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Recent Case Notes

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RECENT CASE NOTES

Bills and Notes—Acceleration of Maturity—Validity of "Unsafe and Insecure" Clauses

Defendant Bank held four notes that were executed by Plaintiff. Each of the notes provided that the holder could accelerate the maturity at any time it believed that the debtor was unsafe or insecure. Prior to the maturity of the notes, Plaintiff's drug store was damaged by water, and Plaintiff was arrested for illegal use of narcotics. Upon default in the installments due on two of the notes, Defendant notified Plaintiff that the balance due on all of the notes had been matured and that Plaintiff's savings and checking accounts had been offset against the balance due. Plaintiff sued for damages for the alleged wrongful offset. *Held*: Provisions that allow the holder of a promissory note to accelerate the maturity of the note when it believes the debtor is unsafe and insecure are valid and enforceable contractual provisions. *Baldwin v. Peoples Nat'l Bank*, 327 S.W.2d 616 (Tex. Civ. App. 1959).

An instrument that is payable on a contingency is not negotiable, and the happening of the event does not cure this defect.¹ Moreover, by the weight of authority a provision that is conditioned on the holder's belief that he is unsafe or insecure introduces an element of uncertainty as to the time of payment and the amount to be paid and renders the note non-negotiable.² However, between the original parties to the instrument negotiability is neither essential to the validity of the note nor material to the right of recovery.³

Most American jurisdictions recognize the validity of acceleration clauses conditioned on the maker's default⁴ or on the performance of certain agreements.⁵ Clauses conditioned on the maker's default

¹ Uniform Negotiable Instruments Law § 4; see Tex. Rev. Civ. Stat. Ann. art. 5932 (1949).

² *Murrell v. Exchange Bank*, 168 Ark. 645, 271 S.W. 21 (1925); *Moyer v. Hyde*, 35 Idaho 161, 204 Pac. 1068 (1922); see generally Annot., 72 A.L.R. 268 (1931); Annot., 44 A.L.R. 1397 (1926); Annot., 34 A.L.R. 872 (1925); Annot., 28 A.L.R. 699 (1924); Note, 7 W. Res. L. Rev. 482 (1956); contra, *Dart Nat'l Bank v. Burton*, 258 Mich. 283, 241 N.W. 858 (1932).

³ *Robinson v. Harris Trust & Sav. Bank*, 89 F.2d 929 (5th Cir.), cert. denied, 302 U.S. 716 (1937); *Gross v. Von Dolcke*, 313 Mich. 132, 20 N.W.2d 838 (1945).

⁴ *Puckett v. Big Lake State Bank*, 73 S.W.2d 893 (Tex. Civ. App. 1934) error ref.; see *Star Brewing Co. v. Higgins*, 248 Mass. 480, 143 N.E. 332 (1924); *Andres v. Brown*, — Mo. —, 300 S.W.2d 800 (1957) (stating Texas law); *Roberts v. Snow*, 27 Neb. 425, 43 N.W. 241 (1889).

⁵ *Continental Nat'l Bank v. Conner*, 147 Tex. 218, 214 S.W.2d 928 (1948); see *Commerce Trust Co. v. Guarantee Title & Trust Co.*, 113 Kan. 311, 214 Pac. 610 (1923); *Nickell v. Bradshaw*, 94 Ore. 580, 183 Pac. 12 (1919).

are not unconscionable or against public policy;⁶ they are simply agreements providing for the time when the debt shall become due and enforceable. Moreover, such agreements are specifically enforceable in a court of equity.⁷ Texas is in accord with the majority of jurisdictions in recognizing the validity of acceleration clauses; however, courts of this state will not enforce harsh and oppressive use of the provisions.⁸ Moreover, Texas courts have granted relief from certain acceleration provisions on the ground that enforcement of the clauses would lead to inequitable consequences.⁹ Thus, although the validity of an "unsafe and insecure" provision had not been litigated in this state prior to the instant case, most Texas courts were traditionally more favorable to debtors.¹⁰

Without discussing Texas law on the validity of acceleration clauses, the court in the principal case accepted the reasoning of a New York case, *Updike v. Manufacturers' Trust Co.*,¹¹ as authority for the validity of an "unsafe and insecure" provision.¹² However, the court pointed out that the unsafe and insecure feeling must be the result of a good faith determination based on sufficient undisputed facts.¹³ Thus, an implied limitation was included in the provision which, together with Texas' equitable policy toward debtors, may give some protection to the maker. However, the limitation necessarily requires that each case be determined on its facts; hence, the holder is deprived of any assurance that his "unsafe and insecure feeling" is justified. Moreover, the applicability of the *Updike*¹⁴ case is questionable, because the note in that case provided for the specific contingency which occurred and the court merely upheld an arm's length agreement. It would seem that the court in the principal case could have supported its decision more adequately by extending to "unsafe and insecure" clauses the Texas doctrine upholding accelera-

⁶ French v. Winstead, 299 S.W.2d 109 (Ky. Ct. App. 1957).

⁷ Harris v. Kessler, 124 Cal. App. 299, 12 P.2d 467 (1932); *Hawkinson v. Banaghan*, 203 Mass. 591, 89 N.E. 1054 (1909).

⁸ Bischoff v. Rearick, 232 S.W.2d 174 (Tex. Civ. App. 1950) error ref. n.r.e.

⁹ Bischoff v. Rearick, supra note 8; *Brown v. Hewett*, 143 S.W.2d 223 (Tex. Civ. App. 1940) error ref.; *Crumley v. Ramsey*, 93 S.W.2d 191 (Tex. Civ. App. 1936) error ref.; *Parker v. Mazur*, 13 S.W.2d 174 (Tex. Civ. App. 1928) error disp.

¹⁰ Bischoff v. Rearick, 232 S.W.2d 174 (Tex. Civ. App. 1950) error ref. n.r.e.; *Parker v. Mazur*, supra note 9.

¹¹ 243 App. Div. 15, 275 N.Y.S. 716 (1934), aff'd, 267 N.Y. 528, 196 N.E. 563, cert. denied, 296 U.S. 648 (1935).

¹² *Ibid.*

¹³ 327 S.W.2d 616, at 620.

¹⁴ *Updike v. Manufacturer's Trust Co.*, 243 App. Div. 15, 275 N.Y.S. 716 (1934), aff'd, 267 N.Y. 528, 196 N.E. 563, cert. denied, 296 U.S. 648 (1935).

tion provisions,¹⁵ or by drawing an analogy to the validity of contracts conditioned on the personal satisfaction of one party.¹⁶

The result of the principal case seems to conflict with the traditional policy of Texas courts, *viz*, favoring debtors over creditors. Admittedly, it is difficult to imagine more extreme circumstances than those present in the instant case, and Defendant may have been justified in his unsafe and insecure feeling. However, it is doubtful that the good faith determination required by the court is sufficient to protect a more stable debtor in less extreme circumstances against the arbitrary acceleration of his note. It is the belief of this writer that the court did not intend to give holders the unqualified right to accelerate the maturity of notes with only their good faith as a deterrent. Future decisions should establish a more sufficient standard to guide the holders of notes which contain "unsafe and insecure" acceleration provisions.

Ann E. Harrell

Community Property—Joint Tenancy—Survivorship

Husband and Wife purchased shares of corporate stock with community funds. The spouses had the stock issued to them as joint tenants with a right of survivorship. Upon the death of Husband, his son by a previous marriage challenged the validity of the survivorship provision on the ground that the stock retained its community status as a matter of law. *Held*: Despite recitals of joint tenancy in the certificates, stock which is purchased with community funds retains its community status upon the death of one of the spouses. *Hilley v. Hilley*, 327 S.W.2d 467 (Tex. Civ. App. 1959).

At common law, two or more persons holding property jointly are presumed to hold the property as joint tenants with a right of survivorship.¹ The Texas Legislature abolished the right of survivorship with respect to property held in common-law joint tenancy.²

¹⁵ *Andres v. Brown*, — Mo. —, 300 S.W.2d 800 (1957) (stating Texas law); *Continental Nat'l Bank v. Conner*, 147 Tex. 218, 214 S.W.2d 928 (1948); *Puckett v. Big Lake State Bank*, 73 S.W.2d 893 (Tex. Civ. App. 1934) error ref.

¹⁶ *Griffith v. Thompson*, 244 S.W.2d 722 (Tex. Civ. App. 1951).

¹ Moynihan, *Real Property* 130 (1940).

² Tex. Rev. Civ. Stat. Ann. art. 2580 (1951). This statute was enacted in 1848 and remained unchanged until the enactment of the present Probate Code in 1955 at which time it was further provided "that by an agreement in writing of joint owners of property, the interest of any joint owner who dies may be made to survive to the surviving joint owner or joint owners, but no such agreement shall be inferred from the mere fact that the property is held in joint ownership."

However, the courts did not consider this abolition of the incident of survivorship by statute as absolute. In 1939, *Chandler v. Kountz*³ held that persons receiving property jointly may contract "that the property in question should pass to and vest in the survivors as at common law"⁴ by right of survivorship.⁵ However, the *Chandler* case did not involve an agreement between a husband and wife concerning community property; rather, the case dealt with the creation of joint tenancies generally. Section 46 of the Texas Probate Code codified the holding in the *Chandler* case by specifically providing for institution of the right of survivorship by agreement between persons holding property jointly.⁶ The only clear and direct applications of this section to community property have involved United States Government Bonds.⁷

The Texas community property law provides for numerous methods of transforming community property into the separate property of a spouse, e.g., by statutory partition, division on divorce or permanent separation, testamentary disposition, and gift.⁸ However, courts closely scrutinize all transactions which involve an attempted change of community property into separate property and "if there is doubt as to the validity of the transaction it will be resolved in favor of the Community."⁹ The controversial¹⁰ holding in *Ricks v.*

³ 130 S.W.2d 327 (Tex. Civ. App. 1939) error ref.

⁴ Id. at 329.

⁵ Moynihan, op. cit. supra note 1, at 131.

⁶ Tex. Prob. Code Ann. § 46 (1955); *Chandler v. Kountz*, 130 S.W.2d 327 (Tex. Civ. App. 1939) error ref.

⁷ *Ricks v. Smith*, ___Tex. ___, 318 S.W.2d 439 (1958); see *Steffens v. Pollard*, 319 S.W.2d 447 (Tex. Civ. App. 1958), aff'd, ___Tex. ___, ___S.W.2d___ (3 Tex. Sup. Ct. Journ. 54, 1959). In *Reed v. Reed*, 283 S.W.2d 311 (Tex. Civ. App. 1955), the Dallas Court of Civil Appeals held that postal savings certificates in the name of the husband and wife as joint tenants did not pass to the surviving wife. Three years later in *Ricks v. Smith*, supra, the supreme court held that United States bonds in the name of the husband and wife passed to the surviving wife. In *Steffens v. Pollard*, supra, the same court of civil appeals held, in affirming the *consent decree* of the Probate Court, that building and loan shares and federal credit union deposits held by the husband and wife as joint tenants and United States bonds payable to the husband or wife passed to the surviving wife. On the merits, however, the court relied heavily on *Ricks v. Smith*, supra. The supreme court granted a writ of error to resolve the conflict between the *Reed* and *Steffens* cases but managed to avoid the instant question. The court of civil appeals was affirmed because the supreme court held that the *consent decree* had foreclosed the question.

⁸ Tex. Const. art. XVI, § 15; Tex. Rev. Civ. Stat. Ann. arts. 4624a, 4638 (1955); *Bearden v. Knight*, 149 Tex. 108, 228 S.W.2d 837 (1950); *Frame v. Frame*, 120 Tex. 61, 36 S.W.2d 152 (1931); *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925); *Corrigan v. Goss*, 160 S.W. 652 (Tex. Civ. App. 1913) error ref. See also *Speer*, Marital Rights in Texas 156 (3d ed. 1929); *Recent Case Note*, 4 Sw. L.J. 218 (1950).

⁹ *King v. Bruce*, 197 S.W.2d 830, 838 (Tex. Civ. App. 1946), rev'd on other grounds, 145 Tex. 647, 201 S.W.2d 803 (1947); *Rowlett v. Mitchell*, 114 S.W. 845 (Tex. Civ. App. 1908).

¹⁰ See *Recent Case Note*, 13 Sw. L.J. 369, 371 (1959).

*Smith*¹¹ indicates another means of transforming community property into separate property. That case held that United States Government Bonds purchased with community funds passed to the wife as her separate property upon the death of the husband. The court in the *Ricks* case reasoned that the terms of the Treasury Regulations governing these bonds constituted an agreement which satisfied section 46 of the Texas Probate Code.¹²

The court refused to apply the method of transformation suggested in *Ricks v. Smith* to the facts in the instant case.¹³ Viewing the rule of the *Ricks* case as applicable only in fact situations involving United States Government Bonds, the court relied instead on earlier cases in reaching its decision.¹⁴ Moreover, the court pointed out that the *Ricks* decision was predicated on a view which "recognizes the supremacy of the Federal Statutes and Treasury regulations"¹⁵ and "no more affects community property law than laws of descent and distribution."¹⁶ The court also noted that the dissenting opinion in the *Ricks* case urged that the decision would have no application in instances where the wife dies first; in this situation a transformation of community property into the separate property of the husband would be avoided.¹⁷ Thus, the court's opinion confines spouses to the conventional devices of community property law¹⁸ for changing community property into separate property. Because of the specific finding that the essential elements of a gift from the husband to the wife were lacking,¹⁹ the court concluded that the property passed to the wife impressed with a community character.

The principal case raises serious doubt as to whether a husband and wife can hold property purchased with community funds as joint tenants with an enforceable right of survivorship. Although *Ricks v. Smith* impliedly validated a transformation of community

¹¹ ___Tex. ___, 318 S.W.2d 439 (1958).

¹² Id. at 440.

¹³ 327 S.W.2d 467.

¹⁴ *Fleck v. Baldwin*, 141 Tex. 340, 172 S.W.2d 975 (1943); *Harmon v. Schmitz*, 39 S.W.2d 587 (Tex. Comm. App. 1931); *Reed v. Reed*, 283 S.W.2d 311 (Tex. Civ. App. 1955); *King v. Bruce*, 197 S.W.2d 830 (Tex. Civ. App. 1946), rev'd on other grounds, 145 Tex. 647, 201 S.W.2d 803 (1947).

¹⁵ 327 S.W.2d 467, 468, quoting from the court of civil appeals' opinion in *Smith v. Ricks*, 308 S.W.2d 941, 947 (Tex. Civ. App. 1957), aff'd, ___Tex. ___, 318 S.W.2d 439 (1958).

¹⁶ *Ricks v. Smith*, ___Tex. ___, 318 S.W.2d 439, 442 (1958).

¹⁷ Ibid. This additional precaution is in keeping with the general policy of restricting the husband as the community manager, i.e., the spouse with more opportunity to effect an improper transformation of community property.

¹⁸ See authorities cited note 8 supra. See also *Coghlan, Changing One Type of Marital Property into Another Type*, 4 Sw. L.J. 218 (1950).

¹⁹ 327 S.W.2d at 468.

property into separate property by agreement between the spouses, the court in the instant case would restrict *Ricks v. Smith* to the unique contractual obligations created by the purchase of government bonds. A change of community property into separate property upon the death of a spouse through the specific terms of an agreement between the spouses would seem to have been the next step following the *Ricks* decision, and the court in the instant case refused to take that step. Thus, it would seem that the *Ricks* decision allowing the right of survivorship between spouses to effect a change in community property may be relied upon only in instances involving United States Government Bonds. With respect to other community property, the doubt which is created by the principal case may be resolved only by a decision of the Texas Supreme Court.

Reagan M. Martin

Constitutional Law — Searches and Seizures — Standing To Suppress Unreasonably Seized Evidence

Defendant was convicted for illegal possession of narcotics¹ on the basis of evidence obtained in an apartment where he was found by officers of the United States Government pursuant to a subsequently contested warrant to search for narcotics.² Defendant moved to suppress the evidence on the ground that the search was unreasonable.³ The Government contended that Defendant lacked standing to suppress the evidence because he neither alleged ownership of the seized articles nor claimed an interest in the apartment greater than that of "invitee or guest."⁴ *Held*: A defendant has standing to challenge the validity of a search warrant and to suppress unreasonably seized evidence when (1) possession of the seized item is the basis

¹ Conviction was under Int. Rev. Code of 1954, § 4704(a), "[A]bsence of . . . stamps from narcotic drugs shall be prima facie evidence of a violation . . . by the person in whose possession the same may be found," and 70 Stat. 570 (1956), 21 U.S.C.A. § 174 (1958), "[P]ossession shall be deemed sufficient evidence to authorize conviction. . . ."

² The search warrant alleged occupancy by the Defendant. Record, p. 1.

³ Defendant contended that the search was unreasonable on two grounds: (1) the warrant was issued without probable cause, and (2) the search violated 62 Stat. 820 (1948), 18 U.S.C.A. § 3109 (1958) (officer may break in after notice and refusal of admittance). Brief for Petitioner, pp. 45, 55.

⁴ The Government, however, charged Defendant with possession in the Complaint and offered evidence at the trial to the same effect. Record, pp. 5, 38. At the pre-trial hearing of the motion to suppress, the Government contended that, if Defendant alleged possession of the narcotic, they were entitled to use such allegation against him at his trial. Record, p. 22.

of conviction, or (2) he is legitimately on the premises searched. *Jones v. United States*, 362 U.S. 257 (1960).⁵

The Fourth Amendment to the Constitution of the United States prohibits unreasonable searches and seizures and the issuance of search warrants without probable cause.⁶ In *Boyd v. United States*⁷ the Supreme Court indicated a tendency to limit the admissibility of evidence obtained in violation of the amendment. *Adams v. New York*⁸ signified a deviation from the trend; however, *Weeks v. United States*⁹ proved that the departure was only temporary. The Court in the *Weeks* case gave full effect to the constitutional protection by requiring the exclusion of illegally obtained evidence;¹⁰ the holding later took codified form in rule 41(e)¹¹ of the Federal

⁵ Mr. Justice Frankfurter disposed of Defendant's first objection (see note 3 supra) holding that there was probable cause for the issuance of the warrant. 362 U.S. at 267-72. Mr. Justice Douglas disagreed. Id. at 273. Since the § 3109 challenge was first made in the circuit court, the Court held that the record was not sufficient enough to enable it to decide the point and remanded the cause for consideration of Defendant's contention. Id. at 272-73.

⁶ "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. ⁷ 116 U.S. 616 (1886). Although the Court held that a statute requiring surrender of private papers violated the fourth amendment because it invaded the individual's "indefeasible right of personal security, personal liberty and private property," various authorities have suggested that the statute could as easily have been held only to violate the fifth amendment guarantee against self-incrimination. Frankel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 366 (1921); Comment, Judicial Control of Illegal Search and Seizure, 58 Yale L.J. 144, 150 (1948).

⁸ 192 U.S. 585 (1904). Police officers with a search warrant for policy slips searched the defendant's office and took policy slips and also private papers for which there was no warrant. Defendant objected to the receipt in evidence of the private papers which, showing his handwriting, served to convict him for knowingly possessing the policy slips. The Court said that it would "not stop to inquire as to the means by which the evidence was obtained." Id. at 594.

⁹ 232 U.S. 383 (1914). A federal marshal with no warrant searched the defendant's room and found papers linking him to a lottery. These papers were admitted into evidence after a motion for return of the evidence had been refused.

¹⁰ "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution intended for the protection of the people against such unauthorized action." 232 U.S. at 394.

¹¹ Motion for Return of Property and to Suppress Evidence:

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention [as in cases of contraband such as narcotics] and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not

Rules of Criminal Procedure.¹² The rule is, however, merely a rule of procedure in the federal courts; hence, although the fourth amendment itself applies to the states through the due process clause of the fourteenth amendment, the exclusionary rule, a means of implementing the fourth amendment protection, does not apply to the states.¹³ Moreover, until June 27, 1960, the rule did not operate to exclude from federal criminal trials evidence illegally obtained by state officers¹⁴ unless they were accompanied by co-operating federal officers.¹⁵ This principle, characterized as the "silver platter doctrine," has been overruled; thus, evidence obtained in violation of the fourth amendment by state or local officers is now inadmissible in a federal criminal trial.¹⁶ However, evidence which has been stolen by private persons presumably remains admissible.¹⁷

On the theory that the rights protected by the fourth amendment are personal, the lower federal courts previously limited the application of the exclusionary rule through their requirement of standing.¹⁸ As a prerequisite to a successful motion to suppress, the

exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Fed. R. Crim. P. 41(e). In the instant case Defendant's motion was based on (4) and (5). *Supra* note 3.

¹² Reynard, *The Right of Privacy*, Fundamental Law in Criminal Prosecutions 105 (Harding ed. 1959).

¹³ Wolf v. Colorado, 338 U.S. 25 (1949). This result has been severely criticized. Comment, Due Process and the Admissibility of Evidence, 64 Harv. L. Rev. 1304 (1951). See generally Ray, Restrictions on the Use of Illegally Obtained Evidence, 9 Sw. L.J. 434, 438 n.22 (1955). For the Texas rule in this regard see Ray, *supra*, at 440-42. See also Recent Case Note, 11 Sw. L.J. 523 (1957).

¹⁴ Rowan v. United States, 281 Fed. 137 (5th Cir. 1922).

¹⁵ Lustig v. United States, 338 U.S. 74 (1949); Byars v. United States, 273 U.S. 28 (1927). See generally Ray, *supra* note 13, at 436 n.15.

¹⁶ Rios v. United States, 364 U.S. 253 (1960); Elkins v. United States, 364 U.S. 206 (1960). Justice Frankfurter, with Justices Clark, Harlan, and Whittaker, dissented in both decisions. 364 U.S. at 233.

¹⁷ Burdeau v. McDowell, 256 U.S. 465 (1921).

¹⁸ Every circuit has so held. E.g., Nunes v. United States, 23 F.2d 905, 907 (1st Cir. 1928); Klein v. United States, 14 F.2d 35, 36 (1st Cir. 1926); United States v. Pepe, 247 F.2d 838, 841 (2d Cir. 1957); United States v. Chieppa, 241 F.2d 635, 638 (2d Cir.), cert. denied, 353 U.S. 973 (1957); Whitcombe v. United States, 90 F.2d 290, 293 (3d Cir.), cert. denied, 302 U.S. 759 (1937); Mabee v. United States, 60 F.2d 209, 212 (3d Cir. 1932); Grainger v. United States, 158 F.2d 236, 237-39 (4th Cir. 1946); Kitt v. United States, 132 F.2d 920, 921-22 (4th Cir. 1942); Parr v. United States, 255 F.2d 86, 88-89 (5th Cir.), cert. denied, 358 U.S. 824 (1958); Lovette v. United States, 230 F.2d 263, 264 (5th Cir. 1956); Gowling v. United States, 64 F.2d 796, 799 (6th Cir. 1933); Holt v. United States, 42 F.2d 103, 105 (6th Cir. 1930); United States v. Eversole, 209 F.2d 766, 768 (7th Cir. 1954); United States v. Pisano, 193 F.2d 361, 365 (7th Cir. 1951); Schnitzer v. United States, 77 F.2d 233, 235 (8th Cir. 1935); Brown v. United States, 61 F.2d 363, 364 (8th Cir. 1932); Kwong How v. United States, 71 F.2d 71, 75 (9th Cir. 1934); Nixon v. United States, 36 F.2d 316, 317 (9th Cir. 1929); Baskerville v. United States, 227 F.2d 454, 456 (10th Cir. 1955); Wilson v. United States, 218 F.2d 754, 756-57 (10th Cir. 1955); Accardo v. United States, 247 F.2d 568, 569-70 (D.C. Cir.), cert. denied, 355 U.S. 898 (1957); Gibson v. United States, 149 F.2d 381, 384 (D.C. Cir.), cert. denied, 326 U.S. 724 (1945).

courts generally required that the movant claim "some proprietary or possessory interest in the premises searched or the property seized."¹⁹ Thus, corporate officers²⁰ and employees in apparent control of the premises²¹ were denied standing to suppress evidence. However, the "owner, lessee or lawful occupant" was held to have sufficient interest to satisfy the requirement of standing.²² Some courts included anyone lawfully present on the premises searched²³ amid suggestions of broader possibilities for the satisfaction of the standing requirement²⁴ even to the extent of "connection with the premises searched or property seized."²⁵ As an alternative to the requirements with respect to the premises searched, the lower federal courts demanded that the defendant affirmatively claim possession of the seized articles in order to acquire standing;²⁶ thus, in cases where possession was the main ingredient of the crime, the defendant was compelled to choose between his right against self-incrimination under the fifth amendment and his right to be secure from unlawful search.²⁷ Prior to the principal case the Supreme Court had never considered the requirement of standing imposed by the lower federal courts;²⁸ however, the Court had held that the protection of the exclusionary rule extended to a guest when co-defendant with the owner of the premises searched²⁹ or to guests living on the premises.³⁰

See generally for perhaps the most thorough treatment of the problem *Edwards, Standing to Suppress Unreasonably Seized Evidence*, 47 *Nw. U.L. Rev.* 471 (1952).

¹⁹ E.g., *Shurman v. United States*, 219 F.2d 282, 288 (5th Cir.), cert. denied, 349 U.S. 921 (1955); *Washington v. United States*, 202 F.2d 214, 215 (D.C. Cir.), cert. denied, 345 U.S. 956 (1953); *Gorland v. United States*, 197 F.2d 685, 686 (D.C. Cir. 1952); *In re Nassetta*, 125 F.2d 924, 925 (2d Cir. 1942). The rule was adverted to in *Irvine v. California*, 347 U.S. 128, 136 (1954).

²⁰ *Lagow v. United States*, 159 F.2d 245, 246 (2d Cir. 1946), cert. denied, 331 U.S. 858 (1947) (sole officer and stockholder).

²¹ E.g., *United States v. Conoscente*, 63 F.2d 811 (2d Cir.), cert. denied, 290 U.S. 642 (1933); *Connolly v. Medalie*, 58 F.2d 629, 630 (2d Cir. 1932) (L. Hand, J.).

²² *Coon v. United States*, 36 F.2d 164, 165 (10th Cir. 1929).

²³ *Klee v. United States*, 53 F.2d 58, 59, 61 (9th Cir. 1931); *Stakich v. United States*, 24 F.2d 701, 702 (9th Cir. 1928).

²⁴ E.g., *Steeber v. United States*, 198 F.2d 615, 617 (10th Cir. 1952) ("dominion and control"); *Safarik v. United States*, 62 F.2d 892, 895 (8th Cir. 1933) ("They neither owned, leased, controlled, occupied, possessed, nor had any interest . . ."); *McMillan v. United States*, 26 F.2d 58, 60 (8th Cir. 1928) ("dominion"); *United States v. De Bousi*, 32 F.2d 902, 903 (D. Mass. 1929) ("lessee or licensee").

²⁵ *Eberhart v. United States*, 262 F.2d 421, 422 n.1 (9th Cir. 1958). This language apparently originated in a headnoter's imagination. Compare headnote 4 of *Goldberg v. United States*, 297 Fed. 98 (5th Cir. 1924), with the text at 101.

²⁶ This dilemma was imposed on the defendant in a number of cases of which the leading example is *Connolly v. Medalie*, 58 F.2d 629, 630 (2d Cir. 1932) (L. Hand, J.). Likewise in the instant case. Note 4 *supra*.

²⁷ *Edwards*, *supra* note 18, at 487; *Recent Case*, 97 *U. Pa. L. Rev.* 728, 729 (1949).

²⁸ *Goldstein v. United States*, 316 U.S. 114, 121 (1942).

²⁹ *McDonald v. United States*, 335 U.S. 451, 456 (1948), noted, 97 *U. Pa. L. Rev.* 728 (1949).

³⁰ *Kremen v. United States*, 353 U.S. 346 (1957) (*per curiam*).

Moreover, a defendant with the right to use the hotel room of another had been allowed standing to suppress evidence seized there; however, the defendant also claimed ownership of the seized property.³¹

The Court in the instant case has at last established a clear and practical definition of standing. Although the requirement of standing will be continued,³² it will no longer rest on the niceties of property law, hairline distinctions between "lessee," "licensee," "invitee," and "guest"; instead, "anyone legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."³³ The Court held that "gossamer strength" technicalities were inappropriate "in fashioning procedures ultimately referable to constitutional safeguards."³⁴ Although the Court's ruling expands the fourth amendment protection beyond the limited scope of a hyper-technical interpretation of the language, the holding is consonant with the current development of the law. The Court has already rejected the "licensee," "invitee" distinction in the law of maritime torts,³⁵ and that same distinction is growing in disfavor in the law of torts generally.³⁶ Even in the homeland of the common law, such distinctions are being discarded.³⁷ The Court accomplished the elimination of the possession dilemma by simply construing rule 41(e)³⁸ to prohibit such a contradictory assertion of power by the Government³⁹ and thus avoided any necessity of considering a potential compulsory abandonment of the constitutional guarantee against self-incrimination. The Court, by thus construing rule 41(e), maintained consistency with the policy involved in rejecting the "licensee," "invitee" distinction.⁴⁰

The basic purpose of the fourth amendment was to protect the

³¹ *United States v. Jeffers*, 342 U.S. 48 (1951). It has been suggested that the case involved an inroad into the requirement of standing. Case Note, 25 So. Cal. L. Rev. 364 (1952); Recent Case, 28 Wash. L. Rev. 56 (1953).

³² *Elkins v. United States*, 364 U.S. 206, 223 n.16 (1960).

³³ 362 U.S. at 267.

³⁴ *Id.* at 266.

³⁵ *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-32 (1959).

³⁶ See *Harper, Licensor-Licensee, Tweedledum-Tweedledee*, 25 Conn. B.J. 123, 133-34 (1951).

³⁷ See *Occupiers' Liability Act, 1957*, 5 & 6 Eliz. 2, c. 31.

³⁸ Note 11 *supra*.

³⁹ 362 U.S. at 264.

⁴⁰ "[W]e are dealing with . . . an important social policy and not a narrow, finicky procedural requirement. This . . . policy . . . precludes application of the Rule so as to compel . . . injustice. . . ." *Ibid.*

individual's right of privacy⁴¹ from abuse by society's interest in the prompt and effective apprehension of criminals.⁴² Whether the exclusionary rule is the best method for effecting this purpose has been the subject of prolonged controversy,⁴³ but no other adequate sanction against unconstitutional police conduct has been found.⁴⁴ The expanded concept of standing enunciated by the Court is in harmony with the policy of the exclusionary rule and is undoubtedly appropriate to the highly interrelated life of modern society. The Court must not be restricted to a meticulous application of common-law principles⁴⁵ if the protections afforded by the Constitution are to have real meaning. A man must be as secure in the home of a friend as he is in his own, for the exigencies of modern society no longer permit a man to wall himself up within his own "castle." Twentieth-century man expects his right of privacy to be protected regardless of where he is as long as he is rightfully there; if the constitutional guarantees are to have operational relevance to our society, then the court has done only what it must do in again applying pragmatic natural law.⁴⁶

Robert C. L. Moffat

Estate Taxation—Community Property—Life Insurance on Surviving Husband

Surviving Husband was insured by several life insurance policies which were purchased with community funds. Husband retained the right to change the beneficiaries and to obtain the cash value of

⁴¹ *Wolf v. Colorado*, 338 U.S. 25, 27 (1949); *McDonald v. United States*, 335 U.S. 451, 453 (1948); 1 Cooley, *Constitutional Limitations* 610, 611 (8th ed. 1927) ("every man's house is his castle"); Senate Comm. on the Judiciary, *Improving Federal Law Enforcement and Administration of Justice*, S. Rep. No. 1478, 85th Cong., 2d Sess. 14 (1958) ("Freedom from the sudden, unjustified 'knock on the door' is a most precious liberty.").

⁴² Reynard, *op. cit. supra* note 12, at 117. Cf., *Carroll v. United States*, 267 U.S. 132, 149 (1924).

⁴³ Note, 63 *Harv. L. Rev.* 119, 133 (1949). For an excellent summary of the arguments pro and con and a collection of authorities see Ray, *supra* note 13, at 438-40 and nn. 23-29. Compare 8 *Wigmore, Evidence* § 2183 (3d ed. 1940) with Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 *Colum. L. Rev.* 11 (1925).

⁴⁴ Glueck, *Crime and Justice* 73, 74 (1936); Recent Case, 64 *Harv. L. Rev.* 1002, 1003 (1951); Note, 14 *Colum. L. Rev.* 338 (1914).

⁴⁵ Grant, *Circumventing the Fourth Amendment*, 14 *So. Cal. L. Rev.* 364 (1952).

⁴⁶ "Rightness or justice of law is not just a matter of form. . . . Such an approach permits law and constitution to grow to meet new problems. Natural law can be pragmatic and empirical, based upon the basic needs and drives and capacities of men, and the building of a good society. It is this pragmatic natural law which Justices Cardozo and Frankfurter sought to describe." Harding, *Due Process: A Natural Law for Criminal Prosecutions?*, *Fundamental Law in Criminal Prosecutions* 22 (1959).

the policies. Wife endorsed the designation of beneficiaries on some of the policies. Upon Wife's death Husband sued for refund of federal estate taxes which were paid on decedent Wife's interest in the life insurance policies. The trial court held for Husband on the ground that Wife had no vested interest at her death, but a mere "right of protection" which was contingent upon her surviving the husband; therefore, her estate was not subject to an estate tax on one-half the value of the policies. *Held: Reversed and Remanded.*

(1) A wife's one-half interest in insurance policies on the life of the husband purchased with community funds is includable in her gross estate for estate tax purposes. (2) A wife's endorsement of the designation by the husband of beneficiaries under insurance policies on the husband's life does not constitute relinquishment of the wife's one-half community interest in the policies. *United States v. Stewart*, 270 F.2d 894 (9th Cir. 1959), *cert. denied*, 361 U.S. 960 (1960).

The Internal Revenue Code provides that the value of the gross estate of a decedent is determined by including the value of all property to the extent of the decedent's interest therein at the time of death.¹ The estate tax is levied upon the privilege of transferring property at death, and the tax is on the interest that ceases at death.² The property concepts of the individual states are determinative of the extent of a decedent's interest in the property.³ Thus, in community property states one-half of all property acquired by spouses during marriage other than by gift, devise, or descent is includable in the gross estate of a deceased spouse.⁴ Moreover, when community funds are used to pay the premiums on life insurance policies, the policies⁵ and cash surrender value⁶ are considered community proper-

¹ Int. Rev. Code of 1954, §§ 2031, 2033. This case does not come under § 2042 of the Int. Rev. Code of 1954. The facts of the present case came under Int. Rev. Code of 1939, § 811(a).

² *Commissioner v. Clise*, 122 F.2d 998, 1001 (9th Cir. 1941); *Bethea v. Sheppard*, 143 S.W.2d 997 (Tex. Civ. App. 1940) error ref. This is thus distinguished from an inheritance tax.

³ *Lang v. Commissioner*, 304 U.S. 264 (1938); *Thurman*, Federal Estate and Gift Taxation of Community Property Life Insurance, 9 Stan. L. Rev. 239, 245 (1957).

⁴ *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959); *In re Hansen's Estate*, 91 Cal. App.2d 610, 205 P.2d 686 (1949); *Bell v. Phillips Petroleum Co.*, 278 S.W.2d 407 (Tex. Civ. App. 1954) error ref. n.r.e.; Tex. Const. art. 16, § 15; *In re Allen's Estate*, 54 Wash.2d 616, 343 P.2d 867 (1959).

⁵ *Traveler's Ins. Co. v. Fancher*, 219 Cal. 351, 26 P.2d 482 (1933); *In re Castagnola's Estate*, 68 Cal. App. 732, 230 Pac. 188 (1924); *Anderson v. Idaho Mut. Benefit Ass'n*, 77 Idaho 373, 292 P.2d 760 (1956). In Texas, *policy* rights, e.g., cash surrender value, as distinguished from *proceed* rights, are community property; see *Commissioner v. Chase Manhattan Bank*, supra note 4, for an excellent discussion on this. *Womack v. Womack*, 141 Tex. 299, 172 S.W.2d 307 (1943); *Cox v. Cox*, 304 S.W.2d 175, 177, 178 (Tex. Civ. App. 1957).

⁶ *Thompson v. Calvert*, 301 S.W.2d 496 (Tex. Civ. App. 1957).

ty. This interest has been construed by the Treasury Department to be one-half of the value of the policy.⁷

Prior to the principal case, federal courts failed to reach harmonious results on the question of whether the wife's interest in community insurance on the life of the husband is includable in her gross estate where the wife predeceases the husband. In 1933 the Board of Tax Appeals, applying Louisiana community property concepts, held that one-half of the cash surrender value of policies on the life of the husband was includable in the wife's gross estate.⁸ However, in *United States v. Waechter*⁹ the Ninth Circuit reached a contrary conclusion on the basis of a determination by the Washington Supreme Court¹⁰ that the wife's one-half interest in the cash surrender values of similar policies was not subject to the state inheritance tax. Federal district courts of California reached conflicting determinations on the includability in the wife's gross estate of one-half of the cash surrender value of community insurance policies on the husband's life where the wife predeceased the husband. In *California Trust Co. v. Riddell*¹¹ the District Court for the Southern District of California held that the interest was includable in the wife's gross estate. However, in the principal case, the District Court for the Northern District of California reached a contrary conclusion on the ground that since the wife had nothing in the policies which could be transferred to her heirs, the interest was not includable.¹²

The court in the principal case resolved the conflict between the federal district courts in California by reversing the determination of the district court for the Northern District of California and holding that the wife's interest in the policies was includable in her gross estate.¹³ The court reasoned: (1) The decision of the lower court was based upon the determination of the Ninth Circuit in the *Waechter*¹⁴ case, and (2) the Washington Supreme Court had over-

⁷ 26 C.F.R. § 20.2042-1 (c) (5) (rev. 1960).

⁸ Estate of Louisa M. Carroll, 29 B.T.A. 11 (1933); 26 C.F.R. § 20.2042-1 (a) (5) (rev. 1960); Rev. Rule 48, 1953-1 Cum. Bull. 392; Benjamin and Pigman, Federal Estate and Gift Taxation of Louisiana Life Insurance, 28 Tul. L. Rev. 75 (1953).

⁹ 195 F.2d 963 (9th Cir. 1952), affirming 98 F. Supp. 960 (W.D. Wash. 1951).

¹⁰ In re Knight's Estate, 31 Wash.2d 813, 199 P.2d 89 (1948).

¹¹ 136 F. Supp. 7 (S.D. Cal. 1955). This is the only California case analogous to the principal case.

¹² 158 F. Supp. 25.

¹³ *Stewart v. United States*, 158 F. Supp. 25 (N.D. Cal. 1957), rev'd, 270 F.2d 894 (9th Cir. 1959), cert. denied, 361 U.S. 960 (1960). The principal case supports Mr. Thurman's article, Federal Estate & Gift Taxation, 1 Ariz. L. Rev. 253, at 272 (1959).

¹⁴ *Waechter v. United States*, 98 F. Supp. 960 (W.D. Wash. 1951), aff'd, 195 F.2d 963 (9th Cir. 1952).

ruled the decision¹⁵ upon which the *Waechter* case was based.¹⁶ It would appear to this writer that in view of this reasoning, the case of *United States v. Waechter*¹⁷ is at most a very doubtful holding.¹⁸ Moreover, the court in the principal case pointed out that the lower court had overlooked a controlling fact, *viz.*, although the cash surrender value would remain community property if the husband claimed it prior to the death of the wife, the husband became the sole owner of the cash surrender value where he claimed it after the wife's death. Thus, the right to one-half of the cash surrender value of the policies passed to the husband upon the death of the wife.¹⁹

Because of the determination that the wife's one-half interest in community insurance on the life of the husband was includable in the wife's gross estate, the court in the principal case was faced with the issue of whether the wife's endorsement of the husband's designation of beneficiaries constituted a gift of her interest. The court concluded that the wife's endorsement did not constitute a divestiture of the wife's interest in the policies.²⁰ The court reasoned that the wife could not by endorsing a designation of beneficiaries by the husband have intended to relinquish her interest in the *policies* as distinguished from her right to the *proceeds*. Moreover, the court pointed out that where the insured designates a beneficiary but retains the right to change the designation, the interest of the beneficiaries prior to the death of the insured is that of a mere expectancy of an incomplete gift. Therefore, the wife's endorsement of the designation of beneficiaries was at most an assent to an incomplete gift, which was still incomplete at the time of her death and was not a transfer to her husband.²¹

It would seem that the result of the principal case will be reached if a similar case arises concerning estate taxation of Texas community life insurance. In Texas, when the life insurance policy premiums on the life of a surviving husband are paid out of community funds and the husband retains the right to change the beneficiary, one-

¹⁵ In re Knight's Estate, 31 Wash.2d 813, 199 P.2d 89 (1948).

¹⁶ In re Leuthold's Estate, 52 Wash.2d 299, 324 P.2d 1103 (1958), wherein it was held that the death of the wife is a taxable event which passes her half of the community interest in the cash surrender value of the policies to her legatees and is therefore subject to an inheritance tax.

¹⁷ 195 F.2d 963 (9th Cir. 1952), affirming 98 F. Supp. 960 (W.D. Wash. 1951).

¹⁸ The writer's view is also based on the excellent discussion of the *Waechter* case by Mr. Thurman in his law review article. See Thurman, *supra* note 3, at 270. It would therefore seem that the result of the principal case should be reached when a similar case arises concerning estate taxation of Washington community life insurance.

¹⁹ 270 F.2d at 898, 899; In re Leuthold's Estate, 52 Wash.2d 299, 324 P.2d 1103 (1958).

²⁰ 270 F.2d at 901.

²¹ *Ibid.*

half of the cash surrender value of the policies passes on death to the surviving husband and is subject to the state inheritance tax.²² The wife owns a present vested interest in the community property.²³ In view of the reasoning that the wife at death possesses a one-half vested interest in the cash surrender value of a community property life insurance policy, there would seem to be no reason to deny an estate tax on the transfer of the interest at her death. The principal case is in accord with the principles of estate taxation of other community property, and because of the states' view of life insurance as community property, no justifiable reason is seen why the courts should vary these principles with regard to life insurance.

With respect to the court's ruling that the wife's endorsement of the beneficiary change constituted no surrender of her rights to the *cash surrender value* of the policies, this holding seems to be based on the difference in *policy-rights* and *proceed-rights*.²⁴ In *Ettlinger v. Connecticut Gen. Life Ins. Co.*²⁵ the wife had been held to relinquish her right to the *proceeds* of community life insurance by signing a request for a change of beneficiary. The court there reasoned that since the husband could change the beneficiary without the wife's consent in writing, and since the only thing he could not do was make a gift of her community interest without her written consent, there could be no other reason for her signing the request. The principal case limits the rule of the *Ettlinger* case to a surrender of the proceeds. This writer would limit the principal case rule to its own fact situation. No reason is seen why a wife could not divest herself of her interest in the *policies*, so long as she *clearly manifests* such an intention.²⁶ It is submitted that the court in the principal

²² *Thompson v. Calvert*, 301 S.W.2d 496 (Tex. Civ. App. 1957).

²³ *Hopkins v. Bacon*, 282 U.S. 122 (1930) (Texas law); *Poe v. Seaborn*, 282 U.S. 101 (1930) (Washington law); *Bender v. Pfaff*, 282 U.S. 127 (1930) (Louisiana law); *Anderson v. Idaho Mut. Benefit Ass'n*, 77 Idaho 373, 292 P.2d 760 (1956).

²⁴ Insurance consists originally of rights in a policy—lifetime rights—and later of rights in the proceeds; policy (lifetime) rights include the rights to the cash surrender value and all other rights *except* the right to the proceeds. *Commissioner v. Chase Manhattan Bank*, 259 F.2d 231, 245, 246 (5th Cir. 1958), cert. denied, 359 U.S. 913 (1959). This case contains an excellent discussion of the difference in *policy-rights* and *proceed-rights*. Also, this case gives an excellent analysis of Texas community property law on insurance rights, pp. 244-52.

²⁵ 175 F.2d 870 (9th Cir. 1949); see *Mayr v. Arana*, 133 Cal. App.2d 471, 284 P.2d 21 (1955).

²⁶ In *Silen v. Silen*, 44 Wash.2d 884, 271 P.2d 674 (1954), a wife had, in a supplemental agreement, stipulated that she (wife) released her community interest in two life insurance policies and that such policies were to become the property of her husband. The court there held that the wife had divested herself of her community interest in the *policies*. Although it is beyond the scope of this casenote, there is some uncertainty among lawyers in Texas as to how a wife can give away her one-half interest in community property in view of the fact that the wife ordinarily has no managerial control over the community property. In order to circumvent this uncertainty, Texas lawyers use the

case merely held that endorsement by a wife of a change in beneficiary, while enough evidence of an intention to divest herself of her community interest in the *proceeds*, is not enough evidence to manifest an intention to surrender her community interest in the *policies*. However, if the intention of the wife is clear, she should be entitled to surrender her community interest in the policies as well as in the proceeds.²⁷ The wife has the right to give away her interest in other community property, and no reason is seen why a different rule should apply to life insurance.

Todd H. Overton

Federal Procedure — Claim of Right — Severance of Claim of Right

Plaintiff, a subcontractor, and his surety brought suit against Defendant, a contractor, for the earnings under the subcontract. Prior to the day set for the trial, Plaintiff submitted amended pleadings alleging additional damages for wrongfully delaying payment to Plaintiff, which delay forced Plaintiff to default and his surety to complete the work. The trial judge denied this amendment because it would have necessitated a continuance. After a recovery was granted in the original suit for earnings under the contract, the present suit was brought for damages caused by Defendant's delayed payment. Defendant contended that Plaintiff was barred by *res judicata* from pursuing another action for damages. *Held*: The rights to recover for earnings under a contract and for damages for delaying payment constitute two causes of action which

indirect method of the husband assigning community life insurance to the wife thus making it her separate property and subject to her control, and then the wife assigning it back to the husband thereby accomplishing a relinquishment of her one-half interest. Article 4619 (6), effective May 30, 1959, makes it clear that the wife can, by such an assignment, relinquish her rights in the community life insurance policy. The statute clearly gives the wife, even without the joinder, participation, or consent of her husband, the right to full control, management, and disposition of any contract of life insurance or annuity to the extent provided by the contract or any assignment thereof. However, this right of the wife can be defeated if the husband elects to give notice to the insurance company that he does not desire this section of the statute to apply to his wife, whereupon this section will not apply to any transaction by or with the wife subsequent to the furnishing of such notice. Tex. Rev. Civ. Stat. Ann. art. 4619 (6) (1959). It would seem, therefore, that if the husband elects to revoke her rights under this section, the original uncertainty is revived.

²⁷ Although it is beyond the scope of this casenote, one should consider that there is always the possibility that a wife's gift or assignment of her community interest will be found to be a gift in contemplation of death (at least where her death occurs soon after the gift), and under section 2035 of the Internal Revenue Code of 1954 will be includable in her gross estate.

may be prosecuted in separate suits. *Ross v. Bateson Constr. Co.*, 270 F.2d 796 (5th Cir. 1959).

A "cause of action"¹ is identified with the infringement of a right or violation of a duty;² however, it also denotes a "unit of grievance"³ or a law of remedies.⁴ These conflicting definitions of a cause of action prompted the substitution⁵ of the "claim of relief" doctrine in the Federal Rules of Civil Procedure.⁶ The "claim of relief" is defined as the aggregate of operative facts which give rise to a right enforceable in the courts.⁷ The doctrine is based on a broader, more liberal and flexible theory than the old rigid common-law cause of action.⁸ The change by the federal rules from the old cause of action to the new claim of relief concept caused difficulty in the application of the common-law tenets of *res judicata* and "splitting" a cause of action.⁹ Consequently, liberal standards¹⁰ are provided for the division of claims without *res judicata* barring the subsequent suit.¹¹

Under rule 42 of the Federal Rules of Civil Procedure, claims may be tried separately¹² (1) to avoid confusing the jury and the

¹ *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62 (1933); *F.O. Day Co. v. Shapiro*, 267 F.2d 669 (D.C. Cir. 1959); Clark, *Code Pleading* §§ 19, 114 (1st ed. 1928); Schopflocker, *What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata*, 21 Ore. L. Rev. 319 (1942).

² *Smith v. Dulles*, 352 U.S. 955 (1956); *F.O. Day Co. v. Shapiro*, supra note 1.

³ Clark, *Code Pleading* § 19, at 130 (2d ed. 1947).

⁴ *F.O. Day Co. v. Shapiro*, 267 F.2d 669 (D.C. Cir. 1959). But see *United States v. Smelser*, 87 F.2d 799 (5th Cir. 1937); *Dennison v. Payne*, 293 Fed. 333 (2d Cir. 1923); Nichols, *Federal Procedure* § 12.158 (1952).

⁵ *Darwin v. Jess Hickey Oil Corp.*, 153 F. Supp. 667 (N.D. Tex. 1957); *Ivancik v. Wright Aeronautical Corp.*, 68 F. Supp. 270 (D. N.J. 1946); Nichols, *op. cit.* supra note 4, at § 14.157.

⁶ Fed. R. Civ. P. 8(a)(2). Also see *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955); *Sidebotham v. Robison*, 216 F.2d 816 (9th Cir. 1954).

⁷ *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62 (1933); *Original Ballet Russe v. Ballet Theatre*, 133 F.2d 187 (2d Cir. 1943); Clark, *op. cit.* supra note 3, at §§ 19, 70; 1 Moore, *Federal Practice* §§ 0.01, 2.04 (1938).

⁸ *United States v. Employing Plasterers' Ass'n*, 347 U.S. 186 (1954); *Enger-Kress Co. v. Amity Leather Prod. Co.*, 18 F.R.D. 347 (E.D. Wis. 1955); *Cromer v. Sollitt Constr. Co.*, 16 F.R.D. 559 (S.D. W.Va. 1954); Clark, *Special Pleading in the Big Case*, 21 F.R.D. 45 (1957).

⁹ *Eichinger v. Fireman's Fund Ins. Co.*, 20 F.R.D. 204 (D. Neb. 1957); *Smith v. Brown*, 17 F.R.D. 39 (M.D. Pa. 1955); 5 Moore, *op. cit.* supra note 7, at § 42; *Walder v. Paramount Publix Corp.*, 23 Fed. Rules Serv. 15a.3 (S.D. N.Y. 1956).

¹⁰ *Enger-Kress Co. v. Amity Leather Prod. Co.*, 18 F.R.D. 347 (E.D. Wis. 1955); *Cromer v. Sollitt Constr. Co.*, 16 F.R.D. 559 (S.D. W.Va. 1954).

¹¹ *Deauville Corp. v. Garden Suburbs Golf & Country Club, Inc.*, 164 F.2d 430 (5th Cir. 1947); *Milner v. National Airlines*, 23 F.R.D. 7 (S.D. Tex. 1958); Fed. R. Civ. P. 18, 42, 54; Note, 39 Minn. L. Rev. 743 (1955).

¹² It should be noted that rule 18, which provides for "Joinder of Claims and Remedies," is consistent with the application of rule 42. However, it would be desirable as a procedural expedient if rule 18 were amended to require compulsory joinder of all related claims. This amendment would not affect the discretionary power of the courts to sever certain cases under rule 42. Moreover, it would eliminate the present type of case which is based on an incorrect original severance.

court, (2) to conform to requisites of procedural necessity or convenience, or (3) to prevent prejudice to parties.¹³ If one of the above is not present, the overwhelming majority of cases consolidate all claims of relief arising out of the same transaction¹⁴ and conform to the basic tenets of the Federal Rules of Civil Procedure, *viz.*, consolidation, expedience, and flexibility.¹⁵ However, rule 42 is permissive;¹⁶ hence, the court has discretion to decide whether a suit involving several claims should be severed or remain consolidated.¹⁷ Multiple injuries to persons and property arising out of a single tort,¹⁸ breach of copyright and unfair competition,¹⁹ infringement of patent and unfair competition,²⁰ breach of contract and fraud,²¹ and wrongful cancellation of a franchise contract and conspiracy to restrain interstate trade²² have all been held to constitute only a single primary right for which there should be recovery in a *single* suit. However, if a plaintiff fails to allege all portions of the claim of relief in the original petition, the courts have been liberal in allowing amended pleadings which incorporate all of the claims in a single suit.²³

The court in the instant case based its decision on the fact that if relief were not granted, Plaintiff would have lost "his day in court" through no fault of his own.²⁴ Thus, it would seem that the court realized that the action taken in the first suit was not entirely correct. However, the court relied on the old concept of cause of action²⁵ and ignored the modern federal trend of combining all

¹³ Fed. R. Civ. P. 42.

¹⁴ *Reeves v. Beardall*, 316 U.S. 283 (1942); *Deauville Corp. v. Garden Suburbs Golf & Country Club, Inc.*, 164 F.2d 430 (5th Cir. 1947); *Mendez & Co. v. General Motors Corp.*, 161 F.2d 695 (7th Cir. 1947); *Atwater v. North Am. Coal Corp.*, 111 F.2d 125 (2d Cir. 1940); *Collins v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 83 (2d Cir. 1939); *Woburn Degreasing Co. v. Spencer Kellogg & Sons*, 37 F. Supp. 311 (W.D. N.Y. 1941); *Milner v. National Airlines*, 23 F.R.D. 7 (S.D. Tex. 1958); *Temp-Resisto Corp. v. Glatt*, 18 F.R.D. 148 (D. N.J. 1955); *Smith v. Brown*, 17 F.R.D. 39 (M.D. Pa. 1955); Fed. R. Civ. P. 18; 1 Moore, *op. cit. supra* note 7, at 42.

¹⁵ *Collins v. Metro-Goldwyn Pictures Corp.*, *supra* note 14; *Enger-Kress Co. v. Amity Leather Prod. Co.*, 18 F.R.D. 347 (E.D. Wis. 1955).

¹⁶ Fed. R. Civ. P. 42.

¹⁷ *Mendez & Co. v. General Motors Corp.*, 161 F.2d 695 (7th Cir. 1947); *Eichinger v. Fireman's Fund Ins. Co.*, 20 F.R.D. 204 (D. Neb. 1957); *Walder v. Paramount Publix Corp.*, 23 Fed. Rules Serv. 15a.3 (S.D. N.Y. 1956).

¹⁸ *Cormier v. Highway Trucking Co.*, 312 S.W.2d 406 (Tex. Civ. App. 1958); Annot., 62 A.L.R.2d 980 (1958).

¹⁹ *Hurn v. Oursler*, 289 U.S. 238 (1933).

²⁰ *Zalkind v. Scheinman*, 139 F.2d 895 (2d Cir. 1943).

²¹ *Original Ballet Russe v. Ballet Theater*, 133 F.2d 187 (2d Cir. 1943).

²² *Mendez & Co. v. General Motors Corp.*, 161 F.2d 695 (7th Cir. 1947).

²³ *Clark*, *op. cit. supra* note 3, at 319.

²⁴ 270 F.2d at 800.

²⁵ Fed. R. Civ. P. 8(a).

claims for relief in a single action.²⁶ Although the liberal context of the Federal Rules of Civil Procedure provides for division of claims under certain circumstances,²⁷ the court failed to cite any of these rules for its decision. Moreover, the court determined that two causes of action arose out of the contract. This decision was based on secondary authority which is not supported by modern federal procedure.²⁸ If a secondary authority were necessary, it would seem that the Restatement of Judgments would have supported the decision more adequately. The Restatement provides that if a prior court *incorrectly* rules that two claims must be severed, *res judicata* will not constitute a bar to the subsequent suit.²⁹ A similar case involving a contract right and a federal law, *Mendez & Co. v. General Motors Corp.*,³⁰ held that all claims arising out of a contract right should be tried in a single suit. However, in the *Mendez* case the *plaintiff* failed to bring the multiple claims arising out of the contract in a single suit; in the principal case the *court* refused Plaintiff's request to bring both claims in one suit.

Although the result reached in the principal case is an equitable one, the court could have supported its decision more adequately by utilizing the discretion granted by rule 42 of the Federal Rules of Civil Procedure. However, it is possible that the lower court refused to allow the amendment to the pleadings because it presented an issue of special damages which required specific pleading.³¹ If the amended claim was for special damages and the amendment failed to plead them specifically, then the lower court was correct in dis-

²⁶ It should be noted that a true anomaly in the law develops at this point. A well settled principle of federal law and procedure is that when a case is brought into a federal court on the basis of diversity of citizenship, the rules of decision, both written and unwritten, of the *state* shall be the governing law. *Erie Ry. v. Tompkins*, 304 U.S. 64 (1938); *United States v. Security-First Nat'l Bank*, 130 F. Supp. 521 (S.D. Cal. 1955). However, some states, Annot., 62 A.L.R.2d 977, 1001 (1958), allow two suits to be maintained for harm to the person and damages to the property arising out of a single act. *Clancey v. McBride*, 338 Ill. 35, 169 N.E. 729 (1929); *Public Serv. Co. v. Dalbey*, 119 Ind. App. 495, 85 N.E.2d 368 (1949); *Carter v. Hinkle*, 189 Va. 1, 52 S.E.2d 135 (1949). Thus, when a suit was brought to the federal courts from one of the above states recognizing two causes of action, the modern trend of the Federal Rules of Civil Procedure proclaiming only one "claim of relief," Fed. R. Civ. P. 8(a)(2), would either have to be compromised to allow two federal claims, or the federal procedure would have to be declared the supreme governing law.

²⁷ *Deauville Corp. v. Garden Suburbs Golf & Country Club, Inc.*, 164 F.2d 430 (5th Cir. 1947); *Milner v. National Airlines*, 23 F.R.D. 7 (S.D. Tex. 1958); Fed. R. Civ. P. 18, 42, 54; Note, 39 Minn. L. Rev. 743 (1955).

²⁸ See *Harris v. Whitworth*, 213 Ark. 480, 211 S.W.2d 101 (1948); *Chicago & S.E. Ry. v. Yawger*, 24 Ind. App. 460, 56 N.E. 50 (1900); 50 C.J.S. Judgments § 674 (1947). Note that neither case was based on the Federal Rules of Civil Procedure.

²⁹ Restatement, Judgments § 67 (1942).

³⁰ 161 F.2d 695 (7th Cir. 1947).

³¹ Fed. R. Civ. P. 9g.

allowing the amendment.³² Moreover, in the principal case the court could have emphasized that the first suit was truly a controversy between Defendant and the surety by reason of the surety's subrogation to Plaintiff's right of compensation when he completed the contract. Based on this theory, the court could have divided the claim of relief so that the surety would recover from Defendant in one suit for the costs of completing the contract, and Plaintiff could recover damages in another suit for Defendant's causing Plaintiff to default. However, even this approach would be time consuming and contrary to the modern theory of the federal rules, *viz.*, settling all claims arising out of a factual situation in a single suit.

Ronald Edward Griesheimer

Federal Procedure — Removal of Cases — Right of Federal Officer to Remove as Third-Party Defendant

Plaintiff, a resident of Texas, brought an action in a state court against Defendant, a Texas contractor, for faulty construction of Plaintiff's home. Defendant impleaded as a third-party defendant the Administrator of Veteran's Affairs on the basis of the third party's authorization of the faulty construction. The Administrator removed the case to the federal district court under 28 U.S.C.A. § 1442.¹ The federal judge dismissed the suit as to the third-party defendant and remanded the remainder of the suit to the state court. The original Defendant appealed. *Held: Dismissed for lack of appellate jurisdiction.* A federal officer who is a third-party defendant in a state court action but against whom no separate and independent claim is asserted may not remove the case to a federal court.² *Westwood Dev. Co. v. Higley*, 266 F.2d 555 (5th Cir. 1959).

³² *Henry Pratt Co. v. Stody Co.*, 16 F.R.D. 175 (S.D. Cal. 1954).

¹ 62 Stat. 938 (1948), 28 U.S.C.A. § 1442 (1950) provides for the removal of suits by any federal officer or person acting thereunder for any act under color of his office or in the performance of his duties.

² The principal case involves four basic problems, *viz.*, (1) whether an order dismissing a third-party action is reviewable when the remainder of the suit is ordered remanded to the state court, *City of Waco v. United States Fid. & Guar. Co.*, 293 U.S. 140 (1934); (2) whether the third-party action was properly dismissed in view of the Rules' terminology "is or may be liable," 63 Stat. 102 (1949), 28 U.S.C.A. § 1447(c) (1950); *Gwaltney Bros. v. Marion County Bldg. Trades Council*, 175 F. Supp. 790 (S.D. Ind. 1959); (3) whether a third-party defendant may remove under 62 Stat. 937 (1948), 28 U.S.C.A. § 1441(c) (1950); and (4) whether a federal officer who is a third-party defendant may remove under 62 Stat. 938 (1948), 28 U.S.C.A. § 1442 (1950). However, the court treated only the fourth issue. 266 F.2d at 558.

The general removal statute provides two basic grounds for removal of suits from state courts to federal courts, *viz.*, (1) the presence of a federal question³ and (2) diversity of citizenship.⁴ Another statute specifically allows federal officers and members of the armed forces to remove certain causes.⁵ The rationale of the latter removal statute is that the federal law is supreme; thus, federal courts should prevent state law or policy from exerting adverse control over officers of the federal government.⁶ As a prerequisite to the removal of a suit by a federal officer, he must show that the action against him arose while he was acting under "color of his office"⁷ and pursuant to federal laws.⁸ However, although courts have tended to place a strict construction on the general removal statute,⁹ the federal officer removal statute has received a more liberal interpretation.¹⁰ Similarly, Congress has gradually increased the right of removal for federal officers and restricted the right under the general removal statute.¹¹

Section 1441(c) allows the removal to a federal district court of an entire case where an independent claim which would be removable if sued upon alone is joined with an otherwise non-removable claim or cause of action. Three distinct problems arise under the section when the party attempting removal is not the original party defendant. First, removal of an entire suit is authorized only where

³ 62 Stat. 937 (1948), 28 U.S.C.A. § 1441(b) (1950); Note, 52 Colum. L. Rev. 101 (1952). A federal question is defined as "a claim . . . arising under the Constitution, treaties or laws of the United States. . . ."

⁴ Mexican Nat'l R.R. v. Davidson, 157 U.S. 201 (1895); 62 Stat. 938 (1948), 28 U.S.C.A. § 1442(b) (1950).

⁵ Sarnar v. Mason, 228 F.2d 176 (3d Cir.), cert. denied, 351 U.S. 924 (1956); 62 Stat. 938 (1948), 28 U.S.C.A. § 1442 (1950); Moore, Federal Practice § 0.6(5) (1959). Note that a federal officer may always remove under the general removal statute if he complies with its requisites.

⁶ Colorado v. Symes, 286 U.S. 510 (1932); Tennessee v. Davis, 100 U.S. 257 (1879); Yeung v. Hawaii, 132 F.2d 374 (9th Cir. 1942); Jones v. Elliott, 94 F. Supp. 567 (E.D. Va. 1950); Application of Shumpka, 268 Fed. 686 (N.D. N.Y. 1920).

⁷ Hood v. United States, 256 F.2d 522 (9th Cir. 1958); DeBusk v. Harvin, 212 F.2d 143 (5th Cir. 1954); Moore, Federal Practice § 0.164(2) (to be published).

⁸ Sarnar v. Mason, 228 F.2d 176 (3d Cir.), cert. denied, 351 U.S. 924 (1956); People's United States Bank v. Goodwin, 162 Fed. 937 (E.D. Mo. 1908).

⁹ Shaver v. Arkansas-Best Freight Sys., 171 F. Supp. 754 (W.D. Ark. 1959); Milton Jacobs, Inc. v. Manning Mfg. Corp., 171 F. Supp. 393 (S.D. N.Y. 1959); Continental Carriers, Inc. v. Goodpasture, 169 F. Supp. 602 (M.D. Ga. 1959); Browne v. Hartford Fire Ins. Co., 168 F. Supp. 796 (N.D. Ill. 1959); Moore, Federal Practice §§ 0.156, 0.162(1) (to be published).

¹⁰ Ove Gustavasson Contracting Co. v. Floete, 176 F. Supp. 841 (E.D. N.Y. 1959); Johnston v. Earle, 162 F. Supp. 149 (D. Ore. 1958); State v. Willingham, 143 F. Supp. 445 (E.D. Okla. 1956); Garden Homes v. Mason, 143 F. Supp. 144 (D. Mass. 1956); Moore, Federal Practice § 0.164(1) (to be published). Contra, Fink v. Gerrish, 149 F. Supp. 915 (S.D. N.Y. 1957).

¹¹ People v. Banning, 88 F. Supp. 449 (E.D. Mich. 1950); Moore, Federal Practice §§ 0.156, 0.162(1), 0.164(1) (to be published).

there has been joinder of two or more claims or causes of action.¹³ "Joinder" has been interpreted to mean joinder exclusively by the *plaintiff*.¹³ Second, a party seeking removal must present a "separate and independent" claim, *i.e.*, a claim that would be removable if sued upon alone.¹⁴ However, courts have encountered difficulty in enunciating a definition of a "separate and independent" claim.¹⁵ Moreover, courts have been unable to determine how the claim of an impleaded third party is separate and independent from the "inter-locked series of transactions" which forms the entire suit.¹⁶ Noted authorities have asserted that *any* third-party claim would be too related to the main question of the controversy to meet the "separate and independent" test.¹⁷ Third, under the strict construction¹⁸ of the general removal statute¹⁹ *only* "the defendant or the defendants" may remove a suit.²⁰ Thus, a cross-acted or cross-claimed plaintiff does not have sufficient standing as a cross-defendant to remove a suit.²¹ Courts have conflicted in determining whether a third-party defendant is a "defendant" within the purview of the general removal statute.²² A few courts have continued to follow the stand taken by the prior removal statute,²³ *viz.*, a third party is a defendant for purposes of removal if his claim is "separable" from that of the original parties.²⁴ Under a second view, no counterclaim, cross-

¹³ 62 Stat. 937 (1948), 28 U.S.C.A. § 1441(c) (1950):

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

¹⁴ Shaver v. Arkansas-Best Freight Sys., 171 F. Supp. 754 (W.D. Ark. 1959); Sequoyah Feed & Supply Co. v. Robinson, 101 F. Supp. 680 (W.D. Ark. 1951); Moore, Commentary on the United States Judicial Code § 0.03(37) (1949); Note, 51 Mich. L. Rev. 115 (1952). Contra, President and Directors of Manhattan Co. v. Monogram Assoc., 81 F. Supp. 739 (E.D. N.Y. 1949).

¹⁵ 62 Stat. 937 (1948), 28 U.S.C.A. § 1441(c) (1950).

¹⁶ Aetna Ins. Co. v. City of Maldin, 102 F. Supp. 126 (E.D. Mo. 1952).

¹⁷ American Fire & Cas. Co. v. Finn., 341 U.S. 6 (1951); Annot., 19 A.L.R.2d 748 (1951).

¹⁸ Moore, *op. cit. supra* note 13.

¹⁹ Bradley v. Halliburton Oil Well Cementing Co., 100 F. Supp. 913 (E.D. Okla. 1951); Cudney v. Midcontinent Airlines, 98 F. Supp. 403 (E.D. Mo. 1951).

²⁰ 62 Stat. 937 (1948), 28 U.S.C.A. § 1441 (1950). See generally, Note, 51 Mich. L. Rev. 115 (1952).

²¹ Mason City & Ft. D. R.R. v. Boynton, 204 U.S. 570 (1907).

²² Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941); West v. Aurora, 73 U.S. (6 Wall.) 139 (1867); Standard Sanitary Mfg. Co. v. Benson Hardware Co., 225 Ala. 412, 143 So. 570 (1932).

²³ Sequoyah Feed & Supply Co. v. Robinson, 101 F. Supp. 680 (W.D. Ark. 1951). Contra, Gregory v. West Virginia Pulp & Paper Co., 112 F. Supp. 8 (E.D. N.C. 1953).

²⁴ 28 U.S.C.A. § 71 (1940).

²⁵ Habermel v. Mong, 31 F.2d 822 (6th Cir. 1929); Henry v. Rice, 74 F. Supp. 222 (E.D. Mo. 1947); Ellis v. Peak, 22 F. Supp. 908 (N.D. Tex. 1938). Also see Shaver v. Arkansas-Best Freight Sys. 171 F. Supp. 754 (W.D. Ark. 1959) reciting old law but

claim, third-party claim, or intervention would afford the basis of removal.²⁵ On the other hand, a few courts have held that if a removable claim is asserted against a third party, the third party should have the right to remove.²⁶ However, the construction of section 1441 does not apply to section 1442.²⁷ Under the liberal interpretation of section 1442,²⁸ co-defendant federal officers were entitled to remove the entire suit even though the other co-defendant did not assent to the removal and none of the requisites of the general removal statute were met.²⁹ However, prior to the principal case no court ever specifically ruled on the question of whether a federal officer as a third-party defendant could remove under section 1442.³⁰

The court in the instant case reasoned that no "separate and independent" claim has been stated; thus, the action was not removable.³¹ The court reached this conclusion by applying the strict interpretation which courts have placed on the general removal statute, section 1441. However, the third-party defendant, a federal officer, never attempted to remove under section 1441; the right to remove was asserted under the specific removal statute for federal officers, section 1442.³² Thus, the court either (1) neglected to notice which removal statute was actually in question, or (2) interpreted section 1442 as being bound by the case-law construction of section 1441. In either case, the court erroneously applied to section 1442 the construction given section 1441. Section 1442 was enacted for the purpose of giving federal courts primary control over federal officers³³ and allowing the officer the right of removal

not applying it: "Section 71 allowed removal when a controversy was wholly between citizens of different states and fully determinable between them. Such a controversy was said to be 'separable.'" *American Fire & Cas. Co. v. Finn.*, 341 U.S. 6 (1951); Note, 41 *Harv. L. Rev.* 1048 (1928).

²⁵ *Shaver v. Arkansas-Best Freight Sys.*, supra note 24; *McMahon v. City of Troy*, 122 F. Supp. 555 (N.D. N.Y. 1954); *Sequoyah Feed & Supply Co. v. Robinson*, 101 F. Supp. 680 (W.D. Ark. 1951); *Moore*, op. cit. supra note 13. It would appear that Professor Moore, as the originator of this interpretation, would so strictly construe section 1441 that only original parties defendant would have the opportunity to remove suits.

²⁶ *Industrial Lithographic Co. v. Mendelsohn*, 119 F. Supp. 284 (D. N.J. 1954); *Gregory v. West Virginia Pulp & Paper Co.*, 112 F. Supp. 8 (E.D. N.C. 1953); *President and Directors of Manhattan Co. v. Monogram Assoc.*, 81 F. Supp. 739 (E.D. N.Y. 1949).

²⁷ *Moore*, *Federal Practice* § 0.164(1) (to be published).

²⁸ *Potts v. Elliot*, 61 F. Supp. 378 (E.D. Ky. 1945).

²⁹ *Jones v. Elliot*, 94 F. Supp. 567 (E.D. Va. 1950).

³⁰ *Goldfarb v. Muller*, 181 F. Supp. 41 (D. N.J. 1959). In the opinion the court quoted in dictum the statement by the United States Attorney General in his brief for *Oklahoma v. Willingham*, 143 F. Supp. 445 (E.D. Okla. 1956), that a third-party defendant federal officer should under the liberal context of section 1442 be allowed the right of removal.

³¹ 266 F.2d 555, 558.

³² 266 F.2d 555, 556.

³³ *Horne v. Aderhold*, 1 F. Supp. 690 (M.D. Ga. 1932).

to prevent state courts from attempting to control federal officers.³⁴ Neither section 1442³⁵ nor any cases³⁶ arising under the statute indicates that a federal officer is bound by the requirements of the general removal statute. Hence, the requisites for removal by a third-party defendant under the general removal statute³⁷ should not apply where the third-party defendant is a federal officer.

It is well settled that while the ultimate purpose of both sections 1441 and 1442 is to allow removal of suits from state courts to federal courts, the statutes were enacted for two different classes of people and based on different rationale. The standards and criteria for applying one statute cannot apply to the other if their specific purposes are to be achieved. To require that a federal officer, sued while acting under color of office, must comply with the "separate and independent cause of action" test is as incorrect as a requirement that a federal officer must fulfill the diversity of citizenship test in order to remove a suit. If the instant case is a new interpretation of the removal statutes, the conclusion must follow that the two removal statutes are to be construed together and that the strict requirements of the general removal statute have supplanted the liberal treatment granted to federal officers. Such a trend will ultimately extinguish the entire benefit of removal for federal officers.

Ronald Edward Griesheimer

Oil and Gas—Leases—Paying Quantities Under Habendum Clause

Plaintiff was the lessor of an oil, gas, and mineral lease in which the habendum clause provided that the lease should continue beyond the primary term for so long as oil or gas was produced; another clause stipulated that reworking operations might be begun within sixty days following the cessation of production. Plaintiff brought an action to cancel the lease on the ground that the only well on the property in question had ceased to produce in paying quantities more than sixty days prior to the commencement of successful re-

³⁴ Application of Shumpka, 268 Fed. 686 (N.D. N.Y. 1920).

³⁵ 62 Stat. 938 (1948), 28 U.S.C.A. § 1442 (1950); Note, 52 Colum. L. Rev. 101 (1952).

³⁶ Venable v. Richards, 105 U.S. 636 (1882); Tennessee v. Davis, 100 U.S. 257 (1879); Johnston v. Earle, 162 F. Supp. 149 (D. Ore. 1958); Garden Homes v. Mason, 143 F. Supp. 144 (D. Mass. 1956).

³⁷ Aetna Ins. Co. v. City of Malden, 102 F. Supp. 126 (E.D. Mo. 1952); Henry v. Rice, 74 F. Supp. 222 (E.D. Mo. 1947).

working operations. The evidence showed that the well had an operating loss for several consecutive months prior to the reworking operations, but that a small profit was made over a fifteen month period prior to the cutoff date. Plaintiff contended that the lease terminated at a point in time sixty days after production in paying quantities had ceased; however, Defendant, the lessee, maintained that a reasonable time must be taken into account. Defendant also sought to exclude from his operating costs depreciation and overriding royalties and contended that the Texas Railroad Commission's proration rules must be taken into account. *Held: Affirmed for Defendant.* (1) The standard by which paying quantities is determined is whether under all the circumstances a reasonably prudent operator would, for the purpose of making a profit and not for mere speculation, continue to operate a well in the manner in which it is being operated; and the trial court shall consider all relevant facts and circumstances and a reasonable period of time. (2) Depreciation expenses and overriding royalties are not deductible as operating expenses in determining paying quantities. *Clifton v. Koontz*, —Tex. —, 325 S.W.2d 684 (1959).¹

When a habendum clause in an oil, gas, or mineral lease provides that the lease shall continue during the primary term and so long thereafter as oil or gas is produced, the estate created and held by the lessee after the primary term is a determinable fee.² Thus, the lease is automatically terminated if production ceases after the primary term³ in the absence of other circumstances extending the lease, e.g., payment of a shut-in royalty in appropriate circumstances.⁴ The word "produced" in the habendum clause is construed by the great majority of the courts to mean substantially the same as "produced in paying quantities."⁵ According to the prevailing view, production in paying quantities during the primary term is a condition precedent to the continuation of the lease;⁶ mere discovery of oil or gas is not sufficient.⁷ Marketing of the product within a reasonable time after drilling has been completed, however, has

¹ See Recent Case Note, 14 Sw. L.J. 283 (1960), for a discussion of the issue of the implied covenant to develop in the principal case. See also Comment, 14 Sw. L.J. 365 (1960).

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

³ *Watson v. Rochmill*, 137 Tex. 565, 155 S.W.2d 783 (1941).

⁴ *Freeman v. Magnolia Petroleum Co.*, 141 Tex. 274, 171 S.W.2d 339 (1943).

⁵ *Garcia v. King*, 139 Tex. 578, 164 S.W.2d 509 (1942); 2 Summers, *Oil and Gas* § 293 (1959). There is, however, some contrary authority. See *Gillespie v. Ohio Oil Co.*, 260 Ill. 169, 102 N.E. 1043 (1913); *Enfield v. Woods*, 198 Ky. 328, 248 S.W. 842 (1923); *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S.E. 836 (1909).

⁶ *Freeman v. Magnolia Petroleum Co.*, 141 Tex. 274, 171 S.W.2d 339 (1943).

⁷ *Hanks v. Magnolia Petroleum Co.*, 24 S.W.2d 5 (Tex. Comm. App. 1930).

been held sufficient to continue the lease after the expiration of the primary term.⁸

"Paying quantities" has been generally defined to mean production in quantities sufficient to yield a return in excess of operating costs, although drilling and equipment costs may never be repaid and the undertaking considered as a whole may ultimately result in a loss.⁹ When the well has clearly made a profit over operating expenses, the courts have no trouble finding production in paying quantities as a matter of law.¹⁰ When the well is marginal, however, the question is one for the jury,¹¹ and the question of inclusion of certain expenses becomes critical. It is clear that production, rather than sales during the period, is the test;¹² consequently any oil which remains unsold at the end of the period will be taken into account.¹³ However, royalties payable to the lessor are not includable in the income of the well,¹⁴ while overriding royalties payable by the lessee are not deducted from the income.¹⁵ The question of depreciation of equipment is unanswered although some cases suggest that it might properly be included as an operating expense.¹⁶ Depletion is not considered an expense,¹⁷ and the question of overhead and administrative expenses allocable to the well is in doubt.¹⁸ Another highly important factor is the period of time to be taken into account in determining whether the well has been producing in paying quantities. The trial court's submission to the jury on the basis of a six month period was upheld in *Sullivan and Garnett v. James*,¹⁹ while

⁸ Cowden v. General Crude Oil Co., 217 S.W.2d 109 (Tex. Civ. App. 1949) error ref. n.r.e.

⁹ Garcia v. King, 139 Tex. 578, 164 S.W.2d 509 (1942). The phrase thus used to determine whether the lease continues under the habendum clause must be distinguished from its use in connection with an express or implied covenant to develop, since under the covenant the phrase means production in such quantities as would yield to the lessee a reasonable profit after deducting the entire cost of drilling, equipping, and operating the well. Transport Oil Co. v. Exeter Oil Co., 84 Cal. App.2d 616, 191 P.2d 129 (1948).

¹⁰ Denker v. Mid-Continent Petroleum Corp., 56 F.2d 725 (10th Cir. 1932).

¹¹ Sullivan and Garnett v. James, 308 S.W.2d 891 (Tex. Civ. App. 1957) error ref. n.r.e.

¹² Id. at 893.

¹³ Henry v. Clay, 274 P.2d 545 (Okla. 1954).

¹⁴ Transport Oil Co. v. Exeter Oil Co., 84 Cal. App.2d 616, 191 P.2d 129 (1948); Garcia v. King, 139 Tex. 578, 164 S.W.2d 509 (1942).

¹⁵ Transport Oil Co. v. Exeter Oil Co., supra note 14.

¹⁶ See United Cent. Oil Corp. v. Helm, 11 F.2d 760 (5th Cir. 1926); Transport Oil Co. v. Exeter Oil Co., 84 Cal. App.2d 616, 191 P.2d 129 (1948); Persky v. First State Bank, 117 S.W.2d 861 (Tex. Civ. App. 1938).

¹⁷ Transport Oil Co. v. Exeter Oil Co., supra note 16.

¹⁸ Sullivan and Garnett v. James, 308 S.W.2d 891 (Tex. Civ. App. 1957) error ref. n.r.e. (Conflicting theories to be resolved by jury.). See Cage, Production in Paying Quantities: Technical Problems Involved, Southwestern Legal Foundation 10th Annual Inst. on Oil & Gas L. & Tax. 61 (1959); Walker, Defects and Ambiguities in Oil and Gas Leases, 28 Texas L. Rev. 895 (1950).

¹⁹ Ibid.

in *Transport Oil Co. v. Exeter Oil Co.*²⁰ the court rejected a one month period, stating that the duration should be extended over a relatively long period so that expenses subject to fluctuation might be exposed to the levelling influence of time. In *Henry v. Clay*²¹ the court considered the entire period of operation of the well. In addition to the time factor, most courts are influenced by the argument that since the operator expended large sums in the development of the well, the profitability of the well should depend on the honest judgment of the lessee acting in good faith and in view of the surrounding circumstances.²² The opinions state that the judgment of the lessee is given great weight,²³ or that his judgment will prevail over that of the inexperienced lessor,²⁴ or that the question is to be determined "in reference to the judgment of the lessee exercised in good faith."²⁵ Although some courts have even said that profitability is for the exclusive determination of the lessee,²⁶ an analysis of the facts in these cases shows that his judgment is not conclusive and that the good faith of the lessee must have some substance in fact.²⁷

The Texas Supreme Court in the principal case settles some of the accounting questions involved in marginal well cases. Citing the *Transport Oil Co.*²⁸ case, the court holds that overriding royalties should not be treated as an expense and that the operating income is the entire income attributable to the contractual working interest created by the original lease.²⁹ Depreciation of drilling equipment is not an expense; since the original equipping costs are not included, the depreciation expense on that equipment should not be included. Moreover, inclusion would decrease the incentive to drill.³⁰ With reference to the time factor, the court said that the sixty-day clause was not determinative of the period of time during which production in paying quantities must be made.³¹ The court reasoned that under an arbitrary sixty-day rule an operator, upon sustaining a slight loss for one month, would have to commence reworking operations immediately or risk losing the lease if he sustained another slight loss the next month. Recognizing that there are various reasons for

²⁰ 84 Cal. App.2d 616, 191 P.2d 129 (1948).

²¹ 274 P.2d 545 (Okla. 1954).

²² 2 Summers, Oil and Gas § 307 (1959).

²³ Union Gas & Oil Co. v. Adkins, 278 Fed. 854 (6th Cir. 1922).

²⁴ Swiss Oil Corp. v. Riggsby, 252 Ky. 374, 67 S.W.2d 30 (1934).

²⁵ Gypsy Oil Co. v. Marsh, 121 Okla. 135, 248 Pac. 329 (1926).

²⁶ Bouldin v. Gulf Prod. Co., 5 S.W.2d 1019 (Tex. Civ. App. 1928) error dismissed; Texas Pac. Coal & Oil Co. v. Bruce, 233 S.W. 535 (Tex. Civ. App. 1921).

²⁷ Nystel v. Thomas, 42 S.W.2d 168 (Tex. Civ. App. 1931).

²⁸ Transport Oil Co. v. Exeter Oil Co., 84 Cal. App.2d 616, 191 P.2d 129 (1948).

²⁹ 325 S.W.2d at 693.

³⁰ The court did not pass on depreciation of pumping equipment.

³¹ 325 S.W.2d at 690.

reduced production which might not prevent an eventual overall profit, the court stated that there can be no arbitrary period for determining the question;³² however, the period must be reasonable under the circumstances. These factors are to be considered with all other relevant circumstances (including pertinent Railroad Commission proration rules) in determining whether a reasonably prudent operator would, for the purpose of making a profit and not for mere speculation, continue to operate the well in the manner in which it was operated.³³ This "prudent operator" test appears new in Texas law, perhaps derived from the language in *Henry v. Clay*³⁴ or *Kyle v. Wadley*,³⁵ or drawn from the test used to determine if there is an implied covenant to develop the lease, *i.e.*, whether a reasonably prudent operator would, in the expectation of making a profit, develop the lease further.³⁶

The decision in the principal case will be helpful in the law of oil and gas by providing some technical guides for determining whether a well is producing in paying quantities. The new rules seem well reasoned and designed to provide a fair standard for the determination of actual operating profit or loss. The question of the period of time is expressly left open to the facts of each particular case, but it is plain that a lessee may operate with a slight loss for short periods of time without risking termination of the lease if he reasonably believes that the well will later show a profit. In addition, the court establishes plainly a "prudent operator" test, requiring consideration of profit and loss and all factors which would influence a prudent operator. Such a standard is somewhat more objective than vague statements concerning the good faith of the operator although it is believed that the result will be the same in most cases. The significance of the good faith of the operator in the future seems uncertain. Nevertheless, the court goes far, in this instance, to protect the investment of the lessee. Query: Is there sufficient protection

³² 325 S.W.2d at 690.

³³ 325 S.W.2d at 691.

³⁴ 274 P.2d 545 (Okla. 1954). The standard by which the judgment and good faith of the lessee is measured is whether the lease is producing, or by the exercise of reasonable skill and diligence could be made to produce, sufficient oil and gas to justify a reasonable and prudent operator in continuing the operation thereof.

³⁵ 24 F. Supp. 884 (W.D. La. 1938).

However, a fair construction of this provision, I believe, means producing in quantities which a reasonably prudent man in the particular business would think justified continuing operations, and not by a mere semblance of production, the sole apparent purpose of which was to preserve the right, when and if the lessee saw fit, at some indefinite time in the future, he might pursue further exploration.

³⁶ See *Clayton v. Atlantic Ref. Co.*, 150 F. Supp. 9 (D. N.M. 1957), for a discussion of this test.

for the lessor in the qualification that the operator must be holding the lease for the profit from the well in question and not for the speculative value of future development?

Franklin H. Perry

Taxation — Oil and Gas Depletion — Deduction on Shut-in Payments

Lessor executed an oil and gas lease to Lessee encompassing 8,165 acres. The lease contained a "shut-in" clause suspending the requirement for continued development if any well capable of producing gas in paying quantities had to be shut in for lack of a satisfactory market.¹ In addition, the clause permitted the lease to continue in effect as to 320 acres around each shut-in well, but only so long as, and on the condition that, the Lessee exercise reasonable diligence in obtaining a market for the gas. In exchange for this right to continue the lease as to the 320 acre tracts, Lessee agreed to pay to Lessor \$5 per acre annually. This payment, however, was not a condition to be fulfilled for the Lessee to retain the lease; rather the agreement constituted a *covenant*, the breach of which would give rise to money damages but would not cause forfeiture of the lease. With respect to the remaining acreage, the lease provided for an annual payment of \$5 per acre. This payment, unlike the other, had to be made as a *condition* for Lessee to retain the remaining acreage under the lease; otherwise forfeiture would result. Four gas wells capable of producing gas in paying quantities were drilled and shut in for lack of a satisfactory market. Lessee, in compliance with the terms of the lease, paid Lessor a sum sufficient to retain the entire 8,165 acres. Lessor did not claim the depletion deduction for several periods after these payments began; subsequently, he filed the present suit for a tax refund on the ground that the shut-in payments were entitled to the percentage depletion deduction. *Held*: Shut-in

¹ Unlike liquid petroleum, gas has characteristics which make it unsuitable for storage. Rather, it must *normally* be transported through pipelines and immediately directed to the consumer. For this reason, wells capable of producing gas in paying quantities are usually "capped" or "shut-in" until a local market is developed. In such a situation a "shut-in royalty clause" is inserted in the lease to permit the lease to continue, without continuous development or actual production, through and past the primary term by the annual payment of a stated sum per well or per acre. See Malone, *Evolution of Shut-in Royalty Law* 1, 2 (1957); Moses, *Problems in Connection with Shut-in Royalty Provisions in Oil and Gas Leases: Part II*, 27 Tul. L. Rev. 478 (1953).

payments in lieu of production which do not cause forfeiture of the lease in the event of nonpayment are entitled to a depletion deduction. *Johnson v. Phinney*, 181 F. Supp. 315 (S.D. Tex. 1960).²

Congress, by an act of legislative grace, allows a taxpayer to take a depletion deduction in the taxation of proceeds from oil and gas wells.³ The rationale behind the depletion deduction is that mineral deposits are wasting assets⁴ and that production eventually exhausts the taxpayer's capital investment.⁵ However, in order to obtain the depletion deduction a taxpayer must have an "economic interest in the minerals in place."⁶ Although the economic interest concept is a creation of federal law, the legal interests which come within this concept are determined by the law of the individual states.⁷ In Texas, for example, royalty payments,⁸ bonus payments,⁹ and minimum and substitute royalties¹⁰ are entitled to the depletion deduction.¹¹ Under the Texas interpretation of oil and gas leases a

² Appeal has been granted in this case.

³ See *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938); *Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938); *Bell v. Commissioner*, 145 F.2d 157 (9th Cir. 1944); *O'Shaughnessy, Inc. v. Commissioner*, 124 F.2d 33 (10th Cir. 1941); Int. Rev. Code of 1954, §§ 611, 613.

⁴ *Anderson v. Helvering*, 310 U.S. 404 (1940); *O'Shaughnessy, Inc. v. Commissioner*, supra note 3.

⁵ 4 Mertens, *Federal Income Taxation* § 24.02 (rev. ed. 1960); Miller, *Oil and Gas—Federal Income Taxation* 9 (3d ed. 1957).

⁶ *Palmer v. Bender*, 287 U.S. 551 (1933). The latest case on this point is *Scotfield v. La Gloria Oil & Gas Co.*, 268 F.2d 699 (5th Cir. 1959), cert. denied, 361 U.S. 933 (1960), noted, 14 Sw. L.J. 420 (1960); *Treas. Reg. § 1.611-1(b)* (1960); Miller, op. cit. supra note 5, at 10.

⁷ *Anderson v. Helvering*, 310 U.S. 404 (1940); *Murphy Oil Co. v. Burnet*, 287 U.S. 299 (1932); *Burnet v. Harmel*, 287 U.S. 103 (1932); *Ferguson v. Commissioner*, 45 F.2d 573, 576-77 (5th Cir. 1930); *Annot.*, 74 A.L.R. 183 (1931). This list of citations points out also that a bonus is a state concept entirely different from royalty payments; however, because of the similarity in consequences attained upon their payment, bonuses are allowed the depletion deduction under federal law, as are royalties.

⁸ *Palmer v. Bender*, 287 U.S. 551 (1933); *Murphy Oil Co. v. Burnet*, supra note 7; *Laird v. Commissioner*, 91 F.2d 498 (5th Cir. 1937); G.C.M. 22730, 1941-1 Cum. Bull. 214.

⁹ *Anderson v. Helvering*, 310 U.S. 404 (1940); *Herring v. Commissioner*, 293 U.S. 322 (1934); 31-A Tex. Jur. Oil and Gas § 475, at 815, § 476, at 818 (1947).

¹⁰ See *Commissioner v. P. G. Lake, Inc.*, 356 U.S. 260 (1958); *Commissioner v. Southwest Exploration Co.*, 350 U.S. 308 (1956), noted, 10 Sw. L.J. 333 (1956); *James Lewis Caldwell McFaddin*, 2 T.C. 395 (1943), modified on other grounds, 148 F.2d 570 (5th Cir. 1945), acq., 1943 Cum. Bull. 16.

¹¹ *James Lewis Caldwell McFaddin*, supra note 10; *Breeding and Burton*, *Taxation of Oil and Gas Income* § 8.07, at 112 (1945). However, *Breeding and Burton* point out that "if the minimum royalty payments are not recoverable from future production, and the lessee may forfeit the lease by nonpayment of the minimum royalties, the Revenue Service will probably consider payments made prior to production as delay rentals." It has also been stated by another writer that minimum royalties paid before production are actually bonus payments. Miller, op. cit. supra note 5, at 63. Also depletable are working interests, *Perkins v. Thomas*, 301 U.S. 655 (1937); *Helvering v. Twin Bell Oil Syndicate*, 293 U.S. 312 (1934); oil and gas payments, *Commissioner v. P. G. Lake, Inc.*, supra note 10; and many others. Miller, op. cit. supra note 5, at 63-77.

royalty interest is an interest in realty;¹² payments thereon (characterized as royalty payments) constitute consideration for actual removal of the realty.¹³ The royalty interest is regarded as an economic interest because royalty payments are dependent upon production.¹⁴ Bonus payments in Texas represent advance payments for oil and gas to be extracted in the future¹⁵ or additional consideration for the lease;¹⁶ hence, in *Herring v. Commissioner*¹⁷ the United States Supreme Court held that bonus payments are entitled to the depletion deduction even though no physical depletion of the corpus has occurred. Minimum and substitute royalties set a minimum figure for royalty payments regardless of the quantity of gas produced.¹⁸ On the other hand, Texas courts regard delay rentals as payment for additional time to utilize the land and not as income from production;¹⁹ hence, federal courts disallow a depletion deduction for delay rental payments²⁰ on the ground that the payments do not arise out of an economic interest.²¹ Thus, the eligibility of a particular payment for the depletion deduction is determined by its nature as a royalty or rental.²²

Shut-in payments are similar to minimum royalties since both accomplish a spreading out of future income over the entire period of the lease when a situation exists in which either little or no actual production is being accomplished.²³ Since both types of payments represent future income and not rent, it is only natural that, like

¹² *Waggoner Estate v. Wichita County*, 273 U.S. 113 (1927); *Sheppard v. Stanolind Oil & Gas Co.*, 125 S.W.2d 643 (Tex. Civ. App. 1939) error ref.; see 31-A Tex. Jur. Oil and Gas § 567, at 982 (1947).

¹³ *Commissioner v. Wilson*, 76 F.2d 766 (5th Cir. 1935); *State Nat'l Bank v. Morgan*, 135 Tex. 509, 143 S.W.2d 757 (1940); *Sheppard v. Stanolind Oil & Gas Co.*, supra note 12; Int. Rev. Code of 1954, §§ 611, 613; 31-A Tex. Jur. Oil and Gas § 479, at 826 (1947).

¹⁴ *State Nat'l Bank v. Morgan*, supra note 13; 31-A Tex. Jur. Oil and Gas § 475, at 815 (1947).

¹⁵ *Herring v. Commissioner*, 293 U.S. 322 (1934); *State Nat'l Bank v. Morgan*, 135 Tex. 509, 143 S.W.2d 757 (1940); *Sheppard v. Stanolind Oil & Gas Co.*, 125 S.W.2d 643 (Tex. Civ. App. 1939) error ref.

¹⁶ Report No. 10, P-H Oil & Gas Taxes, at 6 (May 18, 1960).

¹⁷ 293 U.S. 322 (1934).

¹⁸ *Malone*, op. cit. supra note 1, at 100. The purpose of the shut-in royalty is for compensation during times of nonproduction, whereas the minimum royalty is used when there is a small amount of production.

¹⁹ *J. T. Sneed, Jr.*, 33 B.T.A. 478 (1935), acq., XV-1 Cum. Bull. 21 (1936) (Delay rentals are more in the nature of liquidated damages or a penalty for failure to drill.)

²⁰ *Houston Farms Dev. Co. v. Commissioner*, 131 F.2d 577 (5th Cir. 1942); *Commissioner v. Wilson*, 76 F.2d 766 (5th Cir. 1935).

²¹ *Commissioner v. Wilson*, supra note 20; 31-A Tex. Jur. Oil and Gas § 145, at 247, § 479, at 826 (1947); *Miller*, op. cit. supra note 5, at 151.

²² 181 F. Supp. 315.

²³ *Patterson v. Texas Co.*, 131 F.2d 998 (5th Cir. 1942), cert. denied, 319 U.S. 761 (1943); *State Nat'l Bank v. Morgan*, 135 Tex. 509, 143 S.W.2d 757 (1940); *Sheffield v. Hogg*, 124 Tex. 290, 77 S.W.2d 1021 (1934); 31-A Tex. Jur. Oil and Gas § 475, at 815 (1947).

minimum royalties, shut-in payments are considered royalty.²⁴ Production rather than rental payment is normally necessary for the lease to remain in force beyond the primary term.²⁵ Shut-in clauses usually specify that the payments are a substitute for production; therefore, rental payments to keep the lease operative are no longer required.²⁶ In *Morriss v. First Nat'l Bank*²⁷ the court held that since the typical shut-in payment was a substitute for production and constituted the well a producing well, the payments were royalties and not rentals.²⁸ The *Morriss* case represents virtually the only judicial determination concerning the nature of shut-in payments as royalty or rental; however, the holding comports with the view of most writers in the oil and gas field.²⁹

The effect of nonpayment of a stipulated sum in a lease is the most important criterion in determining whether a rent or royalty is involved.³⁰ The lessor's remedy for failure to make payment of a *royalty* is recovery of damages in a breach of contract action.³¹ On the other hand, one remedy for failure to make a *rental* payment is termination of the lease and recovery by the lessor of the right to extract minerals.³² The issue in the principal case involved the presence of royalty and rental payments pertaining to different areas of realty, both of which were erroneously considered shut-in royalties by the lessor.³³ The court, however, correctly distinguished the two types of payments by noting that nonpayment of the amount

²⁴ However, if the shut-in payments are not recoverable from future production, it appears that the payments should be treated as a delay rental. *Breeding and Burton*, op. cit. supra note 11, at 113; see *Malone*, op. cit. supra note 1, at 105, wherein the author states that all courts have held shut-in payments to be royalties and not rents. 31-A Tex. Jur. Oil and Gas § 475, at 815 (1947).

²⁵ *Masterson*, *The Shut-in Royalty Clause in an Oil and Gas Lease*, 12 Sw. L.J. 459, 474 (1958); *Moses*, op. cit. supra note 1, at 480.

²⁶ *Freeman v. Magnolia Petroleum Co.*, 141 Tex. 274, 171 S.W.2d 339 (1943); *Morriss v. First Nat'l Bank*, 249 S.W.2d 269 (Tex. Civ. App. 1952) error ref. n.r.e.; see *Moses Problems in Connection with Shut-in Provisions in Oil and Gas Leases*, 23 Tul. L. Rev. 374, 379 (1949) (The fact that the shut-in payments are less than the delay rentals would have been is of no consequence.).

²⁷ *Supra* note 26; see also *Moses*, op. cit. supra note 1, at 480.

²⁸ But see *Malone*, op. cit. supra note 1, at 64; *Masterson*, supra note 25, at 472, where it is stated that the court actually had before it a minimum royalty clause, not a shut-in clause.

²⁹ *Scurlock*, *Practical and Legal Problems in Delay Rentals and Shut-in Royalty Payments*, Southwestern Legal Foundation 4th Annual Inst. on Oil & Gas L. & Tax., 17, 37 (1953); see *Masterson*, *A 1952 Survey of Basic Oil and Gas Law*, 6 Sw. L.J. 1, 37 (1952); *Walker*, *Clauses in Oil and Gas Leases Providing for the Payment of an Annual Sum as Royalty on a Nonproducing Gas Well*, 24 Texas L. Rev. 478, 479 (1946); but see *Breeding and Burton*, op. cit. supra note 11, at 113.

³⁰ Report No. 10, P-H Oil & Gas Taxes, at 6 (May 18, 1960).

³¹ *Shell Oil Co. v. Goodroe*, 197 S.W.2d 395 (Tex. Civ. App. 1946) error ref. n.r.e.; see *Risinger v. Arkansas-Louisiana Gas Co.*, 198 La. 101, 3 So. 2d 289 (1941); *Malone*, op. cit. supra note 1, at 55, 56; *Moses*, op. cit. supra note 26, at 377.

³² *Ibid.*

³³ 181 F. Supp. 315.

specified as to the 320 acres around each well would not terminate the lease.³⁴ The only *condition* to holding the 320 acres was the exercise of reasonable diligence in obtaining a market.³⁵ Consequently, the agreement to pay an amount for the 320 acres was merely a *covenant*, the breach of which would give rise to money damages but would not terminate the lease.³⁶ Thus, the court stated that the payments made for the 320 acre tracts were similar to minimum or substitute royalty payments in lieu of production; the payments were eligible for the depletion deduction because nonpayment thereof would not terminate the lease.³⁷ Moreover, the court pointed out that the payments regarding the 320 acre tracts were not delay rentals because the lease had been developed and production was obtained.³⁸ This view is supported by a recent Treasury Regulation which defines delay rentals as "an amount paid for the privilege of deferring development of the property. . . ."³⁹

Shut-in payments are typically a means of preserving the lessee's economic interest in the minerals in place. They are indirectly connected to production and the exhaustion of assets; therefore, they should be given the same consideration as bonus or royalty payments which are used to acquire an economic interest. The principal case is of importance as an extension of the definition of "royalty" as well as an expansion into the field of taxation of the rules set forth in the *Morris* case. The test enunciated by the court for determining the nature of the shut-in payments as rental or royalty is whether the lessor's remedy for nonpayment is termination of the lease. If so, the payment is delay rental and not royalty and therefore is not eligible for the depletion deduction. Thus, considerable caution is required in drafting and interpreting the "shut-in clause." The parties to the lease may designate the payments as "royalties" and take advantage of the depletion deduction only by strict compliance with certain requirements. First, a "substitute for production" clause similar to that in the principal case must provide that reasonable diligence in seeking a market for the shut-in gas is the determining factor in allowing the lease to progress from the primary to the secondary term. Secondly, if a sum of money is stipulated, nonpayment thereof must not be grounds for termination of the lease. If a substitute for production clause is incorporated with a provision

³⁴ *Id.* at 320.

³⁵ 181 F. Supp. 315, 320.

³⁶ *Ibid.*

³⁷ 181 F. Supp. 315, 321.

³⁸ 181 F. Supp. 315.

³⁹ Treas. Reg. § 1.612-3(c) (1960).

for a stated sum of money with no requirement of diligence in seeking a market, in all probability the court will construe the payment as rent, rather than royalty, and disallow the depletion deduction. Thus, the principal case is illustrative of the view that substance rather than form controls in the field of taxation; the nature of a payment as royalty or rental is determined by the objectives of the clause and not by the title.

James L. Collins

Torts — Negligence — Duty of Care Imposed Upon Operator of Escalator

Plaintiff brought suit for injuries sustained while riding on an escalator which suddenly jerked and caused her to fall. The escalator, owned by and under the exclusive control of Defendant, was operated for the convenience and use of Defendant's customers. *Held*: The operators of escalators, while not common carriers, are under a duty to use the high degree of care required of common carriers. *Mattox v. C. R. Anthony Co.*, 326 S.W.2d 740 (Tex. Civ. App. 1959) *error ref. n.r.e.*

Negligence is any conduct which falls below the standard established by law for the protection of others against unreasonable risks of harm.¹ Before negligence is actionable there must be a breach² of a legal duty to conform to a particular standard of conduct owed the injured party by the actor,³ and the act must be the actual and proximate cause⁴ of the damage suffered. The standard of care to which one has a duty to conform is that of "a reasonable man under like circumstances."⁵ The degree of care required must be commensurate with the danger;⁶ therefore, the law places on some persons a higher degree of care either because the risk they take is highly

¹ *United States v. Waterman Steam Ship Corp.*, 190 F.2d 499, 503 (5th Cir. 1951); 2 Restatement, Torts § 282 (1934).

² *Chicago, R. I. & G. Ry. v. Rhone*, 105 S.W.2d 707 (Tex. Civ. App. 1937) *error dismissed*; Prosser, Torts § 35 (2d ed. 1955).

³ *Morgan v. Empire So. Gas Co.*, 236 S.W.2d 198 (Tex. Civ. App. 1951); Prosser, *op. cit. supra* note 2, at § 36.

⁴ *Thompson v. Tippit*, 300 S.W.2d 351 (Tex. Civ. App. 1957) *error ref. n.r.e., cert. denied*, 355 U.S. 943 (1958); Prosser, *op. cit. supra* note 2, at § 44.

⁵ *Moore v. Virginia Transit Co.*, 188 Va. 493, 50 S.E.2d 268 (1948); 2 Restatement, Torts § 283 (1934).

⁶ *Meredith v. Reed*, 26 Ind. 334 (1866); *West Tex. Util. Co. v. Renner*, 32 S.W.2d 264 (Tex. Civ. App. 1930), *modified*, 53 S.W.2d 451 (Tex. Comm. App. 1932).

dangerous⁷ or because they accept an unusual responsibility to the public, *e.g.*, common carriers.⁸

A common carrier of passengers is one who undertakes for hire to carry all persons who may apply for passage.⁹ Accordingly, persons operating buses,¹⁰ trucks,¹¹ airplanes,¹² railroads,¹³ taxicabs,¹⁴ and ski lifts¹⁵ are common carriers where they represent themselves as willing to serve all. Many courts hold the owners and operators of elevators to be common carriers on the theory that they are serving the public interest,¹⁶ but ignore the tests applied to common carriers, *i.e.*, that the carriage is for hire and that the operator must undertake to carry all persons who apply for passage.¹⁷ Generally, the same principles applied to cases involving elevators are applied to those involving escalators, *i.e.*, holding the owner and operator of the escalator as a common carrier.¹⁸ Moreover other courts, without designating the owners and operators of elevators¹⁹ and escalators²⁰ as common carriers, have reached the same result by holding that they owe to the public the duty to exercise a high degree of care in view of the character of the mode of conveyance adopted. However, some jurisdictions hold that they owe only the duty to use

⁷ *Smith v. Appalachian Elec. Power Co.*, 74 F.2d 647 (4th Cir. 1935) (electricity); *Rafferty v. Davis*, 260 Pa. 563, 103 Atl. 951 (1918) (explosives).

⁸ *Indianapolis & St. L. R.R. v. Horst*, 93 U.S. 291 (1876) (highest possible degree of care and diligence); *Carson v. Boston Elevated Ry.*, 309 Mass. 32, 33 N.E.2d 701 (1941) (highest degree of care).

⁹ *Weeden v. Gher*, 316 Ill. 534, 147 N.E. 388 (1925); *Burnett v. Riter*, 276 S.W. 347 (Tex. Civ. App. 1925).

¹⁰ *Austin Bros. Transfer Co. v. Bloom*, 316 Ill. 435, 147 N.E. 387 (1925).

¹¹ *Rogers v. Crespi & Co.*, 259 S.W.2d 928 (Tex. Civ. App. 1953).

¹² *Pacific No. Airlines v. Alaska Airlines*, 80 F. Supp. 592 (D. Alaska 1948).

¹³ *Chicago & N.W. Ry. v. Davenport*, 205 F.2d 589 (5th Cir. 1953).

¹⁴ *Anderson v. Fidelity & Cas. Co.*, 228 N.Y. 475, 127 N.E. 584 (1920).

¹⁵ *Vogel v. State*, 204 Misc. 614, 124 N.Y.S.2d 563 (Ct. Cl. N.Y. 1953).

¹⁶ *Johnson v. Hopkins*, 213 Ala. 492, 105 So. 663 (1925); *Carson v. Weston Hotel Corp.*, 351 Ill. App. 523, 115 N.E.2d 800 (1953); *Murphy's Hotel, Inc. v. Cuddy's Adm'r*, 124 Va. 207, 97 S.E. 794 (1919); *Atkeson v. Jackson Estate*, 72 Wash. 233, 130 Pac. 102 (1913), *aff'd*, 74 Wash. 700, 134 Pac. 175 (1913). *Contra*: *Seaver v. Bradley*, 179 Mass. 329, 60 N.E. 795 (1901).

¹⁷ *Brown v. De Marie*, 131 W. Va. 264, 46 S.E.2d 797 (1948).

¹⁸ *White v. Sears, Roebuck & Co.*, 242 F.2d 821 (4th Cir. 1957); *Weiner v. May Dep't Stores Co.*, 35 F. Supp. 895 (S.D. Cal. 1940); *Simmons v. F.W. Woolworth Co.*, 163 Cal. App.2d 709, 329 P.2d 999 (1958); *Mader v. Mandel Bros. Dep't Store*, 314 Ill. App. 263, 41 N.E.2d 327 (1942); *Haley v. May Dep't Stores Co.*, 287 S.W.2d 366 (Mo. Ct. App. 1956); *Welch v. Rollman & Sons Co.*, 70 Ohio App. 515, 44 N.E.2d 726 (1942); *Petrie v. Kaufman & Baer Co.*, 291 Pa. 211, 139 Atl. 878 (1927).

¹⁹ *Parker v. Manchester Hotel Co.*, 29 Cal. App.2d 446, 85 P.2d 152 (1939); *Owners' Realty Co. v. Richardson*, 158 Md. 367, 148 Atl. 543 (1930).

²⁰ *Hecht Co. v. Jacobsen*, 180 F.2d 13 (D.C. Cir. 1950); *S.S. Kresge Co. v. McCallion*, 58 F.2d 931 (8th Cir. 1932); *Vallette v. Maison Blanche Co.*, 29 So. 2d 528 (La. Ct. App. 1947).

reasonable care required for business invitees.²¹ Notwithstanding divergent theories on the requisite standard of care, there is general agreement that the owner and operator is not an absolute insurer for the safety of his passengers.²²

The principal case is one of first impression in Texas.²³ The court held that although an escalator is not a common carrier, its very nature required the high degree of care of a common carrier. In dealing with *elevator* cases Texas courts²⁴ have followed those jurisdictions²⁵ which hold that the owners and operators are not common carriers but owe the same duty of a high degree of care required of common carriers. This reasoning refuses to torture the theory of common carriers to cover the owners and operators of escalators while it still imposes the strict duty of exercising the highest degree of care.²⁶ The decision in the instant case, like most *elevator*²⁷ and *escalator*²⁸ cases, was brought under the doctrine of *res ipsa loquitur*, imposing a *prima facie* case of negligence against the operator of the escalator where there is proof of a sudden jerk.²⁹ However, the use of this doctrine does not dispense with the question of the duty imposed upon the operator since the doctrine gives only an inference that the defendant has not exercised reasonable care and is not in itself proof that he was under any duty to exercise such care.³⁰ Thus,

²¹ *Stratton v. J.J. Newbury*, 117 Conn. 522, 169 Atl. 56 (1933); *Conway v. Boston Elevated Ry.*, 255 Mass. 571, 152 N.E. 94 (1926); *Richter v. L. Bamberger & Co.*, 11 N.J. Misc. 229, 165 Atl. 289 (Sup. Ct. 1933); *Calabrese v. McCreery & Co.*, 187 Misc. 538, 67 N.Y.S.2d 247 (Sup. Ct. 1946).

²² *Weiner v. May Dep't Stores Co.*, 35 F. Supp. 895 (S.D. Cal. 1940); *Blodgett v. Walker Scott Corp.*, 99 Cal. App.2d 251, 221 P.2d 325 (1950); *Petrie v. Kaufmann & Baer Co.*, 291 Pa. 211, 139 Atl. 878 (1927).

²³ The question of duty was mentioned but not decided in two earlier Texas cases. *Ford v. Leonard's*, 228 S.W.2d 192, 195 (Tex. Civ. App. 1950); *Franner v. Joske Bros.*, 227 S.W.2d 392 (Tex. Civ. App. 1949) error ref.

²⁴ *Farmers' & Mechanics' Nat'l Bank v. Hanks*, 104 Tex. 320, 137 S.W. 1120 (1911); *O'Connor v. Dallas Cotton Exch.*, 153 S.W.2d 266 (Tex. Civ. App. 1941); *Dulaney Inv. Co. v. Wood*, 142 S.W.2d 379 (Tex. Civ. App. 1940) error dism. judgm. cor.; *City Nat'l Bank v. Pigott*, 270 S.W. 234 (Tex. Civ. App. 1925). One Texas case has held the owner and operator to the duty of ordinary care only. *Texas Employers' Ins. Ass'n v. Chocolate Shop Inc.*, 30 S.W.2d 416 (Tex. Civ. App. 1930), *aff'd*, 44 S.W.2d 989 (Tex. Comm. App. 1932).

²⁵ *Parker v. Manchester Hotel Co.*, 29 Cal. App.2d 446, 85 P.2d 152 (1939); *Owners' Realty Co. v. Richardson*, 158 Md. 367, 148 Atl. 543 (1930).

²⁶ *Brown v. De Marie*, 131 W. Va. 264, 46 S.E.2d 797, 802 (1948).

²⁷ *Haag v. Harris*, 4 Cal.2d 108, 48 P.2d 1 (1935); *Cramer v. Mergard*, 56 Ohio App. 493, 11 N.E.2d 108 (1937); *Moohr v. Victoria Inv. Co.*, 146 Wash. 251, 262 Pac. 643 (1928); *Senft v. Ed. Schuster & Co.*, 250 Wis. 406, 27 N.W.2d 464 (1947).

²⁸ *Young v. Anchor Co.*, 239 N.C. 288, 79 S.E.2d 785 (1954); *Vallette v. Maison Blanche Co.*, 29 So. 2d 528 (La. Ct. App. 1947); *Hartnett v. May Dep't Stores Co.*, 231 Mo. App. 1116, 85 S.W.2d 644 (1935); *Heseman v. May Dep't Stores Co.*, 225 Mo. App. 584, 39 S.W.2d 797 (1931); *Welch v. Rollman & Sons Co.*, 70 Ohio App. 515, 44 N.E.2d 726 (1942).

²⁹ 326 S.W.2d 740, at 744.

³⁰ *Prosser*, *op. cit. supra* note 2, at 210.

duty of care is still an essential element in a negligence case involving an escalator when brought under the *res ipsa loquitur* doctrine.

In this modern age there is an increasing use of mechanical machinery for the transportation of people, as for example the elevator, the escalator, and a new innovation, the "moving sidewalk." Since the danger of injury grows with the use of such machinery, the high degree of care required of the owners and operators of escalators in Texas is a most desirable result in the law of torts.

Jay Ungerman

Trusts — Spendthrift Provisions — Validity of Restraints on Alienation Where Settlor Is Beneficiary

A husband and wife created four irrevocable trusts naming themselves as beneficiaries. The trusts contained spendthrift provisions which restrained voluntary and involuntary alienation of the interests of the settlor-beneficiaries. Shortly before her death, the wife assigned to Defendant, for value, her interest in the four trusts which was then due or to become due. Plaintiff, trustee, contended that the assignment constituted a violation of the spendthrift provisions in the trusts and was therefore invalid. *Held*: A settlor cannot create a trust for his own benefit which restrains voluntary and/or involuntary alienation of the beneficial interest. *Glass v. Carpenter*, 330 S.W.2d 530 (Tex. Civ. App. 1959) *error ref. n.r.e.*

Under a normal trust the settlor may be the beneficiary;¹ he may transfer his interest² or have it subjected to claims of creditors.³ The purpose of a spendthrift trust, however, is to restrain the beneficiary's interest from voluntary and/or⁴ involuntary alienation.⁵ The majority of states,⁶ including Texas,⁷ permit a settlor to insert spendthrift

¹ *Mayer v. American Sec. & Trust Co.*, 222 U.S. 295 (1911); *United Bldg. & Loan Ass'n v. Garrett*, 64 F. Supp. 460 (W.D. Ark. 1946); *Schmidt v. Schmidt*, 261 S.W.2d 892 (Tex. Civ. App. 1953) *error ref.*

² *Blair v. Commissioner*, 300 U.S. 5 (1937).

³ *Nichols v. Levy*, 72 U.S. (5 Wall.) 433 (1866); *In re Moulton's Estate*, 233 Minn. 286, 46 N.W.2d 667 (1951).

⁴ The creator of a trust may restrain alienation involuntarily and at the same time allow voluntary alienation. *Bogert, Cases on Trusts* § 8 (2d ed. 1950); but see *Scott, Trusts* § 152.3 (1956).

⁵ In *Long v. Long*, 252 S.W.2d 235 (Tex. Civ. App. 1952) *error ref.*, it was stated that immunity from debts of the beneficiary and inalienability of the fund by him are necessary incidents of a spendthrift trust. Cf. *Keeler v. Diemer*, 334 Pa. 225, 3 A.2d 413 (1939); *Restatement, Trusts* 2d § 152.2 (1959).

⁶ See *Bogert, Trusts* § 40 (3d ed. 1952).

⁷ *Commissioner v. Lightner*, 148 F.2d 566 (5th Cir. 1945); *Hinds v. Sands*, 312 S.W.2d 275 (Tex. Civ. App. 1958).

provisions restraining voluntary⁸ and involuntary⁹ alienation of the beneficial interest, provided the trust complies with general trust law in all other respects.¹⁰ Restraints against involuntary alienation, *i.e.*, alienation by operation of law for debts of the beneficiaries, apply both to present and future creditors.¹¹ The motive for the trust need not be expressed¹² if a clear intent to create a spendthrift trust is present.¹³ Moreover, the beneficiary need not in fact be a spendthrift, improvident, or incapable of handling his affairs.¹⁴ When the beneficiary acquires possession of his interest, all restraints against alienation are invalid.¹⁵ Moreover, creditors of remaindermen may reach vested remainder interests even though the spendthrift provisions regarding the trust beneficiaries are valid as to the trust beneficiaries.¹⁶ Although this type of trust is widely accepted, fraud by the settlor in an attempt to evade creditors will vitiate the entire trust.¹⁷

It is universally held that spendthrift provisions in a trust created by the settlor for his own benefit do not apply to the settlor's creditors¹⁸ even though the state recognizes the validity of spendthrift

⁸ *Broadway Nat'l Bank v. Adams*, 133 Mass. 170 (1882); *Hinds v. Sands*, supra note 7.

⁹ *Hoffman v. Hoffman*, 8 N.J. 157, 84 A.2d 441 (1951); *Estes v. Estes*, 267 S.W. 709 (Tex. Comm. App. 1924); *Caples v. Buell*, 243 S.W. 1066 (Tex. Comm. App. 1922).

¹⁰ In *Nichols v. Eaton*, 91 U.S. 716 (1875), it was held that spendthrift trusts were valid so long as the settlor violated no law in conditioning his bounty in this manner. See *Estes v. Estes*, supra note 9. A spendthrift trust must comply with the requisites as to creation, existence, and validity of trusts generally. *Kessner v. Phillips*, 189 Mo. 515, 88 S.W. 66 (1905).

¹¹ *Smith v. Towers*, 69 Md. 77, 14 Atl. 497 (1888); *Broadway Nat'l Bank v. Adams*, 133 Mass. 170 (1882); *Estes v. Estes*, 267 S.W. 709 (Tex. Comm. App. 1924). The theory is that the grantor would not have given the property had it been liable for the beneficiary's debts and that creditors have no right to rely on property thus held as they are held to exercise proper diligence in ascertaining limitations on the security for the beneficiary's debt.

¹² *Adams v. Williams*, 112 Tex. 469, 248 S.W. 673 (1923).

¹³ *Mellon v. Driscoll*, 117 F.2d 477 (3d Cir. 1941); *Long v. Long*, 252 S.W.2d 235 (Tex. Civ. App. 1952) error ref.

¹⁴ *Adams v. Williams*, 112 Tex. 469, 248 S.W. 673 (1923); *Hinds v. Sands*, 312 S.W.2d 275 (Tex. Civ. App. 1958).

¹⁵ *Kelly v. Kelly*, 11 Cal.2d 356, 79 P.2d 1059 (1938). As to assignments in violation of the spendthrift trust, some courts say even the executory contract is void forever; other courts say, though not effective when made, when the beneficiary gets the property, the contract is effective though previously written. See Annot., 119 A.L.R. 78 (1939).

¹⁶ Once the beneficiary obtains possession of the trust income or corpus a creditor may reach that portion. *Estes v. Estes*, 267 S.W. 709 (Tex. Comm. App. 1924).

¹⁷ *Bogert, Trusts and Trustees* § 224 (1951) and materials discussed in footnote 78 of that section.

¹⁸ *McFaddin v. Commissioner*, 148 F.2d 570 (5th Cir. 1945); *Hughes v. Commissioner*, 104 F.2d 144, 148 (9th Cir. 1939) (applying the rule to both past and future creditors, fraudulent intent is not necessary); *Nelson v. California Trust Co.*, 33 Cal.2d 501, 202 P.2d 1021 (1949); *Pacific Nat'l Bank v. Windram*, 133 Mass. 175 (1882); *Menken Co. v. Brinkley*, 94 Tenn. 721, 31 S.W. 92 (1895); *Booth v. Chadwick*, 154 S.W.2d 268 (Tex. Civ. App. 1941) error ref. w.o.m. (provisions invalid even though the settlor-beneficiary was in fact a spendthrift); *Petty v. Moores Brook Sanitarium*, 110 Va. 815, 67 S.E. 335 (1910); *Bogert, Trusts* § 40 (3d ed. 1952); *Bogert, Trusts and Trustees* § 224, at 493 (1951); *Griswold, Spendthrift Trusts* § 478 (2d ed. 1947); *Restatement, Trusts* 2d § 156.2 (1959); *Scott, Trusts* § 156 (1956).

trusts.¹⁹ However, the creditors may reach only the interest which the settlor-beneficiary retained,²⁰ unless fraud was the motive of the trust.²¹ The prevailing view is that restrictions on voluntary alienation by the settlor-beneficiary are also invalid.²²

Where the settlor is the *sole* beneficiary of a spendthrift trust, he cannot restrain the voluntary alienation of his interest;²³ but he can terminate the trust at will despite the existence of an irrevocability clause.²⁴ However, the settlor-beneficiary may include other beneficiaries whose interest allows them to enforce the irrevocability clause.²⁵ Moreover, these beneficiaries can prevent the settlor from suing to annul the trust even though the settlor's power to alienate his interest is not impaired by the spendthrift provisions.²⁶ One Texas case stated that although Texas recognizes the invalidity of restraints against both voluntary and involuntary alienation when a spendthrift trust is created by a settlor-beneficiary, special circumstances might alter a case to allow the restraint to be valid against the claims of creditors and assignees.²⁷ However, the case was decided

¹⁹ This statement applies regardless of whether common law, case law, or statute is the criterion. *Security Trust Co. v. Sharp*, 32 Del. Ch. 3, 77 A.2d 543 (1950).

²⁰ *De Hierapolis v. Lawrence*, 115 Fed. 761 (C.C.S.D.N.Y. 1902); *Murphy v. C.I.T. Corp.*, 347 Pa. 591, 33 A.2d 16 (1943) (interest reserved); *Mogridge's Estate*, 342 Pa. 308, 20 A.2d 307 (1941) (principal reserved). Only the spendthrift provision is void and not the remainder of the trust. *Benedict v. Benedict*, 261 Pa. 117, 104 Atl. 581 (1918). The beneficiary's transferees and assignees could reach the interest transferred to them despite the spendthrift provisions in the trust. *Pacific Nat'l Bank v. Windham*, 133 Mass. 175 (1882). The settlor cannot attack the validity of the act of trust creation, but his creditors and assignees can assert the invalidity of the spendthrift provision. *Bogert, Trusts and Trustees* § 224, at 493 (1951). See also, *Griswold, Spendthrift Trusts* §§ 474-77 (2d ed. 1947); *Restatement, Trusts* 2d § 156.1 (1959).

²¹ *Bogert, Trusts and Trustees* § 224 (1951).

²² *Liberty Nat'l Bank v. Hicks*, 173 F.2d 631 (D.C. Cir. 1948); *Pilkingham v. West*, 264 N.C. 575, 99 S.E.2d 798 (1957); *Bogert, Trusts and Trustees* § 224, at 493 (1951); *Griswold, Spendthrift Trusts* § 493 (2d ed. 1947); *Scott, Trusts* § 156 (1956). *Contra: Hackley v. Littell*, 150 Mich. 106, 113 N.W. 787 (1907).

²³ *Security Trust Co. v. Sharp*, 32 Del. Ch. 3, 77 A.2d 543 (1950); *Weymouth v. Delaware Trust Co.*, 29 Del. Ch. 1, 45 A.2d 427 (1946); *Fidelity & Columbia Trust Co. v. Williams*, 268 Ky. 671, 105 S.W.2d 814 (1937).

²⁴ *Security Trust Co. v. Sharp*, supra note 23. Courts have established an exception to this rule in isolated cases involving settlors who are epileptics, *Fidelity & Columbia Trust Co. v. Gwynn*, 206 Ky. 823, 268 S.W. 537 (1925), or habitual drunkards, in that although creditors and assignees may have a valid claim against a settlor-beneficiary spendthrift trust, the settlor himself is powerless to revoke the trust if it contains an irrevocability clause. *Downs v. Security Trust Co.*, 175 Ky. 789, 194 S.W. 1041 (1917); *Reidy v. Small*, 154 Pa. 505, 26 Atl. 602 (1893).

²⁵ *Liberty Nat'l Bank v. Hicks*, 173 F.2d 631 (D.C. Cir. 1948); *Byrnes v. Commissioner*, 110 F.2d 294 (3d Cir. 1940); *Rose v. Third Nat'l Bank*, 27 Tenn. App. 553, 183 S.W.2d 1 (1944); 54 Am. Jur. *Trusts* § 147 (1945).

²⁶ *Liberty Nat'l Bank v. Hicks*, supra note 25; *Fidelity & Columbia Trust Co. v. Gwynn*, 206 Ky. 823, 268 S.W. 537 (1925); *Merchant Nat'l Bank v. Morrissey*, 329 Mass. 601, 109 N.E.2d 821 (1953); *Rose v. Third Nat'l Bank*, supra note 25.

²⁷ *Booth v. Chadwick*, 154 S.W.2d 268 (Tex. Civ. App. 1941) error ref. w.o.m. The issue there involved a spendthrift trust created by a settlor-beneficiary while in prison. The court stated that possibly such a trust would not be against public policy during the interval of time the settlor was in prison.

on other grounds and the above statement was dictum.²⁸ This dictum is the only intimation that Texas will not give restraints on both voluntary and involuntary alienation the same treatment, *i.e.*, that both will violate public policy in a settlor-beneficiary trust. However, Michigan has held, in a situation identical with that in the principal case, that restraints against *involuntary* alienation were invalid and against public policy, but restraints on *voluntary* alienation were valid and would be upheld against assignees of the settlor-beneficiary.²⁹ This Michigan case cannot be reconciled with the prevailing majority view regarding restraints on voluntary alienation.³⁰

Although the principal case is clearly correct according to existing case law, it would seem that more investigation of the desirability of applying the instant holding to restraints on *voluntary* alienation might be beneficial, especially since Texas had not previously decided the point. Concededly, such a restraint on involuntary alienation must necessarily be invalidated to protect creditors; however, restraints on voluntary alienation are of a completely different character. Thus, on the one hand is the question of allowing a man to put his property so far out of his own control that he cannot voluntarily alienate it even though he retains the benefit of it and is of full legal capacity. On the other hand is the question of allowing a man of full legal capacity to create a trust and then violate its terms at will. Most writers feel that it is impossible to formulate a rule holding that a man can bind his own future conduct for all time in a manner which concerns only himself.³¹ However, it should be noted that one state has considered the problem legislatively. Kansas, by statute, has validated restraints on voluntary alienation in settlor-beneficiary spendthrift trusts.³² One recurring theory is that if a man can be allowed to live debt free on the bounty of another through a spendthrift trust created for his benefit, why should he not be allowed to put aside a *portion* of his *own* earned accumulations for protection from involuntary alienation by creditors in order to prevent total financial disaster. This thought, evidenced by the Texas decision of *Booth v. Chadwick*,³³ has merit and

²⁸ *Ibid.*

²⁹ *Hackley v. Littell*, 150 Mich. 106, 113 N.W. 787 (1907).

³⁰ See Bogert, *Trust and Trustees* § 224 (1951); Griswold, *Spendthrift Trusts* § 493 (2d ed. 1947); Scott, *Trusts* § 156 (1956).

³¹ Griswold, *Spendthrift Trusts* § 493 (2d ed. 1947).

³² Kan. Gen. Stat. Ann. § 33-101 (1949). Settlor-beneficiary trusts are valid as to creditors, past, present, and future.

³³ 154 S.W.2d 268 (Tex. Civ. App. 1941) error ref. w.o.m.

should be considered simultaneously with the problem of restraint on voluntary alienation should the Texas Legislature ever attempt to enact a statute similar to the existing Kansas law.

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