The trial court granted pendente lite injunctions against all cloud seeding in that area, which order was modified by the court of civil appeals by temporarily enjoining Defendant from seeding only those clouds directly above Plaintiffs' lands. *Held*: Cloud seeding immediately above a person's land may be temporarily enjoined to preserve the status quo until a trial on the merits can be held. *Southwest Weather Research, Inc. v. Jones*, —Tex.—, 327 S.W.2d 417 (1959).

The courts early recognized that interferences with ownership of real property consisted not only of physical entries upon the land but also of entries above¹ and below² the surface. Frequently the doctrine of *cujus est solum ejus est usque ad coelum et ad inferos*, meaning that one's title to land extends upward to the heavens and downward to the center of the earth, was applied to protect the landowner from interferences above and below the surface of his land.³ However, with the advent of aviation this doctrine became subject to certain exceptions,⁴ and recently the United States Supreme Court declared it obsolete.⁵ In addition to the *ad coelum* doctrine, the landowner was said to have certain "natural rights" incidental to his ownership,⁶ *i.e.*, the right to enjoy the land in its natural condition. Specifically, these include the right to riparian waters,⁷ support of land,⁸ drainage,⁹ atmospheric conditions,¹⁰ and underground

¹ *Puroto v. Chieppa*, 78 Conn. 401, 62 Atl. 664 (1905); *Cumberland Tel. & Tel. Co. v. Barnes*, 30 Ky. L. Rep. 1290, 101 S.W. 301 (1907).

² *Harrington v. City of Port Huron*, 86 Mich. 46, 48 N.W. 641 (1891); *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 25 Atl. 597 (1893).

³ Prosser, *Torts* § 13, at 60 (2d ed. 1955).

⁴ Restatement, *Torts* § 194 (1934). Flight over another's land is said to be privileged if conducted:

- (a) for travel or other legitimate purposes,
- (b) in a reasonable manner,
- (c) at a reasonable height so as not to interfere with the surface owner, and
- (d) in conformance with relevant governmental regulations.

⁵ *United States v. Causby*, 328 U.S. 256, 260-61 (1946). Recognizing that Congress has declared the air a public highway, 72 Stat. 798, 49 U.S.C.A. § 1508 (1958), the Court ruled that recognition of a private claim to airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

⁶ See 3 *Tiffany*, *Real Property* § 714 (3d ed. 1939). In *Spann v. City of Dallas*, 111 Tex. 350, 235 S.W. 513 (1921), the court recognized that interferences with a person's *use and enjoyment* of land are regarded as actionable, stating, "Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal." 111 Tex. at 355, 235 S.W. at 514.

⁷ *Mud Creek Irr. Co. v. Vivian*, 74 Tex. 170, 11 S.W. 1078 (1889).

⁸ *Simon v. Nance*, 100 S.W. 1038 (Tex. Civ. App. 1907).

⁹ *Tex. Rev. Civ. Stat. Ann. art. 7589(a)* (1925); *Miller v. Letzerich*, 121 Tex. 248, 49 S.W.2d 404 (1932).

¹⁰ *Pitner v. Shugart Bros.*, 150 Ga. 340, 103 S.E. 791 (1920).

waters.¹¹ However, not all natural rights are absolute¹² as some are subject to reasonable interferences by others.¹³ Moreover, some rights are said to be subject to the correlative rights of others¹⁴ on the theory that the exercise of one's rights should not unreasonably interfere with those same rights of others.¹⁵ The result is that equities are often balanced to determine if an interference should be prohibited.¹⁶

Few cases have been reported on weather modification. The first decision on this point expressly recognized no property interest in clouds above an owner's land.¹⁷ Using the *ad coelum* theory to support a land owner's claimed interest in clouds has been rejected as inappropriate in light of precedent which has all but extinguished the doctrine,¹⁸ and also because application of the doctrine would largely abolish weather modification.¹⁹ Legal writers, however, have considered other doctrines as being analogous to the problem of weather modification, *viz.*, riparian rights,²⁰ rights to percolating waters,²¹ and doctrines relating to animals *ferae naturae*.²² The riparian and percolating waters theories are generally based on "reasonable use,"²³ but this analogy collapses when applied to weather control since clouds follow no well-defined route, nor is the amount of moisture in a cloud readily measurable or continuously available, as with riparian or underground waters.²⁴ Since clouds are objects of a fugitive nature, apparently owned by no one, and because manipulation of the moisture therein appears to be a form of control or possession, clouds may be analogous to animals *ferae naturae*.²⁵ Allowing free appropriation by anyone, however, has been criticized as leaving the landowner in a helpless state.²⁶ The only Texas decision

¹¹ 3 Tiffany, Real Property §§ 746-49 (3d ed. 1939).

¹² See Restatement, Torts, Scope and Introductory Note §§ 822-40, at 224 (1939).

¹³ City of Temple v. Mitchell, 180 S.W.2d 959 (Tex. Civ. App. 1944).

¹⁴ Mud Creek Irr. Co. v. Vivian, 74 Tex. 170, 11 S.W. 1078 (1889).

¹⁵ See Hildebrand, The Rights of Riparian Owners at Common Law in Texas, 6 Texas L. Rev. 19 (1928).

¹⁶ Hogue v. City of Bowie, 209 S.W.2d 807 (Tex. Civ. App. 1948) error ref. n.r.e.

¹⁷ Slutzky v. City of New York, 197 Misc. 730, 97 N.Y.S.2d 238 (1950). It appears that the court's refusal to acknowledge a landowner's interest may be dictum as the case seems to turn on the factor that the equities were heavily in favor of the landowner's opponent.

¹⁸ Comment, 34 Marq. L. Rev. 262, 265 (1951).

¹⁹ Note, 37 Texas L. Rev. 799, 802 (1959); Note, 4 Vand. L. Rev. 332, 334 (1951).

²⁰ Ball, Shaping the Law of Weather Control, 58 Yale L.J. 213, 234 (1949).

²¹ Comment, 37 Calif. L. Rev. 114, 117 (1949).

²² Comment, 1 Stan. L. Rev. 43 (1949).

²³ Katz v. Walkinshaw, 141 Cal. 116, 74, Pac. 766 (1903); see Hildebrand, *supra* note 15. The doctrines are often stated in the negative, *i.e.*, a landowner has the right to use such so long as his use does not unreasonably interfere with the use of others.

²⁴ Ball, *supra* note 20, at 234.

²⁵ Comment, *supra* note 21, at 119.

²⁶ Note, 37 Texas L. Rev. 799, 802 (1959).

considering weather modification is the court of civil appeals opinion in the principal case, holding that a landowner has a "natural right" to moisture in clouds directly above his land.²⁷

In affirming the civil appeals decision, the supreme court in the instant case declined to define the rights of the parties in view of the impending trial on the merits.²⁸ The court merely ruled that there had been no abuse of discretion under these facts in modifying and affirming the temporary injunction issued by the trial court.²⁹ The holding of the intermediate appellate court purported to preserve the status quo by prohibiting cloud seeding directly above Plaintiffs' land on the theory that Plaintiffs are entitled "to such precipitation as Nature deigns to bestow."³⁰ Following the theory that Defendant had infringed Plaintiffs' natural rights incidental to his ownership of the land, the court of civil appeals nevertheless found the trial court's injunction "too broad" in restraining Defendant's activities in the *general area* of Plaintiffs' lands.³¹ Although it was stated that Plaintiffs are entitled to such rainfall as "Nature in her caprice, may provide,"³² the court of civil appeals did not insure Plaintiffs of this result by enjoining weather modification directly over Plaintiffs' lands, because Defendant may still engage in cloud seeding over immediately adjacent lands. Considering the nature and movement of clouds, it appears that this limited relief is inconsistent with the theory on which the decision is based. Bypassing considerations of reasonableness of the interference, the supreme court in the principal case, by affirming and thus seemingly approving of the civil appeals decision, has established a rigid rule which fails to preserve the status quo and is difficult to reconcile with the "natural rights" theory. If the court intended to adopt the theory of the civil appeals decision, it follows that the relief should have been more comprehensive.

Possibly, too little is known of the scientific aspects of weather control at this time to formulate any fixed legal rule. The courts will have a difficult time with weather litigation until science can

²⁷ Southwest Weather Research v. Duncan, 319 S.W.2d 940 (Tex. Civ. App. 1958) error granted; Southwest Weather Research v. Rounsaville, 320 S.W.2d 211 (Tex. Civ. App. 1958) error granted.

²⁸ 327 S.W. 2d 417, 420.

²⁹ Id. at 421.

³⁰ Southwest Weather Research v. Duncan, 319 S.W.2d 940, 945 (Tex. Civ. App. 1958) error granted; Southwest Weather Research v. Rounsaville, 320 S.W.2d 211, 216 (Tex. Civ. App. 1958) error granted.

³¹ Ibid.

³² Southwest Weather Research v. Duncan, 319 S.W.2d 940, 945 (Tex. Civ. App. 1958) error granted; Southwest Weather Research v. Rounsaville, 320 S.W.2d 211, 216 (Tex. Civ. App. 1958) error granted.

authoritatively predict the actual effects of weather modification. Meteorologists, however, have been reluctant to experiment in order to gain this knowledge because of the legal implications involved.³³ In view of the vast potentialities of weather control, the courts are presently faced with the problem of equitable regulation, *i.e.*, permitting the science to develop while prohibiting it from unreasonably infringing on rights of innocent parties. If the test of an alleged interference should be reasonableness, and it appears that it should, then the *location* of the act of cloud seeding becomes immaterial. Although the problem has no perfect analogy to an already existing body of law, it appears that the doctrines of riparian ownership and percolating waters, based on reasonable use in light of the rights of others, are the most analogous and suitable at this time.

Charles R. Johnson

Wills—Probate—Partition By Independent Executor

By the terms of his will the testator named Defendant independent executrix of his estate. The testator also bequeathed his residual estate to Defendant, one-third of which Defendant was to hold in trust for the benefit of Plaintiff. However, the will provided no means for ascertaining the specific interests of Plaintiff and Defendant. Defendant, in her capacity as independent executrix, partitioned the residuary estate between herself and Plaintiff. Plaintiff contended that she was not bound by this partition. *Held*: In the absence of authorization under the will, an independent executor has no power to partition the testator's estate without permission from the court. *Clark v. Posey*, 329 S.W.2d 516 (Tex. Civ. App. 1959) *error ref. n.r.e.*

Although four states authorize independent administration by statute,¹ case law shows that only two of these states, *viz.*, Texas and Washington, actually utilize it.² Under the Texas statute a testator may provide in his will for an executor to administer the estate independently of the probate court after the will is probated and recorded and an appraised inventory and list of claims are filed with

³³ Ball, *supra* note 20, at 227.

¹ Ariz. Rev. Stat. Ann., § 14-502 (1956); Idaho Code Ann., § 15-237 (1947); Tex. Prob. Code Ann., § 145 (1946); Wash. Rev. Code, § 11.68.010—.040 (1956).

² *In re Clawson's Estate*, 3 Wash.2d 509, 101 P.2d 968 (1940); *In re Hanson's Estate*, 87 Wash. 113, 151 Pac. 264 (1915).

the court.³ An *independent* executor possesses power co-extensive with that of an executor,⁴ *i.e.*, he may do independently any act which the executor might do pursuant to an order from the probate court.⁵ The independent executor may incur reasonable expenses,⁶ collect debts,⁷ lend money,⁸ and employ agents.⁹ In essence, therefore, he may do any act which the testator might have done during his lifetime, subject to restrictions in the will of the testator.¹⁰

Where the will does not provide a means for partition of the estate, the Texas Probate Code provides that an independent executor may apply to the probate court for partition and distribution of the estate, which is to be made under the direction and administration of the court.¹¹ If the independent executor does not take advantage of this provision, the probate court has no jurisdiction over any attempted partition;¹² and any suit contesting a partition by the independent executor must be brought in the district court.¹³ Thus, in the absence of authority in the will the independent executor, acting alone, cannot make a valid partition of the estate.¹⁴ The rationale in limiting the partitioning power of the independent executor is that he alone should not have the power to change the intended devise of the testator from an undivided interest in the estate to a specific portion thereof.¹⁵

McDonough v. Cross was the first case to hold that the independent executor had no power to partition a decedent's estate. The court based its decision upon a comparison of the powers of a court appointed administrator and the fact that such a partition would have the effect of changing the testator's will.¹⁶ In the two subsequent cases

³ Tex. Prob. Code Ann., § 145 (1956). Adherence in the will to the wording of the statute will assure independent administration of the estate. *Lovejoy v. Cockrell*, 63 S.W.2d 1009 (Tex. Comm. App. 1933).

⁴ *Alexander v. Berkman*, 3 S.W.2d 864 (Tex. Civ. App. 1928) error ref.

⁵ *Lang v. Shell Petroleum Corp.*, 138 Tex. 399, 159 S.W.2d 478 (1942); *Martin v. Dial*, 57 S.W.2d 75 (Tex. Comm. App. 1933); *In re Elvigen's Estate*, 191 Wash. 614, 71 P.2d 672 (1937).

⁶ *Dyer v. Winston*, 77 S.W. 227 (Tex. Civ. App. 1903).

⁷ Cases cited, note 5 *supra*.

⁸ *Beckhan v. Beckhan*, 227 S.W. 940 (Tex. Comm. App. 1921).

⁹ *Dyer v. Winston*, 77 S.W. 227 (Tex. Civ. App. 1903).

¹⁰ *Hutcherson v. Hutcherson*, 135 S.W.2d 757, (Tex. Civ. App. 1939) error ref.; *Ware v. Barfield*, 54 S.W.2d 1105 (Tex. Civ. App. 1932).

¹¹ Tex. Prob. Code Ann., § 150 (1956); *City Nat'l Bank v. Penn*, 92 S.W.2d 532 (Tex. Civ. App. 1936); *Parker v. Allison*, 22 S.W.2d 338 (Tex. Civ. App. 1929).

¹² *Cocke v. Smith*, 142 Tex. 396, 179 S.W.2d 954 (1944).

¹³ *Leach v. Leach*, 208 S.W.2d 618 (Tex. Civ. App. 1948) error ref. n.r.e.; *Hutcherson v. Hutcherson*, 135 S.W.2d 757 (Tex. Civ. App. 1939) error ref.

¹⁴ *Johnson v. Short*, 94 S.W. 1082 (Tex. Civ. App. 1906); *McDonough v. Cross*, 40 Tex. 251 (1874).

¹⁵ *McDonough v. Cross*, *supra* note 14.

¹⁶ *McDonough v. Cross*, 40 Tex. 251 (1874).

which followed the *McDonough* decision the courts emphasized the fact that the independent executor was one of the devisees among whom the property was to be partitioned.¹⁷ In the instant case, although the independent executrix was a beneficiary under the will and stood to profit by the partition, the court in no way alludes to this factor as a basis for its decision.

The principal case may be regarded as settling the law in Texas that an independent executor, in the absence of authority in the will, can never partition the testator's estate. There is a valid reason for such a rule. Other powers granted to the independent executor merely facilitate administration while the power to partition would be the power to change substantially the testator's will and force the beneficiaries to accept specific property where they had held an undivided interest. If the testator does not specifically grant this power to his independent executor, it is logical to assume that he did not anticipate the existence of such power and the court is correct in disallowing it.

Joe E. Griffith

¹⁷ *Terrill v. Terrill*, 189 S.W.2d 877 (Tex. Civ. App. 1945) error ref.; *Johnson v. Short*, 94 S.W. 1082 (Tex. Civ. App. 1906).