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Recent Developments

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RECENT DEVELOPMENTS

Criminal Law—Enhanced Punishment—Allegation and Proof of the Law of a Foreign State

Indictment charged Relator with assault with intent to murder with malice and to enhance the punishment alleged that he previously had been "duly and legally" convicted of "assault with a deadly weapon with intent to commit murder, upon an information then legally pending . . ." in Arizona. Indictment was attacked by habeas corpus. *Held*: The lack of a formal allegation in an indictment that a felony can be prosecuted in another state upon an information and the lack of proof of this fact do not render the indictment and sentence void but only voidable since they are only defects of form.[1] *Ex parte Sistrunk*, — Tex. Crim. —, 349 S.W.2d 728 (1961).

The Texas Penal Code articles which authorize enhanced punishment in misdemeanor[2] and felony[3] cases point out one way of dealing with habitual offenders, *i.e.*, by giving them a more severe or "enhanced" punishment than a first offender would receive. This customary approach[4] has been used in Texas since the first revision of the penal code.[5] The Texas Court of Criminal Appeals has called these enhancement statutes "reform" statutes,[6] declared that they were constitutional,[7] and stated that they do not cause a defendant to be put in jeopardy twice.[8] Under articles 62[9] and 63,[10] to obtain a

[1] It must be kept in mind that habeas corpus is not available to question errors of form, *i.e.*, voidable errors. Such defects can be attacked only by motion to quash during the trial or on appeal and cannot be raised by collateral attack. Although habeas corpus can never be substituted for an appeal, the Texas Court of Criminal Appeals has the power and the duty to prevent enforcement of a judgment which has been obtained in a criminal case under circumstances and conditions which constitute a denial of due process of law. *Ex parte* McCune, 156 Tex. Crim. 213, 246 S.W.2d 171 (1952). The classification of a defect as one of form or substance determines the legal conclusions which will dispose of this point of a case.

[2] Tex. Pen. Code Ann. art. 61 (1952).

[3] Tex. Pen. Code Ann. arts. 62, 63 (1952).

[4] See Annots., 58 A.L.R. 64 (1920); 82 A.L.R. 306 (1933); 116 A.L.R. 229 (1938); 132 A.L.R. 107 (1942) for the provisions of other states.

[5] Tex. Rev. Pen. Code arts. 818-20 (1879).

[6] Ellis v. State, 134 Tex. Crim. 346, 115 S.W.2d 660 (1938) ("Reform" means to correct, to make new, or to rectify.).

[7] Enhancement statutes create no offense and the defendant cannot complain that the enhancement count fails to define an offense with the particularity required under the Texas Constitution. Kinney v. State, 45 Tex. Crim. 500, 79 S.W. 570 (1904).

[8] Defendant is not punished again for the same offense. The fact of prior conviction is only used as evidence to increase his punishment. Ellison v. State, 154 Tex. Crim. 406, 227 S.W.2d 545 (1950); Sigler v. State, 143 Tex. Crim. 220, 157 S.W.2d 903 (1941); Williams v. State, 109 Tex. Crim. 450, 5 S.W.2d 514 (1928); Kinney v. State, *supra* note 7.

[9] Tex. Pen. Code Ann. art. 62 (1952):

If it be shown on the trial of a felony less than capital that the defendant

valid conviction, both the prior conviction (or convictions) and the principal crime must be felonies, and each must be less than capital. Article 62 requires that the enhancing conviction must be "the same offense or one of *like nature*," but there is no such requirement in article 63. The enhanced punishment is set by statute and not left to the discretion of the jury.[11] Article 62 specifies the maximum punishment allowed for the principal crime upon showing that this is the second conviction,[12] while 63 calls for life imprisonment for a third offender.[13] The case law, through interpretation of the purpose and the language of the statutes, provides some additional requirements which are not specifically set forth in the statutes. For example, two or more convictions on the same day in the same court are to be considered but one conviction for enhancement purposes.[14] Thus, the statute contemplates only successive convictions.[15] Furthermore, valid and final disposition of the case is required for a conviction,[16] which does not become final until the appeal is determined.[17] Finally, federal conviction or a conviction from another state is available to enhance a Texas crime if the crime committed in that jurisdiction would constitute a felony under Texas law.[18]

In order to gain a valid enhanced punishment it is necessary to allege certain essential elements in the indictment: (1) a *prior* conviction,[19] (2) for the same offense or one of *like character*[20] (for article 62 only) and (3) for a crime which is a felony under the laws of Texas.[21] The omission of any one of these allegations is fatal, and

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has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases.

[10] Tex. Pen. Code Ann. art. 63 (1952):

Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

[11] Tex. Pen. Code Ann. arts. 62, 63 (1952).

[12] Tex. Pen. Code Ann. art. 62 (1952):

[T]he punishment . . . shall be the highest which is affixed to the commission of such offense in ordinary cases.

[13] Tex. Pen. Code Ann. art. 63 (1952).

[14] Long v. State, 36 Tex. 6 (1871); *Ex parte* Huff, 166 Tex. Crim. 508, 316 S.W.2d 896 (1958).

[15] *Ex parte* Holley, 170 Tex. Crim. 206, 339 S.W.2d 903 (1960); Arbuckle v. State, 132 Tex. Crim. 371, 375, 105 S.W.2d 219, 221 (1937).

[16] Heard v. State, 148 Tex. Crim. 19, 184 S.W.2d 285 (1944); Newsom v. State, 136 Tex. Crim. 114, 123 S.W.2d 887 (1938).

[17] Arbuckle v. State, 132 Tex. Crim. 371, 375, 105 S.W.2d 219, 221 (1937).

[18] Garcia v. State, 140 Tex. Crim. 340, 145 S.W.2d 180 (1940).

[19] See cases cited note 15 *supra*.

[20] Granado v. State, 168 Tex. Crim. 525, 531, 329 S.W.2d 864, 868 (1959); Therrell v. State, 163 Tex. Crim. 67, 289 S.W.2d 578 (1956); Belton v. State, 130 Tex. Crim. 7, 91 S.W.2d 728 (1936).

[21] *Ex parte* Scafe, ___ Tex. Crim. ___, 334 S.W.2d 170 (1960); Green v. State, 165 Tex. Crim. 46, 303 S.W.2d 392 (1957); Clifton v. State, 156 Tex. Crim. 655, 246 S.W.2d

renders the indictment void. That the enhancing crime is a *felony less than capital* should also be alleged to avoid a motion to quash at the trial, but such an omission is not sufficient to make the indictment void.[22] The sufficiency of the indictment is determined by the allegations therein and not by the proof offered at the trial.[23] As noted, a former conviction in another state is available for enhancement purposes in Texas, but the indictment must show on its face that the enhancing crime would be a felony under Texas law.[24] Thus, it was held in *Ex parte Puckett*[25] that a federal conviction for a violation of the National Motor Vehicle Theft Act[26] was not available to enhance the punishment of a later felony conviction, since there was no showing that the federal violation would be a felony under Texas law.

The same problem is presented in a slightly different context when the allegation mentions a legal proceeding in another state. The Texas rule is clear that the law of another state is presumed to be the same as the Texas law unless there are specific allegations to the contrary.[27] Thus, in an analagous proceeding, the allegations in an affidavit to support an extradition proceeding have been held to be insufficient when they alleged a felony to be prosecuted upon an information in Colorado.[28] In that case there were no allegations that the law of Colorado authorized felony prosecution upon an information, and Texas law expressly prohibits prosecution of felonies upon an information.[29] Hence, with the presumption that the Colorado law is the same as Texas law under these circumstances, the allegations were declared insufficient to support an extradition proceeding.

Since this is the first time this exact point has been before a Texas court, the soundness and clarity of the decision are particularly important. The court in the majority opinion disposed of the attack upon the indictment by stating several general principals of law which are supported by the authorities cited and which represent

201 (1951); Clark v. State, 154 Tex. Crim. 581, 230 S.W.2d 234 (1950); Arnold v. State, 127 Tex. Crim. 89, 74 S.W.2d 997 (1934).

[22] Tex. Pen. Code Ann. art. 59 (1952); *Ex parte* Seymour, 137 Tex. Crim. 103, 128 S.W.2d 46 (1939).

[23] Donald v. State, 165 Tex. Crim. 252, 306 S.W.2d 360 (1957).

[24] See cases cited note 21 *supra.*

[25] 165 Tex. Crim. 605, 310 S.W.2d 117 (1958).

[26] 18 U.S.C. §§ 2312-13 (1958); see Tex. Pen. Code Ann. art. 1430 (1952).

[27] *Ex parte* Burns, 167 Tex. Crim. 533, 322 S.W.2d 289 (1959); Green v. State, 165 Tex. Crim. 46, 303 S.W.2d 392 (1957); *Ex parte* Cooper, 163 Tex. Crim. 642, 295 S.W.2d 906 (1956); *Ex parte* Peairs, 162 Tex. Crim. 243, 283 S.W.2d 755 (1955); *Ex parte* Gardner, 159 Tex. Crim. 365, 264 S.W.2d 125 (1954).

[28] *Ex parte* Cooper, *supra* note 27.

[29] Tex. Const. art. V, § 10.

rules well-established in Texas law.[30] However, questions do arise as to their applicability to the instant set of facts, since in effect, the defect here is considered no more serious than a misspelling of the accused's name in the indictment. The majority considers this case as an attack upon the sufficiency of the evidence and holds the judgment not subject to collateral attack, although the record is completely devoid of *any* evidence as to the laws of Arizona and similarly lacks any allegation that Arizona law permits felony prosecution on an information. The dissent offers no more insight into the problem by stating that the defects are of form only and by citing cases which assertively permit (1) the subsequent attacks by habeas corpus alleging only defects of form,[31] and (2) the consideration of the sufficiency of the evidence upon collateral attack.[32] These cases do not seem to stand for such propositions, and if they did, they would stand alone in the law on these points, contrary to the great weight of authority.[33] However, the dissent's analysis of the *Puckett* decision seems to be accurate and carefully considered.[34] *Puckett* is clear authority for holding the defect in the indictment in the instant case to be one of substance. Even if it is argued that the indictment contained implied allegations that Arizona law permitted felony prosecutions upon an information, the sentence should still be held void because the record contains absolutely no proof offered to sustain such an allegation.[35]

The court evidently did not consider the result of its holding that the lack of formal allegation that a felony can be prosecuted in another state upon an information is only a defect of form, for the effect of this ruling is that a trial judge can take judicial notice of

[30] Neither an attack on sufficiency of evidence or the form of the indictment may be made by habeas corpus proceeding after the conviction has become final. *Ex parte* Lyles, 168 Tex. Crim. 145, 323 S.W.2d 950 (1959); *Ex parte* Seymour, 137 Tex. Crim. 103, 128 S.W.2d 46 (1939).

[31] *Ex parte* Daniels, 158 Tex. Crim. 2, 252 S.W.2d 586 (1952).

[32] *Ex parte* Bush, 166 Tex. Crim. 259, 313 S.W.2d 287 (1958).

[33] Sufficiency of the evidence can never be challenged by habeas corpus. *Ex parte* Lyles, 168 Tex. Crim. 145, 323 S.W.2d 950 (1959); *Ex parte* Wingfield, 162 Tex. Crim. 112, 282 S.W.2d 219 (1955). Defects of form cannot be questioned by habeas corpus. *Ex parte* Pruitt, 139 Tex. Crim. 438, 141 S.W.2d 333 (1940); *Ex parte* Helton, 128 Tex. Crim. 112, 79 S.W.2d 139 (1935).

[34] Although there is some authority holding that the National Motor Vehicle Theft Act, 18 U.S.C. §§ 2312-13 (1958), is unavailable to enhance punishment of crimes committed in some states, there is no Texas case which so holds. The acts denounced by § 2313 of the federal act would be a crime in Texas under Tex. Pen. Code Ann. art. 1430 (1952). If the property "concealed [and] received," were valued at more than $50, such crime would be a felony in Texas. If the federal conviction in the *Puckett* case were under § 2312 or under § 2313, but the property were valued at less than $50, then the conviction would not constitute a felony under Texas law and would not be available for enhancing a subsequent conviction.

[35] The state has the burden of proof in criminal prosecutions.

the law of another state by saying that the lack of such allegations do not make the indictment void. This result is clearly contrary to the established rule in Texas;[38] yet the opinion states, "We announce no new rule of law and construe none."[37] The rules of criminal pleadings in Texas are technical. An indictment must begin "in the name and by authority of the State of Texas" to be sufficient to support a conviction. Omission of the words "of Texas" has been held fatal.[38] Furthermore, the omission of "by" and "authority" likewise makes the indictment void.[39] With such particularity and formality required in case after case, it seems inconsistent for the Court of Criminal Appeals now to hold that it is unnecessary to plead and prove specific facts which show that an enhancing crime is a felony under Texas law when the pleading is inconsistent upon its face with such an interpretation. The most reasonable and important of all the requisites under article 396[40] is that the indictment must allege a crime under the laws of Texas. However, after *Sistrunk,* it is not necessary to allege a prior conviction of a crime which would be a felony under Texas law. Even if the courts conclude that Texas criminal cases are to be decided with more emphasis on the merits and less emphasis on technicalities, an individual should still be charged with a crime of the proper grade required by the statute if he is to be incarcerated for an enhanced period.

William M. Boyd

Admiralty—Texas Wrongful Death and Survival Statutes—Unseaworthiness and Comparative Negligence

Plaintiff's husband, a longshoreman, was fatally injured during unloading operations aboard Defendant's vessel. Plaintiff for herself and two minor children sought damages under maritime law as supplemented by the Texas Wrongful Death Act[1] and the Texas Survival

[38] McCormick & Ray, Texas Law of Evidence § 173 (1956).
[37] 349 S.W.2d at 729.
[38] Saine v. State, 14 Tex. Crim. 144 (1883).
[39] Brown v. State, 46 Tex. Crim. 572, 81 S.W. 718 (1904).
[40] Tex. Code Crim. Proc. Ann. (1954).

[1] Tex. Rev. Civ. Stat. Ann. arts. 4671, 4672 (1940). Article 4672 (character of wrongful act) states:

> The wrongful act, negligence, carelessness, unskillfulness or default mentioned in the preceding article must be of such character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury.

Statute,[2] charging in the alternative negligence and unseaworthiness. The jury found unseaworthiness and negligence of the vessel's crew. Each was found to be a proximate cause of the decedent's death, and the decedent was found to be five per cent contributorily negligent.[3] The trial court, because of the contributory negligence, entered judgment for the Defendant. The court of civil appeals affirmed in part, holding that contributory negligence barred recovery under the Texas Wrongful Death Act. However, it reversed in part, holding that the Texas Survival Statute preserved to the statutory beneficiaries of the decedent all of the rights that he had prior to his death, including the general maritime law doctrines of unseaworthiness and comparative negligence.[4] *Held, reversed and remanded in part:* In an action under the Wrongful Death Statute, if general maritime law doctrines of unseaworthiness and comparative negligence would have applied in favor of the decedent had he lived, then these doctrines will apply in favor of his representatives, and contributory negligence of the decedent may be considered only in mitigation of damages. *Vassallo v. Nederl-Amerik Stoomv Maats Holland*, — Tex. —, 344 S.W.2d 421 (1961).

The doctrines of unseaworthiness and comparative negligence have long been a part of the admiralty law as applied to seamen in *non-fatal* personal injury cases.[5] Originally negligence was regarded as a necessary component of unseaworthiness, but today the shipowner's duty to furnish a seaworthy ship is absolute and is completely divorced from concepts of negligence.[6] The protection afforded by these doctrines was extended to longshoremen in *non-fatal* personal

[2] Tex. Rev. Civ. Stat. Ann. art. 5525 (1958) (survival of cause of action):

> All causes of action upon which suit has been or may hereafter be brought for personal injuries, or for injuries resulting in death, whether such injuries be to the health or to the reputation, or to the person of the injured party, shall not abate by reason of the death of the person against whom such cause of action shall have accrued, nor by reason of the death of such injured person, but, in the case of the death of either or both, all such causes of action shall survive to and in favor of the heirs and legal representatives and estate of such injured party and against the person, or persons liable for such injuries and his or their legal representatives, and may be instituted and prosecuted as if such person or persons against whom same accrued were alive.

[3] The jury awarded $15,000 damages for pain and suffering of the decedent before death under the Survival Statute and $137,170 damages under the Wrongful Death Act.

[4] 337 S.W.2d 309 (Tex. Civ. App. 1960—Eastland). As a result Plaintiffs were awarded the $15,000 damages for pain and suffering of the decedent before death.

[5] *E.g.*, The Osceola, 189 U.S. 158 (1903) (dictum); see generally Gilmore & Black, Admiralty 248-62 (1957). "The unseaworthiness indemnity was looked on as an American innovation, which had perhaps been stimulated by the English Merchants' Shipping Act of 1876 which allowed such recovery . . . ." *Id.* at 250.

[6] Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960), noted, 15 Sw. L.J. 328 (1961). *But see* Ezekial v. Volusia S.S. Co., 297 F.2d 215 (2d Cir. 1961).

injury cases by the United States Supreme Court in 1946.[7] However, under the general maritime law there is no cause of action for death unless specifically created by statute.[8] Seamen's survivors have been given actions for wrongful *death* by the Jones Act[9] and the Death on the High Seas Act.[10] These acts, however, are not applicable to a longshoreman's survivors under the facts in the instant case.[11] The survivors of a decedent, fatally injured as a result of a maritime tort, may seek recovery under the applicable state wrongful death statute, but the proper substantive law to be applied is a question of state law.[12] The problem is complicated by the fact that under the law of some states, such as Texas, there are two separate and distinct causes of action which survivors of a decedent may bring. The first, the decedent's cause of action for pain and suffering from the time of his injury until the time of his death, is preserved for his survivors by the Survival Statute.[13] The second, created by the Wrongful Death Act, gives the survivors a cause of action in their own right for damages they have suffered as a result of decedent's death.[14] The state may apply the substantive law generally applicable to wrongful death cases within its territory, or it may choose to incorporate the general maritime law concepts of unseaworthiness or comparative negligence.[15]

The state wrongful death and survival statutes are by no means uniform. The problem is further complicated by the relative scarcity of decisions. Although federal and state courts have concurrent jurisdiction over maritime torts which result in death and which occur in

[7] Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

[8] Goett v. Union Carbide Co., 361 U.S. 340 (1960); Hess v. United States, 361 U.S. 314 (1960); United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki, 358 U.S. 613 (1959); The Tungus v. Skovgaard, 358 U.S. 588 (1959); The Harrisburg, 119 U.S. 199 (1886).

[9] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958). The Jones Act is the admiralty version of the Federal Employer's Liability Act, 53 Stat. 1404 (1939), 45 U.S.C. §§ 51-60 (1958).

[10] 41 Stat. 537 (1920), 46 U.S.C. §§ 761-66 (1958).

[11] The Jones Act affords no basis for relief because the decedent-longshoreman was employed by the stevedoring contractor rather than being employed by the vessel or as a member of its crew. The Death on the High Seas Act is inapplicable because that act requires that the accident from which death results must occur beyond a marine league from the shore of any state.

[12] Goett v. Union Carbide Co., 361 U.S. 340 (1960); United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki, 358 U.S. 613 (1959); The Tungus v. Skovgaard, 358 U.S. 588 (1959).

[13] *E.g.*, Humble Oil & Ref. Co. v. Ooley, 46 S.W.2d 1038 (Tex. Civ. App. 1932—Eastland) *error dism.*

[14] Atchison, T. & S.F. Ry. v. Hix, 291 S.W. 281 (Tex. Civ. App. 1926—El Paso) *no writ hist.*, quoting St. Louis, I. Mt. & So. Ry. v. Craft, 237 U.S. 648 (1915).

[15] Goett v. Union Carbide Co., 361 U.S. 340 (1960); United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki, 358 U.S. 613 (1959); The Tungus v. Skovgaard, 358 U.S. 588 (1959).

state navigable waters,[16] most actions have been brought in the federal courts. The federal court decisions interpreting state statutes, though persuasive, are not binding on the state courts.[17] The statutes of Florida,[18] Kentucky,[19] Louisiana,[20] New York,[21] Ohio,[22] and Pennsylvania[23] have been interpreted to incorporate contributory negligence as a bar to recovery in maritime tort death cases. The statutes of Delaware,[24] Maryland,[25] New Jersey,[26] and Virginia[27] have been recently construed to incorporate the general maritime substantive law in such cases.[28] The Texas Legislature has repeatedly rejected a broad application of the doctrine of comparative negligence.[29] But in limited areas where specific statutory remedies have replaced the common law, such as workmen's compensation[30] and claims under the railroad acts,[31] contributory negligence is not a bar to recovery. Federal courts have on three occasions held that under the Texas Wrongful Death

[16] An action for wrongful death as a result of a maritime tort may be brought in a federal court under its admiralty jurisdiction, 62 Stat. 931 (1948), as amended, 28 U.S.C. § 1333 (1958), or its diversity of citizenship jurisdiction, 28 U.S.C. § 1332 (1958), but not under its jurisdiction over controversies arising under the Constitution or laws of the United States, Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). It has been long established that state courts have concurrent jurisdiction over such cases. American S. B. Co. v. Chase, 83 U.S. (16 Wall.) 522 (1873). See Annot., 71 A.L.R.2d 1296, 1306-10 (1960).

[17] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[18] Emerson v. Holloway Concrete Prod. Co., 282 F.2d 271 (5th Cir. 1960); Graham v. Lusi, 204 F.2d 223 (5th Cir. 1953).

[19] Feige v. Hurley, 89 F.2d 575 (6th Cir. 1937).

[20] Byrd v. Napoleon Ave. Ferry Co., 227 F.2d 958 (5th Cir. 1955); Babin v. Lykes Bros. S.S. Co., 94 So. 2d 715 (La. App. 1957) (dictum).

[21] Section 131 of the Decedent Estate Law (1949) specifically provides that in actions for wrongful death contributory negligence is a defense.

[22] Niepert v. Cleveland Elec. Co., 241 F.2d 916 (6th Cir. 1957).

[23] Hill v. Waterman S.S. Co., 251 F.2d 655 (3d Cir. 1958); Curtis v. Garcia, 241 F.2d 30 (3d Cir. 1957).

[24] Wright v. Cion Corp., 171 F. Supp. 735 (S.D.N.Y. 1959).

[25] See Maryland *ex rel* Smith v. The A/S Nabella, 176 F. Supp. 668 (D. Md. 1959); Maryland *ex rel* Gladden v. Weyerhaeuser S.S. Co., 176 F. Supp. 664 (D. Md. 1959).

[26] The Tungus v. Skovgaard, 252 F.2d 14 (3d Cir. 1957), *aff'd*, 358 U.S. 588 (1959); Halecki v. United N.Y. & N.J. Sandy Hook Pilots Ass'n, 251 F.2d 708 (2d Cir.), *rev'd on other grounds*, 358 U.S. 613 (1958).

[27] Holley v. The Manfred Stansfield, 269 F.2d 317 (4th Cir. 1959).

[28] Cases holding that contributory negligence is not a bar to a claim for wrongful death caused by a maritime tort which were decided before The Tungus v. Skovgaard, 358 U.S. 588 (1959), are apt to be misleading. Such cases often proceeded on the theory that in a federal admiralty court the substantive law governing an action for death caused by a maritime tort within a state's territorial waters was supplied by federal maritime law, and only the remedy is provided by the wrongful death statute of the state in which the accident occurred. These cases can no longer be regarded as authority. See, *e.g.*, The Devona, 1 F.2d 482 (D. Me. 1924) (Maine wrongful death statute); see also Annot., 71 A.L.R.2d 1296, 1314 (1960).

[29] Bills embodying comparative negligence have been introduced in the Texas House of Representatives on five occasions, but none of the bills ever reached a vote. See H.B. 122 (1959); H.B. 228 (1957); H.B. 101 (1953); H.B. 390 (1951); H.B. 462 (1941).

[30] Tex. Rev. Civ. Stat. Ann. art. 8306 (1956).

[31] Tex. Rev. Civ. Stat. Ann. arts. 6388, 6440 (1926).

Act and the Survival Statute contributory negligence of the decedent is a complete bar to recovery in cases involving death from maritime torts occurring in the territorial waters of Texas.[32] The instant case, however, is one of first impression for the Supreme Court of Texas.

In the instant case the reasoning of the court of civil appeals, which the supreme court affirmed, in awarding recovery under the Survival Statute was that "no new cause of action is created by the Survival Statute but that it simply preserves for the heirs and legal representatives of the deceased the same cause of action and rights which he possessed at the time of his death."[33] In examining the issue of recovery under the Wrongful Death Act, the supreme court reasoned, "The answer to the question presented hinges on our construction of the Texas Statutes involved."[34] The court then declined to follow the construction accepted by the Fifth Circuit in 1926.[35] Instead, it quoted[36] portions of a 1959 opinion of the Fourth Circuit interpreting a substantially similar Virginia statute: "[T]his statute was intended . . . to grant recovery in all instances where a decedent would have recovered. The statute appears not to concern itself with which law, local or maritime, would have supported the recovery, but only whether there would have been a recovery."[37]

In applying the doctrine of comparative negligence to unseaworthiness the court merely followed the traditional approach taken by admiralty courts.[38] However, the current maritime decisions themselves are subject to possible question in allowing set-off for contributory negligence against a claim for unseaworthiness. As long as unseaworthiness was thought to be based on negligence,[39] comparative negligence was unquestionably applicable. However, in 1960 the United States Supreme Court held in *Mitchell v. Trawler Racer, Inc.*[40] that a shipowner's duty to furnish a vessel and appurtenances reasonably fit for their intended use is absolute and that liability for unseaworthiness is completely divorced from concepts of negligence. Since the duty is now absolute and liability for its breach is incurred without fault, there appears to be little reason for an application of

[32] Graff v. Parker Bros. & Co., 204 F.2d 705 (5th Cir. 1953); Truelson v. Whitney & Bodden Shipping Co., 10 F.2d 412 (5th Cir.), *cert. denied*, 271 U.S. 661 (1926); The Nellie B., 174 F. Supp. 846 (S.D. Tex. 1959).

[33] 337 S.W.2d at 313.

[34] ___ Tex. at ___, 344 S.W.2d at 424.

[35] Truelson v. Whitney & Bodden Shipping Co., 10 F.2d 412 (5th Cir. 1926).

[36] ___ Tex. at ___, 344 S.W.2d at 424.

[37] Holley v. The Manfred Stansfield, 269 F.2d 317 (4th Cir. 1959).

[38] See cases cited note 42 *infra*.

[39] See 15 Sw. L.J. 328 (1961).

[40] 362 U.S. 539 (1960).

comparative negligence. In the seaman's right to maintenance and cure, another form of absolute liability in maritime law, contributory negligence has no bearing.[41] Nevertheless, the admiralty courts have continued to apply comparative negligence to diminish recovery for unseaworthiness without questioning its continued applicability.[42] Surely that policy is entitled to critical re-examination now that the liability for unseaworthiness is absolute.

This case presented an excellent opportunity for the court to hold contributory negligence a bar to recovery, since Texas had as much federal court authority as any state to this effect and since there was a clear record of rejection of comparative negligence by the legislature. Nevertheless, the decision as made is both sound and humane. If the injuries had not been fatal and Plaintiff's husband had survived with permanent and total disability, he could unquestionably have recovered in admiralty damages for loss in earning power with consequent protection to his family.[43] There seems to be no sound basis for denying recovery to a decedent's family who have been completely deprived of his earning power and companionship by death. Thus, the instant case is one more step in the gradual but perceptible movement to lessen the harshness of the contributory negligence doctrine.

David C. Briggs

Primary Jurisdiction—Concurrent Jurisdiction in the Court and the Railroad Commisson—Judicial Discretion in Exercising Jurisdiction

Defendant, owner of an oil and gas lease on .42 acres, drilled a gas well and attempted to "sand fracture"[1] the common formation

[41] *E.g.*, Farrell v. United States, 336 U.S. 511 (1949).

[42] Merrill v. The S.S. Cuaco, 189 F. Supp. 321 (D. Ore. 1960); Cooper v. D/S A/S Progress, 188 F. Supp. 578 (E.D. Pa. 1960); Oddenes v. Universe Tankships, Inc., 188 F. Supp. 117 (S.D.N.Y. 1960); Holley v. The Manfred Stansfield, 186 F. Supp. 212 (E.D. Va. 1960) (on remand).

The following rationale has been offered to explain why contributory negligence is not a defense in cases of strict liability:

> The explanation must lie in part . . . upon the policy which places the absolute responsibility for preventing the harm upon the defendant, whether his conduct is regarded as fundamentally anti-social, or he is considered merely to be in a better position to transfer the loss to the community. Prosser, Torts 341 (1955).

[43] Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). Even if the action were brought in a state court, contributory negligence should not be a bar to recovery. Norris, The Law of Maritime Personal Injuries Affecting Harbor Workers, Passengers, and Visitors 105-06 (1959), citing Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942).

[1] Sand fracturing is a process whereby sand and a liquid are mixed and forced under

which underlay the surrounding property owned by Plaintiff. Plaintiff, alleging that the cracks or veins caused by sand fracturing would extend into the common formation under the land which it had leased and that this would amount to a subsurface trespass, brought suit to enjoin Defendant. Defendant claimed that: (1) the matter must first be determined by the Railroad Commission of Texas because that administrative body had primary jurisdiction over the subject matter; and (2) the holding of the Commission could then be appealed to the district court and there tested by the substantial evidence rule.[2] *Held:* The primary jurisdiction doctrine does not apply and the district court is not ousted from jurisdiction over the inherently judicial problem of trespass. *Gregg v. Delhi-Taylor Oil Corp.*, —Tex.—, 344 S.W.2d 411 (1961).

The doctrine of primary jurisdiction determines whether a court or an administrative agency should make an initial decision.[3] The fountainhead from which the primary jurisdiction doctrine flows is the case of *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*[4] The doctrine applies where the enforcement of a claim originally cognizable in the courts requires the resolution of issues which under a regulatory scheme have been placed within the special competence of an administrative body.[5] In such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.[6] The

very high pressure into gas-bearing sand thereby causing the formation to be cracked so that the gas may flow from the producing formation into the well.

[2] This rule . . . means that in most cases of direct attack upon administrative orders, by statutory appeal or by special writ, the trial court is limited to the determination of whether, from all the evidence adduced in the trial of the cause before the court, the action of the agency is illegal, arbitrary, or capricious, or is not reasonably supported by substantial evidence. If reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its action, the order must be set aside. Harris, *The Administrative Law of Texas*, 29 Texas L. Rev. 213, 225 (1950).

[3] Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481 (1958); Far East Conference v. United States, 342 U.S. 570 (1952); Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752 (1947); Thompson v. Texas-Mexican Ry., 328 U.S. 134 (1946).

[4] 204 U.S. 426 (1907). An oil company sued a railroad to recover charges paid in excess of what was just and reasonable, also alleging that the rate was discriminatory, preferential, and in violation of the long and short haul provisions. The Court said:

> [A] shipper seeking reparation predicated upon the unreasonableness of the established rate *must* . . . primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable. . . . *Id.* at 448. (Emphasis added.)

The Court reasoned that if courts and juries could determine reasonableness of rates, uniformity would be impossible. The Court further said that initial jurisdiction in the courts would destroy the prohibition against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted.

[5] United States v. Western Pac. Ry., 352 U.S. 59 (1956).

[6] *Ibid.*

doctrine is judge-made, and the principal criterion in deciding whether the doctrine is applicable is judicial appraisal of the need for resort to administrative judgment.[7] Questions of when the doctrine of primary jurisdiction is applicable arise only when the statutory arrangements are such that jurisdictions of administrative and judicial bodies are concurrent for an initial determination of some questions.[8] If there is exclusive jurisdiction in either the courts or the agency, then no question of primary jurisdiction arises.[9] The principal reason behind the doctrine is recognition of the need for orderly and sensible cooperation of the work of agencies and courts.[10] Whether the agency happens to be expert or not, a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account the agency's approach, for otherwise, parties who are subject to the agency's continuous regulation may become the victims of uncoordinated and conflicting requirements.[11] Generally, the doctrine has been limited to questions of fact and questions requiring the skills of administrative specialists.[12] Where only questions of law are involved in a controversy, direct application for relief must be made to the courts.[13]

The doctrine of primary jurisdiction is not a restrictive rule but is used by the courts to give them freedom in determining whether they should take jurisdiction over a case at hand. In a leading case discussing the doctrine[14] the United States Supreme Court said, "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation."[15] In determining if these reasons[16] are present and if a plaintiff should pursue his ad-

[7] 3 Davis, Administrative Law § 19.09 (1958).

[8] Davis, *Administrative Law Doctrines of Exhaustion of Remedies, Ripeness for Review, and Primary Jurisdiction,* 28 Texas L. Rev. 376, 400 (1950).

[9] Spartan Drilling Co. v. Bull, 221 Ark. 168, 252 S.W.2d 408 (1952); Kavanaugh v. Underwriters Life Ins. Co., 231 S.W.2d 753 (Tex. Civ. App. 1950—Waco) *error ref.*

[10] 3 Davis, Administrative Law § 19.01 (1958).

[11] *Ibid.*

[12] Great No. Ry. v. Merchants Elevator Co., 259 U.S. 285 (1922).

[13] Kovarsky v. Brooklyn Union Gas Co., 279 N.Y. 304, 18 N.E.2d 287 (1938).

[14] United States v. Western Pac. Ry., 352 U.S. 59 (1956).

[15] *Id.* at 64.

[16] Davis cites as reasons for the doctrine of primary jurisdiction:

(1) enforcement of a claim may require the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body;

(2) there is a need for orderly and sensible coordination of the work of agencies and courts;

(3) a court confronted with problems within an agency's area of specializa-

ministrative remedy, a court may properly use its own discretion.[17] However, this discretion can only be applied in the absence of clear statutory language conferring exclusive jurisdiction on the administrative body.[18]

The discretionary power to refuse jurisdiction has been exercised by courts in other areas of the law. For example, in the *Pullman* case,[19] the federal courts adopted the "doctrine of abstention." Under that doctrine, even though federal jurisdiction has been properly invoked in order to challenge the constitutionality of a state statute or an administrative order, the federal court, in the exercise of sound discretion, normally will stay the action pending an interpretation of the challenged statute or order by the state courts. A state ruling may then alleviate the necessity for deciding the federal constitutional question.[20] The United States Supreme Court encourages this restriction on the scope of federal jurisdiction for two reasons: (1) because of a scrupulous regard for the rightful independence of the state governments; and (2) to insure smooth working of the federal judiciary.[21] Indeed, the Supreme Court has approved such a use of discretion by a lower court in staying proceedings where the question involved a state statute and the state court had not yet ruled on it.[22] Thus, by analogy it is apparent that judicial appraisal of the need for resort to administrative judgment is based on the discretion of the court before which the question arises. Authorities agree[23] that judicial discretion should be exercised with caution and that the courts should be careful not to abuse their discretion nor freely to cede their jurisdiction. It has been stated:

> No discretion has any business to be wholly free; no discretion has any business to be truly unique in exercise. To be *right* discretion,

tion should have the advantage of whatever contribution the agency can make to the solution;

(4) uniformity can be secured if determination of the issue is left to the agency. 3 Davis, Administrative Law § 19.09 (1958).

[17] Neely v. United States, 285 F.2d 438, 443 (Ct. Cl. 1961).

[18] Spartan Drilling Co. v. Bull, 221 Ark. 168, 252 S.W.2d 408 (1952); Kavanaugh v. Underwriters Life Ins. Co., 231 S.W.2d 753 (Tex. Civ. App. 1950—Waco) *error ref.*

[19] Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[20] 1A Moore, Federal Practice 2101 (1961).

[21] Burford v. Sun Oil Co., 319 U.S. 315 (1943).

[22] Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). The Court has also held, on motion to dismiss on ground of *forum non conveniens,* that whether the offer of a litigant, opposing the motion to guarantee that witnesses from without the jurisdiction are present at the trial, should be accepted rests in the sound discretion of the trial court. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.

[23] Thomas Corp. v. Nicholas, 221 F.2d 286, 288 (5th Cir. 1955); Young v. Garret, 159 F.2d 634 (8th Cir. 1947); Bowles v. Simon, 145 F.2d 334, 337 (7th Cir. 1944); Cohen v. Young, 127 F.2d 721, 726 (6th Cir. 1942).

> to be lawful exercise of discretion (though there be neither rule nor precedent nor likelihood of repetition), the action so far as it affects any man or group adversely must be undertaken with a feeling, explicit or implicit, of willingness, of readiness, to do the like again, if, or, and when a like case may arise.[24]

In the instant case, the court, in holding that the doctrine of primary jurisdiction did not apply, reasoned that since the Legislature had not specifically delegated to the Railroad Commission the question of subsurface trespass or sand fracturing, the courts were not ousted from jurisdiction.[25] The court could have found concurrent jurisdiction in the Railroad Commission and by exercising its discretion could have allowed the Commission to make the initial decision under the primary jurisdiction doctrine.[26] However, the court chose to take jurisdiction and thereby bypassed the administrative agency. In so doing, it seemed to guard closely its jurisdiction over a question which it felt was inherently judicial in nature.[27] There is little doubt that the courts have the power to determine whether a subsurface trespass is occurring or is about to occur, and there is certainly no indication that the court abused its discretion in making the initial decision.

The principal case implies that courts may use their own discretion to determine whether the court or an administrative agency should make the initial decision. Unfortunately, opinions based on a court's discretion rather than a rule of law are of little value as precedent and make the practicing lawyer's task more difficult. Indeed, it is difficult to anticipate from prior case law the manner in which a court will exercise its discretion. There is no doubt that the principal case is sound in result, but the fact that other courts can use their own discretion in applying the doctrine of primary jurisdiction strips the case of most of its precedential value. Thus, the problems

[24] Llewellyn, The Common Law Tradition 217 (1960).

[25] Factors the court used in deciding that the primary jurisdiction doctrine did not apply were:

(1) the Legislature had not specifically delegated to the Commission the question of subsurface trespass or sand fracturing;
(2) the Commission itself asserted no such power;
(3) the Commission had made no rules regarding the subject though requested to do so by Defendant;
(4) no administrative discretion was involved because the Commission would have no discretion to authorize the trespass;
(5) this was not a question of how a well should be completed but where it was completed;
(6) the question presented was primarily judicial in nature. See 344 S.W.2d at 414, 415, 418.

[26] See Davis, *supra* note 8.

[27] 344 S.W.2d at 415.

raised by the primary jurisdiction doctrine will have to be obviated by careful drafting of statutes so that there will be exclusive jurisdiction in either an agency or a court.

Robert T. Gowan

Torts—Safety Responsibility Law—Constitutionality

Defendant struck a horse while driving a motor vehicle. Under the Colorado Safety Responsibility Statute[1] Defendant was required to show that he had sufficient insurance to cover his potential liability or secure a release from the other party to the accident. If he could not satisfy either of these requirements then he was required to deposit an amount deemed by the Colorado Director of Revenue to be sufficient to cover any damages which might be assessed against him. Defendant failed to comply with the terms of the statute and his operator's license was revoked without a hearing. He was later arrested for driving without a license. *Held:* The revocation of Defendant's operator's license without a hearing is a deprivation of a property right without due process of law, and the statute[2] authorizing suspension is unconstitutional. *People v. Nothaus,* — Colo. —, 363 P.2d 180 (1961).

Safety responsibility legislation is designed to alleviate the problem of the irresponsible driver who uses the highway without sufficient financial resources to compensate for any damage he may do.[3] Such legislation seeks to insure that a wronged party who proves fault in a suit instituted for damages will not have "an empty judgment."[4] Two basic statutory forms are used to encourage the financial responsibility of automobile drivers. The most simple plan is compulsory liability insurance, which has been adopted in Massachusetts.[5] It requires the owner of an automobile to have a designated minimum amount of insurance covering any personal injury or death occurring in a motor vehicle accident.[6] The penalty for non-compliance is revocation of the vehicle's registration.[7] The second form, safety re-

[1] Colo. Rev. Stat. Ann. § 13-7-7 (1954).

[2] Colo. Rev. Stat. Ann. § 13-7-7 (1954).

[3] See Escobedo v. State Dep't of Motor Vehicles, 35 Cal. 2d 870, 222 P.2d 1, 5 (1950).

[4] Department of Public Safety v. Gillaspie, 254 S.W.2d 180 (Tex. Civ. App. 1952—San Antonio), *aff'd,* 152 Tex. 459, 259 S.W.2d 177 (1953).

[5] Mass. Gen. Laws Ann. ch. 90, § 34A-J (1954).

[6] Mass. Gen. Laws Ann. ch. 90, § 34A (1954). The amount of coverage required is $5,000 for each person injured or killed and $10,000 for any one accident resulting in death to more than one person.

[7] Mass. Gen. Laws Ann. ch. 90, § 34H (1954) (Revocation of registration suspends the use of that automobile by the operator.). For a criticism of this type legislation see Braun, *The Need for Revision of Financial Responsibility Legislation,* 40 Ill. L. Rev. 237 (1945).

sponsibility legislation, requires the deposit of security after an accident and is the more usual form of statutory relief. The Connecticut statute, enacted in 1925 and since repealed, is the forerunner of all the "security" type legislation.[8] That statute required one to give proof of financial responsibility only as to future operations of vehicles and the satisfaction of judgments.[9] In 1937 New Hampshire enacted a statute[10] which required the operator to deposit security upon the occurrence of an accident or risk the suspension of his operator's license. This act was the basis for the model safety responsibility acts of the American Automobile Association and the National Conference on Street and Highway Safety.[11] Generally, statutes based upon the model acts[12] require a report of all accidents resulting in injury, death, or property damage over a certain amount.[13] Within a specified time after the official charged with administering the statute[14] receives the report, the driver must make a deposit of security. The amount required is within the discretion of the designated official and is set at an amount which will be sufficient to satisfy any judgments for damages resulting from the accident.[15] The security may be either a bond for the required amount[16] or a deposit of money or securities.[17] Statutory exceptions are made for persons with a specified amount of insurance[18] and for accidents without injury or damage.[19] Most states require no preliminary hearing and no determination of fault prior to suspension.[20]

[8] Conn. Laws ch. 183 (1925), repealed by Conn. Laws ch. 254 (1931).

[9] As pointed out by Braun, *supra* note 7, at 240, this type of statute has not been successful and has proved unpopular.

[10] N.H. Laws ch. 161-208 (1937), as amended, N.H. Rev. Stat. Ann. §§ 268:1-27 (1955).

[11] The two acts are substantially the same.

[12] See also the Texas act, Tex. Rev. Civ. Stat. Ann. art. 6701h (1960). Compare Colo. Rev. Stat. Ann. § 13-7-1 to -9 (1954).

[13] *E.g.*, Colo. Rev. Stat. Ann. § 13-7-6 (1954); Ohio Rev. Code Ann. § 4509.1-65 (Page 1954); Tex. Rev. Civ. Stat. Ann. art. 6701h (1960). The failure to file a report results in suspension.

[14] In Colorado the official who administers the article is the Director of Revenue. Colo. Rev. Stat. Ann. § 13-7-2 (1954). In Texas it is the Department of Public Safety which administers the statute. Tex. Rev. Civ. Stat. Ann. art. 6701h, § 2 (1960).

[15] Colo. Rev. Stat. Ann. § 13-7-7 (1954); Tex. Rev. Civ. Stat. Ann. art. 6701h, § 5 (1960).

[16] Colo. Rev. Stat. Ann. § 13-7-27 (1954); Tex. Rev. Civ. Stat. Ann. art. 6701h, § 9 (1960). Under the Texas statute the Department of Public Safety sets the form of security.

[17] Colo. Rev. Stat. Ann. § 13-7-28 (1954).

[18] Tex. Rev. Civ. Stat. Ann. art. 6701h, § 5(c) (1960), provides for insurance in the amount of $5,000 per death or injury in any one accident or $10,000 for the death or injury of two or more persons in any one accident. See Colo. Rev. Stat. Ann. § 13-7-7 (2) (1954).

[19] Colo. Rev. Stat. Ann. § 13-7-7(2) (1954); Tex. Rev. Civ. Stat. Ann. art. 6701h, § 6(c) (1960).

[20] The Texas and Colorado statutes do not require a finding of fault. Texas specifically

Safety responsibility legislation has been held constitutional in a majority of the states which have adopted the plan.[21] In *Rosenblum v. Griffin*[22] the pioneer New Hampshire act[23] was attacked on the ground that suspension of an operator's license without regard to fault and without a hearing is a deprivation of due process of law.[24] The court in that case answered that the operation of an automobile is a privilege "which could be withheld at the state's pleasure."[25] The basis for the decision was that "securing redress for injured highway travelers is a proper subject of police regulation."[26] However, in the more recent leading decision of *Escobedo v. State Dep't of Motor Vehicles*[27] the California Supreme Court, when faced with the same question, held that use of the public highways was a "right."[28] The court held that suspension of this "right" without a hearing did not violate due process of law "if reasonably justified by a compelling public interest" and if the decision were subject to subsequent judicial review.[29] In *Reitz v. Mealey*[30] a claim of denial of due process of law was made by one whose license and registration had been revoked for failure to satisfy a judgment for damages. The United States Supreme Court dismissed the claim on grounds that the safety responsibility statute was a reasonable regulation and an additional means of enforcing the judgment.[31] The Court utilizes a test based upon reasonableness and public necessity in cases involving governmental action without a hearing.[32] In addition, there is the requirement that there be subsequent judicial review of the action.[33]

The majority in the principal case ignored rulings in other juris-

allows judicial review in Tex. Rev. Civ. Stat. Ann. art. 6701h, § 2 (1960).

[21] Escobedo v. State Dep't of Motor Vehicles, 35 Cal. 2d 870, 222 P.2d 1 (1950); De Vries v. Alger, 329 Mich. 68, 44 N.W.2d 872 (1950); Ragland v. Wallace, 80 Ohio App. 210, 70 N.E.2d 118 (1946); Gillaspie v. Department of Public Safety, 152 Tex. 459, 259 S.W.2d 177 (1953); State v. Stehlek, 262 Wis. 642, 56 N.W.2d 514 (1953).

[22] 89 N.H. 314, 197 Atl. 701 (1938).

[23] N.H. Laws ch. 161-208 (1937), as amended, N.H. Rev. Stat. Ann. §§ 268:1-27 (1955).

[24] This was the first challenge to the early New Hampshire statute.

[25] Rosenblum v. Griffin, 89 N.H. 314, 197 Atl. 701 (1938).

[26] *Ibid.*

[27] 35 Cal. 2d 870, 222 P.2d 1 (1950).

[28] Escobedo v. State Dep't of Motor Vehicles, *supra* note 27, at 5.

[29] *Ibid.* The court in the *Escobedo* case found authority for subsequent judicial review by mandamus proceedings in Cal. Vehicle Code § 317 (1935), as amended, Cal. Vehicle Code §§ 14104-06.

[30] 314 U.S. 33 (1941). The case involved the New York statute which requires suspension of operators' licenses for non-satisfaction of judgments. New York Vehicle & Traffic Law § 94(b).

[31] 314 U.S. at 37.

[32] Phillips v. Commissioner, 283 U.S. 589 (1931) (assessment of tax without a hearing).

[33] Yakus v. United States, 321 U.S. 414, 442 (1944) (prices set without hearing under the Emergency Price Control Act of 1942).

dictions holding safety responsibility legislation of various types constitutional. It is not clear whether the decision was based upon the due process clause of the United States Constitution[34] or the due process clause of the Colorado Constitution.[35] However, the use of a motor vehicle was termed a property right under the Colorado Constitution.[36] The taking of such a right without a hearing was considered a taking without due process of law.[37] The majority cited no cases in support of its position, stating that on a "matter so obviously basic and fundamental no additional citation of authority is required."[38] In striking down the statute, the court relied entirely on the failure to provide for a hearing prior to the suspension of the operator's license. Colorado expressly provides for subsequent judicial review in all cases involving cancellation, suspension, or revocation of operators' licenses.[39] However, this provision for judicial review of suspensions was not taken into consideration by the court. In other cases upholding governmental action without a hearing, provisions for subsequent judicial review have been considered determinative by the United States Supreme Court,[40] and by the California court in *Escobedo v. State Dep't of Motor Vehicles*.[41] The court in the instant case, refusing to follow precedent from other jurisdictions, stated that those jurisdictions had "overlooked basic constitutional guarantees"[42] and struck down the statute.

The dilemma presented by the instant case cannot be resolved by resort to a standard based on whether the use of the highways is a "right" or a "privilege." The basic test must be whether the procedure for suspension of an operator's license satisfies the standards for due process established in cases of governmental action without a hearing. Cases involving safety responsibility legislation and suspension of operators' licenses establish that the lack of a prior hearing is not determinative. The controlling factors must be (1) whether the

[34] U.S. Const. amend. XIV, § 2: "Nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

[35] Colo. Const. art. II, § 25: "No person shall be deprived of life, liberty or property without due process of law. . . ."

[36] Colo. Const. art. II, § 3: "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."

[37] 363 P.2d at 182.

[38] 363 P.2d at 183.

[39] Colo. Rev. Stat. Ann. § 13-3-28 (Supp. 1960); see Tex. Rev. Civ. Stat. Ann. art. 6701h, § 2 (1960).

[40] Bowles v. Willingham, 321 U.S. 503 (1944); Yakus v. United States, 321 U.S. 414, 442 (1944).

[41] 35 Cal. 2d 870, 222 P.2d 1, 6 (1950).

[42] 363 P.2d at 183.

suspension is justified by "compelling public interest," and (2) whether there are provisions for subsequent judicial review that will safeguard against completely arbitrary proceedings with no possibility of review. It would appear that these factors are present in the instant case but that the court has refused either to recognize or accept them. In so doing the court has ignored persuasive authority and rejected legislation which is in the public interest.

Marshall G. Martin

Torts—Charitable Institutions—Immunity from Tort Liability

Plaintiff's wife was admitted to Defendant hospital as a paying patient. When taking necessary blood tests, a laboratory technician, an employee of Defendant, negligently failed to mark the patient's name or identification on the blood sample tube at her bedside. As a result several unmarked tubes were confused with the wife's blood sample, and she received a blood transfusion of a different type from her own. The error resulted in her death. Plaintiff sued the hospital in his own right and as his wife's administrator for out-of-pocket expenses, loss of his wife's services, and for her wrongful death. The trial court held the Defendant hospital liable. *Held, affirmed*: A charitable, non-profit hospital is no longer immune from liability for injuries to patients caused by the negligence of its employees. *Parker v. Port Huron Hosp.*, 361 Mich. 1, 105 N.W.2d 1 (1960).

A charitable institution is a corporation organized for purely benevolent, charitable, religious, or educational purposes and not for financial gain.[1] The fact that a charity receives payment for its services from the beneficiaries, *i.e.*, recipients of the benefits of the charity, or makes small profits from its operations, will not affect its character as a charity so long as the money is used for charitable purposes.[2] Thus, schools, universities, and hospitals which are not operated for financial gain are charitable institutions even though a fee is charged for their services.[3] A slight majority of the jurisdic-

[1] Enell v. Baptist Hosp., 45 S.W.2d 395 (Tex. Civ. App. 1931—Galveston) *error ref.*

[2] Southern Methodist Univ. v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943); Scott v. Rice Institute, 178 S.W.2d 156 (Tex. Civ. App. 1944—Galveston) *error ref.*; Enell v. Baptist Hosp., 45 S.W.2d 395 (Tex. Civ. App. 1931—Galveston) *error ref.*

[3] City of Dallas v. Smith, 130 Tex. 225, 107 S.W.2d 872 (1937); Baylor Univ. v. Boyd, 18 S.W.2d 700 (Tex. Civ. App. 1929—Dallas) *no writ hist.*; Scott v. All Saints Hosp., 203 S.W. 146 (Tex. Civ. App. 1918—Ft. Worth) *no writ hist.*

tions in the United States grant a charitable institution immunity from liability for its employees' negligent acts which result in injuries to beneficiaries of its services.[4] This charitable immunity doctrine is based on old English cases which have since been overruled.[5] The extent of the immunity conferred, however, varies among the different jurisdictions. Some states grant complete immunity,[6] while a few jurisdictions allow recovery to paying patients, as distinguished from non-paying patients.[7] Several states allow recovery by strangers and employees, as distinguished from beneficiaries.[8] Still others impose liability for administrative negligence, as distinguished from medical negligence.[9] Finally, some states impose liability where the assets of the charity will not be depleted by the plaintiff's recovery, *e.g.*, where the charity carries liability insurance.[10] A large minority of jurisdictions, in refusing to grant any immunity to charitable institutions, hold the charity liable under the established doctrine of *respondeat superior*.[11]

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[4] Prosser, Torts 786-87 (2d ed. 1955). For a state-by-state survey of the current status of the charitable immunity doctrine, see 36 Notre Dame Law. 93 (1960).

[5] Massachusetts, in McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432, 21 Am. Rep. 529 (1876), was the first American court to declare charities to be immune from tort liability. That court relied upon the English case, Holliday v. Vestry of the Parrish of St. Leonard, 11 C.B. (n.s.) 192, 142 Eng. Rep. 769 (1861), which followed dictum from Duncan v. Findlater, 6 Cl. & Fin. 894, 7 Eng. Rep. 934 (1839). The dictum from the *Duncan* case was overruled by Mersey Docks Trustees v. Gibbs, [1866] 1 H.L. 93. *The Holliday* case was overruled in Foreman v. Mayor of Canterbury, [1871] 6 Q.B. 214.

[6] *E.g.*, Cabbiness v. City of North Little Rock, 228 Ark. 356, 307 S.W.2d 529 (1957); Springer v. Federated Church, 71 Nev. 177, 283 P.2d 1071 (1955); Landgraver v. Emanuel Lutheran Charity Bd., 203 Ore. 489, 280 P.2d 301 (1955); Bond v. City of Pittsburgh, 368 Pa. 404, 84 A.2d 328 (1951).

[7] Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915); Lyon v. Tumwater Evangelical Free Church, 47 Wash. 2d 202, 287 P.2d 128 (1955) (immunity from non-paying beneficiaries), *limiting* Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wash. 2d 162, 260 P.2d 765 (1953). *Contra,* Penaloza v. Baptist Memorial Hosp., 304 S.W.2d 203 (Tex. Civ. App. 1957—Eastland) *error ref. n.r.e.;* St. Paul's Sanitarium v. Williamson, 164 S.W. 36 (Tex. Civ. App. 1914—Dallas) *error ref.* It might be noted here that the Texas law on this point is set out erroneously in Prosser, Torts 787 n.67 (2d ed. 1955).

[8] St. Vincent's Hosp. v. Stine, 195 Ind. 350, 144 N.E. 537 (1924); Basabo v. Salvation Army, 35 R.I. 22, 85 Atl. 120 (1912); Weston's Adm'x v. Hospital of St. Vincent of Paul, 131 Va. 587, 107 S.E. 785 (1921). Texas allows *employees* to recover but not strangers (at least where there is no administrative negligence). Southern Methodist Univ. v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943) (strangers); Hotel Dieu v. Armendarez, 210 S.W. 518 (Tex. Comm. App. 1919) (employees); Baptist Memorial Hosp. v. McTighe, 303 S.W.2d 446 (Tex. Civ. App. 1951—El Paso) *error ref. n.r.e.* (employees); Scott v. Rice Institute, 178 S.W.2d 156 (Tex. Civ. App. 1944—Galveston) *error ref.* (strangers).

[9] Southern Methodist Univ. v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943); Enell v. Baptist Hosp., 45 S.W.2d 395 (Tex. Civ. App. 1931—Galveston) *error ref.;* Baylor Univ. v. Boyd, 18 S.W.2d 700 (Tex. Civ. App. 1929—Dallas) *no writ hist.* Administrative negligence is negligence in hiring or retaining employees, or negligence in selecting or supplying safe instrumentalities. Medical negligence is negligence by an act of an employee.

[10] Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950); Howard v. South Baltimore Gen. Hosp., 191 Md. 617, 62 A.2d 574 (1948); Vanderbilt Univ. v. Henderson, 23 Tenn. App. 135, 127 S.W.2d 284 (1938).

[11] 105 N.W.2d at 13. It should be noted that Wisconsin relied on the principal case in

There are several different theories upon which the doctrine of charitable immunity is said to rest.[12] The prevailing theory of immunity, the "trust fund" theory, treats charitable assets as a trust fund which the donor intended exclusively for charitable purposes; payment of any of this fund to satisfy a tort judgment would entirely frustrate such donative intent and would dissipate the trust funds, thereby depriving the favored class or the public of the charity's benefits.[13] On the other hand, the "waiver" theory holds that a beneficiary, by accepting the charity's benefits, impliedly agrees to waive any right to bring a tort action.[14] It has also been stated that the exemption of public charities from tort liability is based upon public policy; the theory is that public policy forbids the crippling or destroying of charities established for the benefit of the public merely to compensate one or more individuals for injuries inflicted by the negligence of the corporation, its superior officers and agents, or its servants or employees. The principle is that in organized society the rights of the individual must, in some instances, suffer injury without compensation and be subordinated to the public good, so that the public will not be deprived of the benefit of the charity.[15]

Although Texas grants immunity to charitable institutions, a distinction between negligence in hiring and retaining employees or in furnishing safe instrumentalities, *i.e.*, administrative negligence, and negligence by an act of an employee, *i.e.*, medical negligence, is recognized. Liability is imposed only in the former situations, regardless of whether the plaintiff is a charity or a paying patient[16] or

abolishing immunity from paying patients. Kojis v. Doctor's Hosp., 12 Wis. 2d 367, 107 N.W.2d 131, *modified*, 107 N.W.2d 292 (1961) (makes the abolition prospective). Kentucky has also overruled the doctrine of charitable immunity; the Kentucky court discussed the principal case. Mullikin v. Jewish Hosp. Ass'n, 348 S.W.2d 930 (Ky. 1961).

[12] For an excellent and thorough discussion of the various theories, see President & Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942).

[13] Parks v. Northwestern Univ., 218 Ill. 381, 75 N.E. 991 (1905); Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910); Blatt v. George H. Nettleton Home for Aged Women, 365 Mo. 30, 275 S.W.2d 344 (1955) (holding that the doctrine of charitable immunity does not protect the funds of a charity which are received from enterprises totally unconnected with the charitable purposes and overruling the *Eads* case, *infra*, to that extent only); Dille v. St. Luke's Hosp., 355 Mo. 436, 196 S.W.2d 615 (1946) (holding that the doctrine rests on the trust fund theory and public policy); Eads v. Young Women's Christian Ass'n, 325 Mo. 577, 29 S.W.2d 701 (1930) (trust fund theory).

[14] Wilcox v. Idaho Falls Latter Day Saints Hosp., 59 Idaho 350, 82 P.2d 849 (1938), *overruled*, Wheat v. Idaho Falls Latter Day Saints Hosp., 78 Idaho 60, 297 P.2d 1041 (1956) (charity liable to paying patients for medical negligence, but theory is the same); St. Vincent's Hosp. v. Stine, 195 Ind. 350, 144 N.E. 537 (1924).

[15] Vermillion v. Woman's College of Due West, 104 S.C. 197, 88 S.E. 649 (1916).

[16] Southern Methodist Univ. v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943); Enell v. Baptist Hosp., 45 S.W.2d 395 (Tex. Civ. App. 1931—Galveston) *error ref.*; Baylor Univ. v. Boyd, 18 S.W.2d 700 (Tex. Civ. App. 1929—Dallas) *no writ hist.* A charitable institution may also be liable for negligence of its officers or managing directors

whether he was a beneficiary of the trust or a stranger to it.[17] Thus, Texas has adopted a modified "trust fund" theory. In Michigan, prior to the instant case, the "trust fund" theory of charitable immunity was followed.[18] Liability was imposed only when the charitable institution was negligent in the selection and retention of its employees or the instrumentalities used by it in carrying on and furthering its benevolent purposes.[19] Also, Michigan made no distinction between paying and non-paying patients.[20]

The court in the instant case overruled previous Michigan cases and held that a charitable, non-profit hospital should no longer be held immune from tort liability to patients for injuries caused by the negligence of its employees. This appears to be the new rule for all charitable institutions in Michigan. The charitable immunity exception has thus been removed and the doctrine of *respondeat superior* now applies to all subsequent causes of action against charities. The court based its decision primarily on *President & Directors of Georgetown College v. Hughes*[21] where the court, Justice Rutledge writing, expertly and systematically rejected the theories asserted in favor of the charitable immunity doctrine. With respect to the "trust fund" theory, that court stated that no statistical evidence had been presented to show that the mortality or crippling of charities was greater in states which did not grant immunity than in states which did have total or partial immunity. Furthermore, that court pointed out that insurance is now available to protect against possible dissipation of the trust funds. Another factor considered by the court to warrant the abolition of charitable immunity was the cost to the victim (normally an indigent in charitable hospitals) of bearing the full burden of his hospital injury. The "waiver" theory was also rejected as being patently unfounded, since one cannot be held to waive something voluntarily when he has no choice in the matter, *e.g.*, when he is unconscious upon entering the hospital. The principal case is significant in that the court rejected the contention that a change in the long-established doctrine of charitable immunity was a proper subject of the legislature only.[22] The court

in selecting or supplying safe instrumentalities. Baptist Memorial Hosp. v. McTighe, 303 S.W.2d 446 (Tex. Civ. App. 1951—El Paso) *error ref. n.r.e.*

[17] Southern Methodist Univ. v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943).

[18] Downes v. Harper Hosp., 101 Mich. 555, 60 N.W. 42 (1894) (overruled by the principal case).

[19] DeGroot v. Edison Institute, 306 Mich. 339, 10 N.W.2d 907 (1943) (overruled by the principal case).

[20] Greatrex v. Evangelical Deaconess Hosp., 261 Mich. 327, 246 N.W. 137 (1933) (overruled by the principal case).

[21] 130 F.2d 810 (D.C. Cir. 1942).

[22] A majority of the courts, including Michigan, have said that any change in the

reasoned that the exception to the common law doctrine of *respondeat superior* was not made part of the law of Michigan by the legislature but by the court, and similarly, it could be and would be removed by the court when principles of law, logic, and justice demanded it.

The court in the instant case seems unquestionably to have been correct in holding that although the various immunity theories may have been justified when charities were small and few, they are no longer justified in view of the tremendous growth of charitable institutions and the availability of liability insurance. Time and circumstances have brought about the necessity of abolishing the immunity of charitable institutions from tort liability. Although it may have been good public policy in the past to grant the immunity, it is now good public policy to discontinue it as an exception to the rule of *respondeat superior*. The first step in abolishing the immunity rule was the holding of some courts that a paying patient was entitled to recover. Certainly it is even more justifiable to abolish the immunity as to non-paying patients, for they are the least able to bear the burden.

In Texas the doctrine of charitable immunity, subject to certain limitations, is firmly entrenched.[23] Texas courts have held that the existence of liability insurance, which removes any fears of "trust fund" dissipation, will not affect the immunity.[24] Moreover, the

charitable immunity rule is a matter of policy to be determined by the legislature. DeGroot v. Edison Institute, 306 Mich. 339, 10 N.W.2d 907 (1943) (overruled by the principal case); Landgraver v. Emanuel Lutheran Charity Bd., 203 Ore. 489, 280 P.2d 301 (1955). The principal case was relied on in abolishing immunity to paying patients in Wisconsin in Kojis v. Doctor's Hosp., 12 Wis. 2d 367, 107 N.W.2d 131, *modified*, 107 N.W.2d 292 (1961). However, the Supreme Court of Pennsylvania, on June 27, 1961, stated that abolition of the doctrine of charitable immunity should be "prospectively by legislation and not retroactively by judicial ukase." Michael v. Hahnemann Medical College & Hosp., 404 Pa. 424, 172 A.2d 769 (1961). The Pennsylvania court could not agree to overruling the charitable immunity prospectively (*i.e.*, do as the principal case did—apply it to the instant case and to all causes of action arising after the filing of the opinion overruling the charitable immunity). The Supreme Court of Arkansas on October 30, 1961, refused to overturn the doctrine of charitable immunity; the court felt bound by their prior decisions. The court based its ruling on the theory that charitable immunity from tort liability had become a rule of property in Arkansas and should not be overturned even if the court was disposed to do so. It is interesting to note that a majority of the court held that the charitable institution was not amenable for injuries on the theory that there was a breach of contract. Halton v. Sisters of Mercy of St. Joseph's Hosp., ___ Ark. ___, 351 S.W.2d 129 (1961). The Supreme Court of Missouri on December 11, 1961, refused to overturn the doctrine of charitable immunity. The Missouri court held that the existence of liability insurance made no difference. The court also stressed the Missouri legislature's failure or refusal to overrule the doctrine. Schulte v. Missionaries of La Salette Corp., 352 S.W.2d 636 (Mo. 1961).

[23] Jones v. Baylor Hosp., 284 S.W.2d 929 (Tex. Civ. App 1955—Dallas) *no writ hist.* There the court said that even if the rule ought to be changed, the court was bound to apply it under the principle of stare decisis.

[24] Baptist Memorial Hosp. v. McTighe, 303 S.W.2d 446 (Tex. Civ. App. 1951—El Paso) *error ref. n.r.e.*

Supreme Court of Texas as late as January of 1962, refused "no reversible error" an application for writ of error in a case where the petitioner sought to have the doctrine of charitable immunity overturned.[25] Although a refusal of an application for writ of error "no reversible error" means only that the supreme court agrees that the correct result has been reached by the court of civil appeals, it would seem to this writer that since the question of charitable immunity was put squarely and properly before the court, its refusal to grant the application under the facts of the case constituted acquiescence in the immunity doctrine. Thus, it seems certain that legislative enactment will be necessary to change the present Texas rule. It might be observed that from the very latest cases[26] on this question, it appears that the recent trend of other jurisdictions toward abolition of the charitable immunity doctrine may be grinding to an unfortunate halt.

Todd H. Overton

[25] Goelz v. J. K. & Susie L. Wadley Research Institute, 350 S.W.2d 573 (Tex. Civ. App. 1961—Dallas) *error ref. n.r.e.* Motion for rehearing was overruled on January 29, 1962.

[26] See cases cited note 22 *supra.*