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Recent Developments

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RECENT DEVELOPMENTS

Equity — Specific Performance — Certainty as to Terms

Purchaser sued Vendor for specific performance of a contract to sell land. The contract, after describing the property to be conveyed, provided: "Price to be $10,000. Buyer agrees to pay $2,000 cash; balance at six per cent interest. Payments to be agreed upon by seller and buyer. We have agreed as follows: fifteen annual installments as balance." *Held:* A contract for the sale of land which provides: (1) for deferred payment of the balance of purchase price in fifteen annual installments but not the amount of the several installments and (2) for six per cent interest on the deferred balance but not when the interest is payable or in what amounts; is too indefinite and uncertain for specific performance. *Bryant v. Clark*, —Tex.—, 358 S.W.2d 614 (1962).

Specific performance of a contract is an equitable remedy[1] which compels a defaulting party to fulfill the contractual requirements.[2] The relief of specific performance is not a matter of absolute right,[3] but rests in the sound discretion of the court. It is to be determined from all the facts and circumstances.[4] The basis for the remedy is that by compelling the parties to do the thing they have agreed to, more complete and perfect justice can be attained than by giving damages for a breach of the contract.[5]

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[1] Sterback v. Robinson, 148 Md. 24, 128 Atl. 894 (1925); Keys v. Hopper, 270 Mich. 504, 259 N.W. 319 (1935); Gotthelf v. Stranahan, 138 N.Y. 345, 34 N.E. 286 (1893); Lone Star Gas Co. v. Municipal Gas Co., 117 Tex. 331, 3 S.W.2d 790 (1928); Restatement, Contracts § 326(c) (1932).

[2] Nunnally v. Holt, 1 S.W.2d 933 (Tex. Civ. App. 1927); Wilson v. Beaty, 211 S.W. 524 (Tex. Civ. App. 1919) *error ref.*; 5 Pomeroy, Equity Jurisprudence § 1401 (5th ed. 1941). Equity supplies a means of compelling a party to do that which he ought to have done without the coercive power of the court. Guadalupe County Bd. of Educ. v. O'Bannon, 26 N.M. 606, 195 Pac. 801 (1921); Edwards v. Tobin, 132 Ore. 30, 284 Pac. 562 (1930); Lone Star Gas Co. v. Municipal Gas Co., *supra* note 1; Restatement, Contracts § 326(c) (1932).

[3] Wesley v. Eells, 177 U.S. 370 (1900); McCabe v. Matthews, 155 U.S. 550 (1895); 49 Am. Jur. *Specific Performance* § 8 (1943).

[4] Haffner v. Dobrinski, 215 U.S. 446 (1910); Hennessay v. Woolworth, 128 U.S. 438 (1888).

[5] Bates v. Smith, 48 S.D. 602, 205 N.W. 661 (1925); Stevens v. Palmour, 269 S.W. 1057 (Tex. Civ. App. 1925).

The most important aspect of land, insofar as the equitable remedy of specific performance is concerned, is that no piece of land has its counterpart anywhere else, and it is impossible of duplication. As a result, contracts for the sale of land are the subject matter most commonly involved in actions for specific performance. A presumption has arisen that only the acquisition of the exact land bargained for will give the party complete relief. Therefore, as a general rule, equity courts will specifically enforce contracts for the sale of land, and it is as much a duty of the court to decree specific performance as it is to give damages for its breach. Bennett v. Copeland, 149 Tex. 474, 235 S.W.2d 605 (1951); Simpson v. Green, 231 S.W. 375 (Tex. Com. App. 1921) *adopted;* Restatement, Contracts § 360 (1932).

Equity requires for specific enforcement of a contract that it be complete, definite, and certain in all of its essential terms.[6] A court of equity will not furnish terms that may be contrary to the intentions of the parties, thereby creating a new contract.[7] Two of the tests used for ascertaining certainty are: (1) the terms must be so clear that the court can determine what the contract is and can require that the specific thing agreed to be done shall be done[8] and (2) the intentions of the parties must be ascertainable to a "reasonable degree of certainty."[9] Absolute certainty is not required.[10]

The certainty required is often greater for specific performance than for the legal remedy of damages.[11] The reason given is that the action for damages is founded upon mere nonperformance, which can be established without determining all of the terms of the agreement with exactitude.[12] In contrast, the equity court must frame a decree which accurately states what the defendant is to do.[13] However, the soundness of the distinction has been challenged. Critics point out that creation of the dichotomy results in the absurdity of having contracts bind defendants to do something in general, but nothing in particular.[14] Also, even in an action at law, the jury still must determine the exact terms of the contract to ascertain whether a breach has occurred, and if so, to determine what the proper damages are.

[6] Preston v. Preston, 95 U.S. 200 (1877); Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146 (1899); Daubmyre v. Hunter, 86 Fla. 326, 98 So. 69 (1923); Hume v. Bogle, 204 S.W. 673 (Tex. Civ. App. 1918); 5 Pomeroy, Equity Jurisprudence § 1404 (5th ed. 1941); Restatement, Contracts § 370 (1932).

[7] Kearns v. Andree, 107 Conn. 181, 139 Atl. 695 (1928); Ward v. Newbold, 115 Md. 689, 81 Atl. 793 (1911); Zimmerman v. Rhoads, 226 Pa. 174, 75 Atl. 207 (1910); Wilson v. Beaty, 211 S.W. 524 (Tex. Civ. App. 1919) *error ref.*; Hargreaves v. Burton, 59 Utah 575, 206 Pac. 262 (1922).

[8] Emery Memorial v. Cincinnatti Underwriters Agency Co., 88 F.2d 506 (6th Cir. 1937), *cert. denied*, 302 U.S. 696 (1937); Russell v. Agar, 121 Cal. 396, 53 Pac. 926 (1898); Thompson v. Weimer, 1 Wash. 2d 145, 95 P.2d 772 (1939); 49 Am. Jur. *Specific Performance* § 22 (1943).

[9] Price v. Stipek, 39 Mont. 426, 104 Pac. 195 (1909); United Press v. New York Press Co., 164 N.Y. 406, 58 N.E. 527 (1900); Central Mortgage Co. v. Michigan State Life Ins. Co., 43 Okla. 33, 143 Pac. 175 (1914).

[10] Long v. Reiss, 290 Ky. 198, 160 S.W.2d 668 (1942); Trotter v. Lewis, 185 Md. 528, 45 A.2d 329 (1946). In Jackson v. Rogers, 111 S.C. 49, 96 S.E. 692 (1918), the court states: "The law does not require mathematical or absolute certainty in the terms of a contract to make it enforceable. The written document must express clearly the intentions of the parties, but there is no rule of law which requires it to be a work of art."

[11] Preston v. Preston, 95 U.S. 200 (1877); Stay v. Tennille, 159 Ala. 514, 49 So. 238 (1909); Hotopp v. Adair, 144 Ark. 69, 223 S.W. 393 (1920); Maloy v. Boyett, 53 Fla. 956, 43 So. 243 (1907); Young v. Schwint, 108 Kan. 425, 195 Pac. 614 (1921); Tanner v. Imle, 253 S.W. 665 (Tex. Civ. App. 1923) *error dism.*; Restatement, Contracts § 370 (1932).

[12] *Ibid.*

[13] *Ibid.*

[14] Walsh, Equity 329, 330 (1930); Pound, *Progress Of The Law—Equity*, 33 Harv. L. Rev. 420 (1920).

In contrast to the requirement of certainty is the policy of the law against the destruction of contracts merely because of vagueness. Ordinarily, the courts will specifically enforce a contract couched in general terms when the details can be supplied by implication of law.[15]

In the principal case, the court held that the contract in question was too indefinite and uncertain to allow specific performance.[16] The court quoted from Pomeroy's treatise on specific performance[17] to the effect that specific performance demands a clear, definite, and precise understanding of all the terms.[18] However, the court failed to mention a subsequent section of the same treatise which states that "subordinate details can be supplied or inferred by the law."[19] A similar statement from the Restatement of the Law of Contracts[20] requiring reasonable certainty of terms was relied upon by the court.[21] However, a comment of the Restatement under the section cited reads as follows:

> Expressions that at first appear incomplete or uncertain are often readily made clear and plain by the aid of *common usage* and reasonable implications of fact. *Apparent difficulties of enforcement due to uncertainty of expression may disappear in the light of courageous common sense.*[22] (Emphasis added.)

By the court's emphasis and omissions in the above cited authorities, a fundamental analytical error is apparent. Although it is true that to be specifically enforced a contract must be complete, definite,

[15] Everett v. Dilley, 39 Kan. 73, 17 Pac. 661 (1888); Spiritusfabriek Astra v. Sugar Prods. Co., 221 N.Y. 581, 116 N.E. 1077 (1917); O'Herin v. Neal, 56 S.W.2d 1105 (Tex. Civ. App. 1932) *error ref.*; Pomeroy, Specific Performance § 161 (3d ed. 1926).

[16] 358 S.W.2d at 615. The court stated the general rule of equity that a contract to be specifically enforceable must be definite, certain, and complete in all its material terms and cited for authority a number of treatises and cases. 358 S.W.2d at 616-17.

[17] Pomeroy, Specific Performance § 159 (3rd ed. 1926).

[18] 358 S.W.2d at 616.

[19] Where the terms which the parties have expressed in their contract are general, and the subordinate details can be supplied or inferred by the law, the agreement will thereby be rendered sufficiently certain; the vagueness and obscurity which might result from the generality of the express provisions are obviated by the legal implications. Pomeroy, Specific Performance § 161, at 410 (3d ed. 1926). See also 4 Pomeroy, Equity Jurisprudence § 1405 (5th ed. 1941).

[20] Restatement, Contracts § 370 (1932). The court also relied upon Wilson v. Fisher, 144 Tex. 53, 188 S.W.2d 150 (1945), and Williams v. Manchester Bldg. Supply, 213 Ga. 99, 97 S.E.2d 129 (1957), as authority for the general rule. 358 S.W.2d at 616-17. However, the facts in both cases are so different from those in the instant case that they add nothing by way of explanation.

[21] 358 S.W.2d at 616.

[22] Restatement, Contracts § 370, at 674 (1932). This quotation is also contained in the dissenting opinion of Justice Hamilton. 358 S.W.2d at 619.

and certain; absolute certainty is not required.[23] Reasonable certainty is sufficient.[24]

The court also seemingly overlooked the important corollary to the general rule, *i.e.*, expressions that at first appear incomplete or uncertain are often readily made clear and plain by the aid of (1) common usage,[25] (2) reasonable implications of law[26] and fact,[27] and (3) common sense.[28] A Texas court of appeals, in *Burger v. Ray*, stated: "A contract not only includes the things said or written, but also terms and matters which, though not actually expressed, are implied by law, and these are as binding as those terms actually written or spoken."[29]

The court in the instant case struck down the provision of the contract which related to the amount of the installments. The contract read: "15 annual installments as balance." The court concluded that this provision was indefinite because it contained no provision as to the amount of such installments. Purchaser's contention that the fifteen annual installments were to be paid in equal amounts was rejected because the court said that the parties could have provided otherwise. However, there was no mention of a contrary intent in the contract. Justice Hamilton, in his dissenting opinion, stated:[30]

> The very fact that the contract contained no such provisions is the reason why the court could conclude with reasonable certainty that the parties intended that the deferred balance would be payable in fifteen equal annual installments. It is the absence of the suppositions proposed by the court that compels this construction of the contract. The court by reaching this construction would not be making a new contract for the parties, but would merely be enforcing the obvious intent of the parties.

[23] State Highway Comm'n v. Ames, 143 Kan. 847, 57 P.2d 17 (1936); Long v. Reiss, 290 Ky. 198, 160 S.W.2d 668 (1942); Trotter v. Lewis, 185 Md. 528, 45 A.2d 329 (1946); Kleinschmidt v. Central Trust Co., 103 Ore. 124, 203 Pac. 598 (1922); Langley v. Norris, 141 Tex. 405, 173 S.W.2d 454 (1943); Stevens v. Palmour, 269 S.W. 1057 (Tex. Civ. App. 1925).

[24] Micheli v. Taylor, 114 Colo. 258, 159 P.2d 912 (1945); Steele v. Nelson, 139 Kan. 559, 32 P.2d 253 (1934); Stinchcomb v. Stinchcomb, 207 Okla. 59, 246 P.2d 727 (1952); Langley v. Norris, 141 Tex. 405, 173 S.W.2d 454 (1943); Wilson v. Beaty, 211 S.W. 524 (Tex. Civ. App. 1919) *error ref.*; Ellis v. Wadleigh, 27 Wash. 2d 941, 182 P.2d 49 (1947). A contract should be sufficiently definite so as reasonably to define the rights of the respective parties. O'Herin v. Neal, 56 S.W.2d 1105 (Tex. Civ. App. 1932) *error ref.*

[25] Wagner v. Eustathiw, 169 Cal. 663, 147 Pac. 561 (1915); Restatement, Contracts § 370 (1932).

[26] Burger v. Ray, 239 S.W. 257 (Tex. Civ. App. 1922) *error dism.*

[27] Restatement, Contracts § 370 (1932).

[28] *Ibid.*

[29] 239 S.W. 257, 259 (1922). See also Shealy v. Edwards, 73 Ala. 175 (1882); Bowser v. Marks, 96 Ark. 113, 131 S.W. 334 (1910); Bird v. Couchois, 214 Mich. 607, 183 N.W. 36 (1921).

[30] 358 S.W.2d at 617. J. Smith concurred in the dissent.

The construction urged by Purchaser did not call for an abuse of discretion. In the words of Roscoe Pound:[31]

> If the courts ought not to be wiser than the parties and make their contracts over for them, they [the court] ought not to conjure up objections that blind them to what the parties have agreed to and thus defeat fair business transactions.

Wilson v. Beaty,[32] a leading case in Texas on the subject of specific performance upon which Purchaser strongly relied, was distinguished by the court. The contract, in *Wilson*, stated that the purchaser agreed to execute notes payable on or before the fifteenth day of December of each year with the option of paying them at anytime not later than five years from the date of their execution. The number of notes was not specified in the *Wilson* contract; the court stated that this was immaterial and would create no uncertainty because the purchaser had the option of paying all or any part of the contract at any time before the end of the five year term.[33]

The court overlooked an important aspect of the *Wilson* case. Although the court in *Wilson* stated that a contract for the sale of land could not be specifically enforced when there was no certainty as to the time of payments of the purchase money, they later supplemented this statement, in *dictum*, by approving of the granting of specific performance in a situation where the exact *number* of payments, the exact *sum* of each payment, and the exact *date* each was due were not named in the contract.[34] The court in *Wilson* concluded that the granting of specific performance in such a situation "seems reasonable and full of common sense and justice, which should be decisive in every case."[35]

The court, in the principal case, also struck down the interest provision for being too indefinite and uncertain. The interest provision stated: "balance at six per cent interest." The court concluded that uncertainty existed because it was not clear when the interest was to be paid,[36] citing *Harter v. Morris*[37] and *Goode v. Westside Developers, Inc.*[38] as authority.

In *Harter*, an Indiana case, the contract provided for six per cent interest and for the "usual prepayment privileges." The Indiana court refused to grant specific performance because it could not

[31] Pound, *op. cit. supra* note 14, at 435.
[32] 211 S.W. 524 (Tex. Civ. App. 1919) *error ref.*
[33] 358 S.W.2d at 616.
[34] 211 S.W. at 528.
[35] *Ibid.*
[36] 358 S.W.2d at 617.
[37] 72 Ind. App. 189, 123 N.E. 23 (1919).
[38] 258 S.W.2d 844 (Tex. Civ. App. 1953) *error ref. n.r.e.*

ascertain what was meant by "usual prepayment privileges." No such vague allusion was present in the instant case.

The *Goode* case was the only Texas case cited by the court as authority on the interest question. But interest was nowhere mentioned in that case. However, it is interesting to note the three cases cited by the *Goode* court, *viz.*, *Hume v. Bogle*,[39] *Bean v. Holmes*,[40] and *Elliott v. Brooks*.[41]

In *Hume*, the contract provided for seven per cent interest to be agreed upon later. In *Bean*, the contract omitted any reference to interest. And, in *Elliott*, the entire "contract" consisted of the following two statements made by the vendor: (1) "I would take $30 for the place;" and (2) "I believe I will let you sell the place at $30 *cash*."

Although none of the above four cases offers any help for the interest problem in the instant case, other cases do exist on the specific point. In *Ehrenstrom v. Phillips*,[42] the Delaware Chancery stated: "The omission from the agreement of the provision whether the interest was payable annually or semi-annually is not of such a serious character as to render the contract really ambiguous."[43] In *Wagner v. Eustathiw*,[44] the California Supreme Court stated:

> True it is that while it [the contract] fixes the interest at the rate of 7 per cent, there is no definite provision as to the payment of interest monthly or annually. But in such a case *custom steps in*, and it will be considered that in contemplation of the parties the interest would be paid as is customary in contracts of the kind.[45] (Emphasis added.)

The equities in the instant case were clearly with the Purchaser. He was ready and willing to execute the contract. He had caused the land to be surveyed and had deposited money in escrow to apply on the cash down payment. The vendor did not allege either in her answer or in her testimony that there was any misunderstanding, mistake, or fraud as to the terms of the contract. She merely said that she "loved her place" and did not feel that she could give it up. In short, there was a flagrant breach of the contract. In refusing to apply to the general rule of equity which requires a contract to be definite and certain in all of its terms, the corollary

[39] 204 S.W. 673 (Tex. Civ. App. 1918).
[40] 236 S.W. 120 (Tex. Civ. App. 1922) *error ref.*
[41] 184 S.W.2d 929 (Tex. Civ. App. 1944).
[42] 9 Del. Ch. 74, 77 Atl. 80 (1910).
[43] *Id.* at 84.
[44] 169 Cal. 663, 147 Pac. 561, 562 (1915).
[45] *Ibid.* See also Meyer v. Jenkins, 80 Ark. 209, 96 S.W. 991 (1906); Muller v. Cooper, 165 Ga. 439, 141 S.E. 300 (1928); Caplan v. Buckner, 123 Md. 590, 91 Atl. 481 (1914); Inglis v. Fohey, 136 Wis. 28, 116 N.W. 857 (1908); Annot., 60 A.L.R.2d § 7, at 276 (1958).

to that rule, *viz.*, that expressions which at first appear incomplete or uncertain are often readily made clear and plain by the aid of (1) common usage, (2) reasonable implications of law and fact, and (3) common sense, the court reached a conclusion which was neither compelled nor justified by the facts.

William F. Russell

Federal Estate Tax—Deductions in Community Property States—Funeral Expenses, Administration Expenses, and Claims Against the State

Testator died domiciled in Texas owning community and separate property. His will was probated in Texas and presented Widow with an election.[1] She could either: (1) *not take* under the will and retain her vested one-half share of the community property or (2) *take* under the will and effect Testator's disposition of her half share of the community.[2] The will provided that if Widow elected to take under the will, the executor was to pay out of Testator's half of the community (a) "all and not merely one-half"[3] of the funeral expenses, (b) administration expenses, and (c) "all debts owing by [Testator] whether community or separate."[4] There was also a provision that if Widow elected not to take under the will, then half of the funeral expenses, administration expenses, and debts "shall be charged to the one-half share and portion of the community estate . . . vested in [Widow]."[5] Widow elected to take under the will. The executor deducted all of the funeral expenses,[6] administration expenses,[7] and debts[8] to determine the taxable estate in the federal estate tax return. The Commissioner determined a deficiency by disallowing half of the deduction taken for commu-

[1] For an excellent discussion of the widow's election see Comment, *The Widow's Election—A Study in Three Parts*, 15 Sw. L.J. 85 (1961).

[2] The wife is not put to an election unless the husband attempts to make a disposition of his wife's property rights. See Comment, *supra* note 1, at 135.

[3] The quotation from the will appears in the district court's opinion. 189 F. Supp. 830, 832 (N.D. Tex. 1960).

[4] *Ibid.*

[5] *Id.* at 833. Even without such a provision, if Widow had elected not to take under the will, her half of the community property would have been so charged.

[6] The funeral expenses totaled $4,696.70. Brief for Taxpayer, p. 13.

[7] The total amount of administration expenses was $4,073.74.

[8] The debts, which were all community, totaled $32,367.74. Included in this amount was $23,701.34 due for 1951 income taxes and interest thereon of $1,955.33. The government did not distinguish between debts imposed by law and those founded on contract. The court treated all debts as imposed by law.

nity debts and by apportioning the administration expenses.[9] The executor paid the deficiency and sued for an alleged overpayment. The district court sustained the disallowance.[10] *Held; reversed (2-1):*[11] Debts imposed by law and funeral and administration expenses are deductible in full when a testator's will provides for full payment out of his estate. *United States v. Stapf,* 309 F.2d 592 (5th Cir. 1962), *cert. granted,* 372 U. S. 928 (1963).[12]

The federal estate tax[13] has had a continuous history since the Revenue Act of 1916.[14] Its constitutional validity has been upheld because it is an indirect tax not requiring apportionment.[15] The basic structure of the tax has been unchanged since the first enactment in 1916;[16] that is, gross estate[17] minus deductions and exemptions determines the taxable estate[18] with the tax imposed on the transfer of the taxable estate.[19]

The *Stapf* case involved section 812 of the 1939 Code, which allows deductions from the gross estate of (1) funeral expenses, (2) administration expenses, and (3) claims against the estate that "are allowed by the laws of the jurisdiction . . . under which the

[9] The Commissioner determined that 65% of the administration expenses should be allocated to and deducted from Testator's gross estate. The remaining 35% was allocated to Widow's one-half of the community. The Commissioner allowed the deduction for the full amount of the funeral expenses.

[10] 189 F. Supp. 830 (N.D. Tex. 1960).

[11] Justice Brown joined in Justice Bell's majority opinion. Judge Wisdom filed a vigorous dissent.

[12] The case was decided under the Internal Revenue Code of 1939 and before the Texas Probate Code became effective on January 1, 1954. Tex. Prob. Code Ann. § 43S. However, apparently none of the changes in either the Internal Revenue Code of 1954 or in the Texas Probate Code would alter the result.

The marital deduction, Int. Rev. Code of 1939, § 812(e); Int. Rev. Code of 1954, § 2056, which was also involved, will not be discussed in this Note. The general topic together with a discussion of the district court's opinion, which was affirmed by the Fifth Circuit, is discussed in Comment, *supra* note 1, at 138-41.

[13] Int. Rev. Code of 1954, §§ 2001-56.

[14] Revenue Act of 1916, ch. 463, §§ 200-212, 39 Stat. 777.

[15] New York Trust Co. v. Eisner, 256 U.S. 345 (1921). See also Lowndes, *Current Constitutional Problems in Federal Taxation,* 4 Vand. L. Rev. 469 (1951); Lowndes, *The Constitutionality of the Federal Estate Tax,* 20 Va. L. Rev. 141 (1933).

[16] For a brief history of the government's early ventures into the field of death taxes before the Revenue Act of 1916, see Lowndes & Kramer, Federal Estate and Gift Taxes 7 (1956). An historical discussion since 1916 appears in 1 Mertens, Law of Federal Gift and Estate Taxation §§ 201-03 (1959).

[17] Revenue Act of 1916, ch. 463, § 202, 39 Stat. 777. The current sections to determine the value of the gross estate are §§ 2031-44, Int. Rev. Code of 1954.

[18] Revenue Act of 1916, ch. 463, § 203, 39 Stat. 778. The current sections allowing exemptions and deductions to determine the value of the taxable estate are §§ 2051-56, Int. Rev. Code of 1954. Prior to the 1954 Code, the term "net estate" was used instead of "taxable estate," without substantial difference in meaning.

[19] Revenue Act of 1916, ch. 463, § 201, 39 Stat. 777. The current corresponding section is § 2001, Int. Rev. Code of 1954. The most significant addition to the basic estate tax structure was the allowance of credits for state death taxes. See Revenue Act of 1924, ch. 234, § 301, 43 Stat. 303. The credits are now allowed in §§ 2011-15, Int. Rev. Code of 1954.

estate is being administered."[20] The quoted phrase, which has been in the estate tax provision since 1916,[21] makes the deductibility of a particular item depend upon state law. Texas law relevant to each of the three deductible items should be considered separately as suggested by Judge Wisdom in his dissent.[22]

I. Texas Law in Absence of Will Provision

A. *Funeral Expenses*

The deduction for funeral expenses was not in issue in the *Stapf* case[23] because the full amount was allowed upon the authority of *Blair v. Stewart*, decided by the Fifth Circuit in 1931.[24] However, a careful reading of the cases cited in *Stewart* reveals that the Fifth Circuit misconstrued Texas law.[25] Clearly, in Texas funeral ex-

[20] Section 812 also provides "The deduction herein allowed in the case of claims against the estate . . . shall, when founded upon a promise or agreement, be limited to the extent that they are contracted bona fide for an adequate and full consideration." One contention of the government was that there was no adequate and full consideration for more than half of the community debts "for in the case of the community debts founded upon agreements, one-half of the consideration is attributable to the wife, and the other one-half to the husband." Brief for Government (appellee), p. 15-16. The court did not reach the question of consideration because "the debts here were in the main for income taxes . . . debts imposed by law. The contention of the government would be well taken if the debts were founded on contract. . . . [H]owever . . . none are pointed out as arising under contract." 309 F.2d at 596. The court thus limited its holding regarding the deductibility of claims against the estate, which the testator assumes in his will, to claims imposed by law.

[21] Revenue Act of 1916, ch. 463, § 203, 39 Stat. 778.

[22] Judge Wisdom criticized the majority for failing to differentiate between funeral expenses, administration expenses, and debts because each "is a distinct category controlled by its own rationale in determining whether it is chargeable to the decedent's estate or to the community." 309 F.2d at 605.

[23] 309 F.2d at 594 n.3.

[24] 49 F.2d 257 (5th Cir.), *cert. denied*, 284 U.S. 658 (1931). The Fifth Circuit, in *Stewart*, held that all funeral expenses are deductible from the decedent's half of the community property. This holding was partially based upon the court's finding that "[T]he administrator of an estate has no authority to administer any estate except that of the decedent and therefore cannot administer on the behalf of the community property that belongs to the surviving spouse." 49 F.2d at 259. This finding is erroneous. See text accompanying note 28 *infra*. The Fifth Circuit, in *Stewart*, cited Gilroy v. Richards, 63 S.W. 664 (Tex. Civ. App. 1901) and Goldberg v. Zellner, 235 S.W. 870 (Tex. Comm. App. 1921), for holding that community and not separate property is primarily chargeable with funeral expenses. However, the court admitted that it was not clear from the *Gilroy* opinion whether the entire community or only the decedent's share was liable. But, according to the court, any doubt was set to rest by Richardson v. McCloskey, 276 S.W. 680 (Tex. Comm. App. 1925), "where it was held that funeral expenses were chargeable against 'the estate.' The only estate there being administered was the interest of the decedent in community property. . . ." Therefore, according to the court, funeral expenses must be chargeable to the decedent's one-half interest in the community property only. 49 F.2d at 259.

[25] Richardson v. McCloskey, 276 S.W. 680 (Tex. Comm. App. 1925), upon which the *Stewart* court relied so heavily, does not support its holding. In *Richardson*, both the husband and wife were deceased, the wife survived by three years. The dispute was between legatees and devissees of both. One issue concerned whether the husband's tombstone and curbing around his cemetery lot were funeral expenses. The lower court held the two items were not funeral expenses and the wife had contracted to be individually liable for their payment. The commission of appeals reversed, stating: "Indeed, the case of Goldberg v.

penses of a deceased spouse are primarily chargeable to the entire community estate and are payable prior to partition.[26] Therefore, for federal taxation of Texas estates only one-half of the funeral expenses should be allowed as a deduction. Notwithstanding Texas law, after the *Stewart* decision "it has been the uniform practice of examining revenue agents in Texas to allow all of the decedent's funeral expenses . . . as a deduction. . . ."[27]

B. *Administration Expenses*

Under Texas law, an executor or administrator may or may not administer the entire community estate, depending upon a number of factors.[28] But, for purposes of the estate tax deduction, the circumstances under which the entire community estate or only a portion thereof is administered are unimportant. What is important is the liability for the administration expenses. In Texas, when the entire community estate is administered, the entire community is liable for administration expenses.[29] Also, there is authority for apportionment of the administration expenses between the deceased's separate property and the community.[30] The district court in the principal case allowed a deduction from Testator's gross estate based

Zellner [*supra* note 24] . . . is itself authority for the holding that the community estate is primarily liable for such expense in the absence of a contract to the contrary." 276 S.W. at 684. A subsequent phrase, which was the one relied upon in the *Stewart* case, *supra* note 24, reads as follows: "[F]uneral expenses would include a tombstone . . . an expenditure for such purpose should be allowed and charged against *the estate*." (Emphasis added.) 276 S.W. at 684. It is apparent from what the commission of appeals said earlier that it was referring to the community estate as a whole when it said "the estate."

[26] Pickens v. Pickens, 125 Tex. 410, 83 S.W.2d 951 (1935); Goggans v. Simmons, 319 S.W.2d 442 (Tex. Civ. App. 1958) *error ref. n.r.e.*; 18 Tex. Jur. 2d *Decedents Estates* § 256 (1960). In Norwood v. Farmers & Merchants Bank, 145 S.W.2d 1100 (Tex. Civ. App. 1940), one court of civil appeals declared:

> We think the authorities are also clear and to the effect that the item of funeral expenses is a legitimate charge against said community estate and deductible therefrom before partition. [The court then quoted extensively from Richardson v. McCloskey, *supra* note 25]. Further, if there be anything in the opinion in Blair v. Stewart, 5 Cir., 49 F.2d 257, implying a different application of the rules of law employed in the disposition of this appeal, then we are of the opinion that that authority cannot be given any effect here in view of the opinions of our Supreme Court above cited [referring to the *Richardson* and *Goldberg* cases, see notes 24, 25 *supra*] as well as those of other appellate courts of this state. 145 S.W. at 1103.

[27] Childress, *Community Property in the Administration of Estates in Texas*, in Texas Institutes: 2 Business and Family Planning 155, 178 (1957).

[28] A discussion of the circumstances under which the entire community estate, or only a portion thereof, could be administered is outside the scope of this Note. For the Texas statutes concerning the administration of community estates, see Tex. Prob. Code Ann. §§ 155-77 (1956).

[29] Morris v. Halbert, 36 Tex. 19 (1872); Norwood v. Farmers & Merchants Bank, 145 S.W.2d 1100 (Tex. Civ. App. 1940) *error ref.*; 18 Tex. Jur. 2d *Decedents Estates* § 234 (1960).

[30] Goggans v. Simmons, 319 S.W.2d 442 (Tex. Civ. App. 1958) *error ref. n.r.e.*

upon an allocation of the administration expenses.[31] The Fifth Circuit allowed deduction of the full amount. However, no Texas case has been found in which the cost of administration of the entire community was charged only to the decedent's one-half share of the community property in the absence of a will provision so directing.

When there is no such will provision and the wife dies first, the courts have allowed the deduction of all administration expenses upon the theory that only her one-half of the community is administered.[32] But, when the husband dies first, without a will provision, the courts have allowed deduction of only one-half of the administration expenses; the theory here is that the entire community property is administered.[33]

Deductibility should not be based upon which spouse dies first. As mentioned above,[34] various factors determine what part of the community property is to be administered. To arrive at the amount to be allowed as a deduction, the property actually administered must be determined. Then the expenses can be apportioned between the decedent's estate and the survivor's estate according to the time and effort expended on each. Only the expenses incurred in administering the decedent's estate would be deductible.[35]

C. *Claims Against The Estate*

The Texas Probate Code provides that "community property, except such as is exempt from forced sale, shall be charged with all valid and enforceable debts existing at the time of dissolution of marriage by death."[36] Thus, by statute the entire community property is charged with community debts.[37] Although there is no mention in the Texas Probate Code of personal liability of the husband for community debts, without question during the lifetime of both husband and wife, the husband is considered primarily liable for community debts.[38] However, "the community property of the

[31] See note 9 *supra.*

[32] Katherine Schuhmacher, 8 T.C. 453 (1947).

[33] Blackburn's Estate v. Commissioner, 180 F.2d 952 (5th Cir. 1950).

[34] See note 28 *supra* and accompanying text.

[35] See Jackson, *Community Property and Federal Taxes,* 12 Sw. L.J. 1, 37 (1958), suggesting that such apportionment would be the better rule.

[36] Tex. Prob. Code Ann. § 156 (1956). The statute in force prior to the effective date of the Probate Code, January 1, 1956, had almost the same language. Former art. 3661, Tex. Rev. Civ. Stat. (1925).

[37] There is substantial case law to the same effect. Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935); Nesbitt v. First Nat'l Bank, 108 S.W.2d 318 (Tex. Civ. App. 1937); Cockrell v. Lovejoy, 44 S.W.2d 1040 (Tex. Civ. App. 1931), *aff'd,* 63 S.W.2d 1009 (Tex. Comm. App. 1933).

[38] Grebe v. First State Bank, 136 Tex. 226, 150 S.W.2d 64 (1941); Leatherwood v. Arnold, 66 Tex. 414, 1 S.W. 173 (1886).

husband and wife shall be liable for their debts contracted during marriage, except in such cases as are specially exempted by law."[39] The personal liability of the husband, therefore, comes into existence only when there is a valid community debt, but insufficient community funds to satisfy it. In that event, the husband's separate property can be reached.[40] It is clear from the above discussion that a husband in Texas is not personally liable for debts in the true sense of the words. It is the community, under his control, which is liable.[41]

[39] Tex. Rev. Civ. Stat. Ann. art. 4620 (1960).

[40] In Clark v. First Nat'l Bank, 210 S.W. 677 (Tex. Comm. App. 1919), the court stated:

> Under our law the community property is the primary fund for the payment of community debts, and we think that, where there exists sufficient community property to pay the community debts, no resort can be had to the separate property of the deceased spouse for the purpose of paying such debts, though such property is, of course, liable if the community property should prove to be insufficient. *Id.* at 679.

The Texas courts will probably continue to refer to the husband's liability for community debts as "personal." The expression should be understood to mean that although the husband is liable for valid community debts, he may use community funds, of which one-half belongs to the wife, to extinguish these debts. In other words, the husband is entitled to pay the "personal" obligation with property belonging to one not considered personally liable. It would seem more accurate, therefore, to say that the community property (under the management of the husband) is primarily liable for community debts, with the husband secondarily liable. This proposition finds support in the cases in which the husband pays a valid community debt out of his separate property and is allowed reimbursement from the community for one-half of the amount of the debt. See Sargeant v. Sargeant, 118 Tex. 343, 15 S.W.2d 589 (1929); Martin v. McAllister, 94 Tex. 567, 63 S.W. 624 (1901). The right of reimbursement is the same when the wife advances funds to the community out of her separate funds. Dakan v. Dakan, 125 Tex. 305, 83 S.W.2d 620 (1935).

[41] The court distinguished between debts imposed by law and debts founded on contract. See note 20 *supra*. This distinction should not have been reached in the *Stapf* case. The claim, whether it be imposed by law or founded on contract, must be a *claim against the estate*. The Code itself so requires. Int. Rev. Code of 1939, § 812. Int. Rev. Code of 1954, § 2053. Texas law is clear that the wife's half of the community is charged with half of the valid community debts regardless of the source of the debt. See notes 36, 37 *supra* and accompanying text.

The distinction between debts imposed by law and those founded on contract first appeared in 1932. Revenue Act of 1932, ch. 209, § 805, 47 Stat. 280. Section 805 provided: "The deduction herein allowed in the case of claims against the estate . . . shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth." The House Ways and Means Committee Report relating to section 805 stated:

> The principal changes made are . . . (4) A clarifying provision limiting the requirements of an adequate and full consideration in money or money's worth to liabilities founded on contract. The existing law might be open to a construction under which no claim against the estate would be deductible unless supported by an "adequate and full consideration in money or money's worth," but the real intent could hardly have been to deny the deduction of liabilities imposed by law or arising out of torts, and the amendment whereby the requirement of a consideration applies only where the liability is founded on contract is designed to clear up any doubt which may be thought to exist. H. R. Rep. No. 708, 72d Cong., 1st Sess. 48 (1932).

The same language appeared in S. Rep. No. 665, 72d Cong., 1st Sess. 51 (1932).

The only distinction for estate tax purposes between a debt imposed by law and one founded on contract is that the debt imposed by law, to be deductible, does not have to

In cases without a will provision, only half of the debts have been allowed as a deduction.[42] This is unchanged by the *Stapf* case which holds that when a husband who is personally liable for debts includes such a provision in his will, then the full amount of the community debts is deductible from his gross estate.

II. The Effect of a Will Provision

The Stapf will provided for payment of all funeral expenses, administration expenses, and debts out of Testator's half of the community. The court allowed the deduction for the full amount of: (1) the funeral expenses based upon the authority of *Blair v. Stewart*,[43] (2) the administration expenses on the basis of the will provision,[44] and (3) the community debts on the basis of (a) the husband's personal liability and (b) the will provision.[45] The basis for (1) accepting the deduction for the full amount of the funeral expenses is erroneous since *Blair v. Stewart* misconstrues Texas law.[46] Because the community, not the husband, is liable for community debts, basis (3)(a) is incorrect.[47] Thus, if the deduction for the full amount of community debts and administration expenses is to be sustained, it must be based upon the will provision.

In discussing the effect of the will provision upon the deductibility of administration expenses and debts, the court stated: "Texas law makes it abundantly clear that decedent by the terms of his will could so obligate his estate and his community property."[48] However, the citations in support of this statement are will construction cases in which the parties to the suits were devisees.[49] The effect of such provisions upon the rights of creditors to enforce claims against the entire community property was not determined.

be supported by an adequate and full consideration. However, the debt imposed by law, to be deductible, must meet the ever present first requirement that it be a *claim against the estate*, for the simple reason that it is claims against the estate that are deductible. In Texas the wife's half of the community debts is not a claim against her husband's estate as contemplated by the federal estate tax.

[42] Lang's Estate v. Commissioner, 97 F.2d 867 (9th Cir. 1938).

[43] See text accompanying notes 23, 24 *supra*.

[44] 309 F.2d at 596.

[45] *Ibid.*

[46] See notes 23-27 *supra* and accompanying text.

[47] See notes 36-42 *supra* and accompanying text.

[48] 309 F.2d at 596.

[49] See Mathews v. Jones, 245 S.W.2d 974 (Tex. Civ. App. 1952); Medlin v. Medlin, 203 S.W.2d 635 (Tex. Civ. App. 1947) *error ref.*, cited by the court, 309 F.2d at 596.

The majority also relied upon Lang's Estate v. Commissioner, 97 F.2d 867 (9th Cir. 1938), as authority which recognized, but did not apply "the principle that community debts are deductible in their entirety from the community interest of the decedent in determining estate tax liability *where directed by the provisions of the will.*" (Emphasis added.) 309 F.2d at 595. The majority quoted from *Lang's Estate* as follows:

> On this issue we think the Board was correct in permitting a deduction of

The present test of the deductibility of a claim against the estate is whether under local law it is enforceable against decedent's estate.[50] Unfortunately, such a test does not designate by whom the claim must be enforceable. Clearly, however, the phrase "claims against the estate" implies claims by creditors or parties similarly situated, *e.g.*, taxing authorities or judgment creditors, to whom the deceased became personally obligated to pay during his lifetime. A better test for deductibility of claims against the estate would be one based upon the rights of creditors to enforce claims against the decedent's estate or the entire community. A community creditor is not bound by a will provision in the face of statutory law making *all* community property liable for community debts, even though devisees are bound.[51] Thus, a will provision should not affect the deductibility of a claim against the estate.[52] The assumption by the testator of the community debts for which the entire community is liable is nothing more than a legacy to the wife of an amount equal to one-half of the community debts.

The assumption by the testator of all administration expenses is likewise a legacy to the wife because her half of the community, when administered, is charged with its administration expenses. Further, it seems reasonable that only those administration expenses

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> only one-half of these communtiy obligations. Regardless of the incidents of the husband's personal liabliity for community debts during his lifetime, Section 1342, Remington's Revised Statutes, supra, as construed by the Supreme Court of Washington, requires that community debts be satisfied pro rata from that portion of the community property distributable to the wife and that portion subject to the husband's testamentary disposition. It is only by provision of a deceased husband's will that a community debt may be charged solely against his share of the community. Redelsheimer v. Zepin, 105 Wash. 199, 202, 177 P. 736; In re Hart's Estate, 150 Wash. 482, 492, 273 P. 735. 309 F.2d at 595.

However, the cases cited by *Lang's Estate* also involve the construction of wills. For a discussion of the rights of creditors, notwithstanding the will provision, see the discussion of the *Redelsheimer* case, note 51 *infra*.

[50] Commissioner v. Kelly's Estate, 84 F.2d 958 (7th Cir. 1936), *cert. denied*, 299 U.S. 603 (1936); Smyth v. Erickson, 221 F.2d 1 (9th Cir. 1955); Glascock v. Commissioner, 104 F.2d 475 (4th Cir. 1939).

[51] The State of Washington, a community property state, has a statute similar to Tex. Prob. Code Ann. § 156 (1956), note 36 *supra*, charging the entire community property with community debts. Wash. Rev. Code Ann. § 11.04.050 (1963). In a will construction case the Supreme Court of Washington said:

> It is no doubt true that the creditors of the estate may subject the whole estate to the payment of their claims. If a testator should direct that the debts should be paid from his part of the community estate, and such estate was not sufficient to pay all the debts of the community, the creditors, under the above statute might subject the whole estate to the payment of the debts. . . . Redelsheimer v. Zepin, 105 Wash. 199, 177 Pac. 736 (1919).

[52] When the testator's property is sufficient, the creditors will be paid according to the testator's directions, but since this does not affect the rights of the creditor against the entire community property, it should not affect the deductibility under federal estate tax law.

incurred in administering property included in the gross estate should be allowed as a deduction. The wife's half of the community property is not included in the deceased husband's gross estate for estate tax purposes;[53] therefore, the cost of administering her one-half of the community property should not be allowed as a deduction from the husband's gross estate.

III. Conclusion

In Texas the widow's one-half of the community is liable for one-half of the community debts; consequently, the assumption by the testator of these debts is nothing more than a legacy to the wife. As such it should not be deductible as a "claim against the estate" for purposes of federal estate tax. The Supreme Court should reverse the Fifth Circuit on this point and allow only one-half of the community debts as a deduction. The Court should declare that the deductibility of a claim against the estate is determined by the rights of creditors or taxing authorities to enforce their claims against the entire community property or only a portion thereof regardless of will provisions to the contrary.[54]

Because the funeral expenses deduction is not in issue, the Supreme Court may not express a view. However, according to Texas law, the Commissioner could rightfully allow only one-half of such expense as a deduction.

The entire community and Testator's separate property were administered in the *Stapf* case. Thus, the entire community is liable for the cost of administering the community property. That portion of the administration expenses actually expended in administering Testator's separate property and his one-half of the community property should be allowed as a deduction. The expenses in administering Widow's one-half of the community property should not be allowed.[55]

Sam N. Vilches, Jr.

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[53] Int. Rev. Code of 1954, § 2033. A similar provision appeared in the 1939 Code. See Int. Rev. Code of 1939, § 811(a). See also Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959); Pitts v. Hamrick, 228 F.2d 486 (4th Cir. 1955). Even when the widow elects to take under the will, her one-half of the community is not includable in the husband's gross estate. G.C.M. 7773, XI-2 Cum. Bull. 426 (1930); Comment, *supra* note 1, at 135.

[54] See notes 50-52 *supra* and accompanying text.

[55] See notes 34, 35 *supra* and accompanying text.

Labor Law — Jurisdiction — Pre-emption

In an original habeas corpus proceeding, Plaintiff, a union agent, sought release from a contempt order. Intentionally ignoring the trial court's temporary injunction order, Plaintiff had continued to picket employer's refinery.[1] Plantiff contended that the injunction was void, arguing that under sections 7[2] and 8[3] of the National Labor Relations Act federal legislation had pre-empted the labor activity involved, and, thus, state courts were without jurisdiction to enjoin the picketing. The Texas Supreme Court ruled that the activity was not *arguably subject* to sections 7 or 8, and upheld the trial court's jurisdiction.[4] On certiorari, the United States Supreme Court vacated the judgment in a *per curiam* opinion and *held:* Primary and exclusive jurisdiction to determine whether activity is either arguably protected or prohibited is vested in the NLRB, and state courts do not have jurisdiction over cases involving such activity in the absence of a NLRB ruling that such activity is neither protected nor prohibited, or of a compelling precedent applied to essentially undisputed facts. *Ex parte George,* 371 U.S. 72 (1962).

The doctrine of pre-emption, although not confined to the field of labor law, is a creature of comparatively recent legislative policy in the area of labor-management.[5] By virtue of the interestate com-

[1] Plaintiff's union was also enjoined by the trial court; however, the union was not found guilty of contempt.

[2] National Labor Relations Act (Wagner Act) § 7, 49 Stat. 452 (1935), 29 U.S.C. § 157 (1958), as amended, Labor-Management Relations Act (Taft-Hartley Act) § 101, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title.

[3] National Labor Relations Act (Wagner Act) §§ 8(a), (b), 49 Stat. 452 (1935), 29 U.S.C. § 158 (1958), as amended, 73 Stat. 525, 542 (1959), 29 U.S.C. § 158, (Supp. II, 1959). Sections 8(a) and 8(b) define prohibited unfair labor practices by an employer and by labor organizations or their agents respectively.

[4] ___ Tex. ___, 358 S.W.2d 590 (1962).

[5] Cases which have applied constitutional limitations to deny state court injunction power over peaceful picketing are different from those cases which invoke the doctrine of pre-emption. In Thornhill v. Alabama, 310 U.S. 88 (1940), the United States Supreme Court held that the states cannot enjoin peaceful picketing because the latter is equated to speech which cannot be abridged. U.S. Const. amend. I. The *Thornhill* type situation generally involved intrastate commerce; federal legislation was not applicable. See also Employees Union v. Angelos, 320 U.S. 293 (1943); Bakery & Pastry Drivers Union v. Wohl, 315 U.S. 704 (1942); AFL v. Swing, 312 U.S. 321 (1941); Carlson v. California, 310 U.S. 106 (1940). However, after these cases, the Court greatly restricted its original concept of picketing as a constitutional right. See, *e.g.,* Teamsters v. Vogt, Inc., 354 U.S. 284 (1957); Hughes v. Superior Court, 339 U.S. 460 (1950); Giboney v. Empire Storage

merce[6] and the supremacy clauses[7] of the Constitution, Congress can preclude state action in any matter involving interstate commerce.[8] The Court has construed the National Labor Relations Act,[9] as amended by the Taft-Hartley[10] and Landrum-Griffin Acts,[11] to mean that Congress delegated primary and exclusive jurisdiction over certain areas of labor-management conduct to the National Labor Relations Board.[12] As a result, state court jurisdiction was "pre-empted" in cases that involved activity either authorized by section 7 as "arguably protected" substantive rights,[13] or designated as "arguably prohibited" labor practices by section 8.[14]

Although not precisely defined and largely circumscribed, there remained an area of permissive state power. Mass picketing, violence, activity which threatened public peace and welfare, or conduct inimical to a substantial local policy has been recognized as labor activity not pre-empted by the act and thus subject to state jurisdiction through its police power.[15]

Initially, the "pre-emption" doctrine applied to "substantive rights" which were "protected" by section 7 and to unfair labor practices which were "prohibited" by section 8. The earliest cases concerned a conflict between state law and federal policy as embodied in the act.[16] No distinction was made between legislative and

& Ice Co., 336 U.S. 490 (1949); Milk Wagon Drivers of Chicago v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941). Furthermore, contemporaneous with this limitation of the *Thornhill* principle, the Court, nevertheless, began to restrict state action by utilization of the pre-emption doctrine. The expansive concept of interstate commerce as evidenced by NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), is the basis for, and has given impetus to, the latter doctrine. See generally Jeffers, *The Labor Injunction in Texas Courts Today*, 36 Texas L. Rev. 938 (1958).

[6] U.S. Const. art. I, § 8.

[7] U.S. Const. art. VI.

[8] "If the Congressional enactment occupies the field, its control by the Supremacy Clause supersedes or, in the current phrase, pre-empts state power." UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266, 271 (1951).

[9] National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), 29 U.S.C. §§ 151-68 (1958).

[10] Labor-Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), 29 U.S.C. §§ 141-97 (1958).

[11] Labor Management Reporting and Disclosure Act (Landrum-Griffin Act), 73 Stat. 525 (1959), 29 U.S.C. §§ 153-87 (Supp. III, 1962).

[12] See, *e.g.*, Allen-Bradley Local v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942).

[13] See, *e.g.*, Amalgamated Ass'n Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951); UAW v. O'Brien, 339 U.S. 454 (1950); Hill v. Florida, 325 U.S. 538 (1945).

[14] See, *e.g.*, Plankinton Packing Co. v. Wisconsin Employment Relations Bd., 338 U.S. 953 (1950).

[15] Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949); Allen-Bradley Local v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942).

[16] See Amalgamated Ass'n of Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951); UAW v. O'Brien, 339 U.S. 454 (1950); Plankinton Packing Co. v.

judicial pre-emption; if the activity was "protected" or "prohibited," state courts had no jurisdiction.[17]

In 1953, the Court significantly extended the pre-emption doctrine in *Garner v. Teamsters*,[18] when it held that a Pennsylvania court did not have jurisdiction to enjoin picketing even though it violated state law and was not *expressly* prohibited by the Taft-Hartley Act.[19] Reasoning that picketing, which was not expressly "prohibited" by the act, may have been *impliedly* "protected," the Court concluded that the picketing was subject to the exclusive jurisdiction of the Board.[20] Four years earlier in *UAW v. Wisconsin Employment Relations Bd.*,[21] the Court was unwilling to *imply* that the specific conduct was "protected" and thus pre-empted because Congress did not *expressly* delegate to the Board the power to permit or forbid the specific conduct involved.[22] The basic proposition advanced by the *Garner* decision was that the Board, *not the courts*, was to decide whether an activity was "protected" or "prohibited."[23] The sweep of this rule flows from the following language of Mr. Justice Jackson:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order.... A multiplicity of tribunals and a diversity of procedures are quite as

Wisconsin Employment Relations Bd., 338 U.S. 953 (1950); La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd., 336 U.S. 18 (1949); Bethlehem Steel Co. v. New York Labor Relations Bd., 330 U.S. 767 (1947); Hill v. Florida, 325 U.S. 538 (1945). *But cf.*, Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301 (1949); UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949).

[17] See cases cited in note 16 *supra*.

[18] 346 U.S. 485 (1953).

[19] The Court stated:

> The detailed prescription of a procedure for restraint of specified types of picketing would seem to *imply* that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is *implicit* in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits. *Id.* at 499-500. (Emphasis added.)

[20] *Id.* at 501.

[21] 336 U.S. 245 (1949).

[22] The activity consisted of frequent intermittent work stoppages by the union employees. "Congress made no express delegation of power to the Board to permit or forbid this particular union conduct, from which an exclusion of state power could be implied." *Id.* at 253. The Court held that this type of activity was either governable by the states or entirely ungoverned.

[23] Garner v. Teamsters, 346 U.S. 485, 489 (1953).

apt to produce incompatible or conflicting adjudications as are different rules of substantive law.[24]

Subsequent to *Garner*, in *San Diego Bldg. Trades Council v. Garmon*,[25] the Court expanded pre-emption into areas in which substantive conduct—either "protected" or "prohibited"—was *arguably* at issue. Speaking for the majority in *Garmon*, Justice Frankfurter said:

> At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. *But courts are not primary tribunals to adjudicate such issues.* It is essential to the administration of the Act that these determinations be left in the *first instance* to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a state's power and state jurisdiction too must yield to the exclusive primary competence of the Board. . . . When an activity is *arguably subject* to § 7 or § 8 of the Act, the states as well as the Federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.[26] (Emphasis added.)

From *Garmon*, the permissible area of state power was restricted to explicit determinations by the NLRB that the activity was neither "protected" nor "prohibited," and to cases of "compelling precedent applied to essentially undisputed facts."[27] Moreover, refusal of the NLRB to assert jurisdiction does not grant power to state courts to act.[28] *Garmon* made "pre-empted jurisdiction" a corollary to "arguably protected" substantive rights and "arguably prohibited" unfair labor practices. Although "arguably protected" and "arguably prohibited" were admitted to be nebulous limitations upon the doctrine,[29] mere assertion of pre-emption does not deprive state courts of jurisdiction.[30] "Arguably protected" and "arguably prohibited" have been defined as "susceptible of reasonable argument."[31] *Garmon* re-affirmed the jurisdiction of state courts over conduct "not argu-

[24] *Id.* at 490.

[25] 359 U.S. 236 (1959). This case is commonly referred to as the second *Garmon* decision. (Hereinafter referred to as *Garmon*.)

[26] *Id.* at 244-45.

[27] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959).

[28] *Id.* at 245-46. See also Goss v. Utah Labor Relations Bd., 353 U.S. 1 (1957).

[29] *Id.* at 237-44. In Machinists Ass'n v. Gonzales, 356 U.S. 617 (1958), Justice Frankfurter indicated the uncertainty of the limitations by stating that "the statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." *Id.* at 619.

[30] Retail Clerks Union v. Superior Court, 52 Cal. 2d 222, 339 P.2d 839 (1959), *cert. denied*, 361 U.S. 864 (1959).

[31] Grunwald-Marx, Inc. v. Los Angeles Joint Bd. Amalgamated Clothing Workers, 52 Cal. 2d 568, 343 P.2d 23 (1959).

ably protected" or "not arguably prohibited" and designated this type of activity as one of a "peripheral concern" to national policy.[32] However, *peripheral concern* was expressly used in the *Garmon* case[33] in reference to cases in which the state jurisdiction was based upon a compelling state interest in preserving domestic tranquility[34] and in instances in which the state remedy had no federal counterpart.[35] Furthermore, state courts have no jurisdiction to determine if "protected" or "prohibited" conduct is *arguably* at issue.[36]

Despite the far-reaching pronouncements in *Garner* and *Garmon*, state courts can exercise jurisdiction through their police powers over "arguably protected" or "arguably prohibited" conduct when violence, mass picketing, and threats to public peace are present.[37] Also, state courts have been permitted to assume jurisdiction in order to provide a remedy not otherwise available under the act. Thus, state court jurisdiction was upheld to grant damages in a common law tort action,[38] compensatory and punitive damages to an employee who was prevented from working because of picketing activity,[39] and damages to an union employee for wrongful expulsion from a union.[40] The Taft-Hartley Act provided another exception to total pre-emption by granting federal district courts, or any other court having jurisdiction over the parties, jurisdiction over various types of union activity including hot-cargo agreements, secondary boycotts, and work assignment disputes.[41] The Landrum-Griffin Act added a fourth exception to the pre-emption doctrine by granting state courts power to act if the NLRB has refused jurisdiction over disputes because the effect upon interstate commerce is not considered substantial.[42]

In the *George* case, the Texas Supreme Court assumed jurisdiction

[32] See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959).

[33] *Id.* at 243-44, 247-48.

[34] See UAW v. Russell, 356 U.S. 634 (1958); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956).

[35] United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

[36] In San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959), the Court stated: "Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations." See Teamsters v. Oliver, 358 U.S. 283 (1959); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955), for cases in which state courts relied on general restraint of trade statutes to support jurisdiction.

[37] Youngdahl v. Rainfair, 355 U.S. 131 (1957); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956); Allen-Bradley Local v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942).

[38] United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

[39] UAW v. Russell, 356 U.S. 634 (1958).

[40] Machinists Ass'n v. Gonzales, 356 U.S. 617 (1958).

[41] 61 Stat. 158 (1947), 29 U.S.C. § 187 (1958), as amended, 73 Stat. 545 (1959), 29 U.S.C. § 187 (Supp. III, 1962).

[42] 73 Stat. 541 (1959), 29 U.S.C. § 164 (Supp. III, 1962).

on the ground that Plaintiff's conduct was neither "arguably protected" nor "arguably prohibited" and, therefore, not pre-empted.[43] The Texas court denied the writ of habeas corpus because the primary *purpose* of Plaintiff's conduct, as found by the trial court, was to secure the breach of a valid and subsisting labor contract between employer and another union,[44] activity contrary to the public policy of the state as expressed in its statutes.[45] The picketing activity was ruled to be one of *peripheral concern* to national policy.

Previous interpretations of the pre-emption doctrine as expressed in *Garner* and *Garmon* indicated that the courts are not primary tribunals to determine whether the activity in question is one of peripheral concern to national policy, unless the conduct comes within an exception to the pre-emption doctrine. Although Justice Frankfurter envisioned situations in which it would be difficult to determine whether activity was governed by the act, he concluded that the "courts are not primary tribunals to adjudicate such issues."[46] In these instances, state jurisdiction "must yield to the exclusive and primary competence of the Board."[47] Ruling that the plaintiff's activity in the instant case "was conduct at least arguably protected by section 7 of the act,"[48] the United States Supreme Court followed the *Garmon* decision in vacating the judgment of the state court.[49] On remand, the plaintiff was purged of contempt.[50] Subsequent to the *George* decision, in *Local 438 Const. & Gen. Laborers Union v. Curry*,[51] the Court again reversed a state court injunction against picketing, the alleged *purpose* of which was violative of a state right-to-work law.[52] The court ruled that the conduct was at least "arguably prohibited," and thus pre-empted and reserved for exclusive and primary jurisdiction of the NLRB.

The instant case is significant not only as an illustration of the application of a reasonable policy embodied in the pre-emption doc-

[43] ___ Tex. ___, 358 S.W.2d 590, 600 (1962).
[44] *Id.* at 597.
[45] Tex. Rev. Civ. Stat. Ann. art. 5154d(4) (1962), provides, in part:
> It shall be unlawful for any person, singly or in concert with others, to engage in picketing, the purpose of which, directly or indirectly, is to secure the disregard, breach or violation of a valid subsisting labor agreement arrived at between an employer and the representatives designated . . . by the employees.

[46] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959); Garner v. Teamsters, 346 U.S. 485, 490-91 (1953).
[47] San Diego Bldg. Trades Council v. Garmon, *supra* note 46, at 245.
[48] 371 U.S. at 73 (1962).
[49] *Ibid.*
[50] *Ex parte* George, ___ Tex. ___, 364 S.W.2d 189 (1963).
[51] 371 U.S. 542 (1963).
[52] Ga. Code Ann. § 54-804 (1961).

trine,[53] but also because it reflects an apparent reluctance by Texas courts to understand or apply the sweeping effect of the *Garmon* decision. "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."[54] Conduct "arguably protected" or "arguably prohibited" offers a vague limitation on the pre-emption doctrine. However, as Chief Justice Calvert in his dissent on the motion for rehearing in the *George* case[55] points out, matters of peripheral concern are left to the states, but peripheral concern "was not intended as an escape phrase for ceding to state courts jurisdiction to control peaceful picketing."[56] To the contrary, the regulation of strikes and picketing is an area of conduct with which national policy is primarily concerned. The *purpose* of plaintiff's picketing, although the basis of the Texas court's decision, is immaterial in cases in which pre-emption applies.[57] The *conduct*—not the purpose—determines whether state courts may assume jurisdiction under an exception to the general rule. Moreover, the employer was not without a remedy.[58] As the *George* case re-affirms, state courts should exercise restraint in asserting jurisdiction in the absence of a compelling precedent based upon similar facts or upon a NLRB ruling that the section 7 or section 8 conduct is "not protected" or "not prohibited."

Donald J. Lucas

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[53] "The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959).

[54] Garner v. Teamsters, 346 U.S. 485, 490-91 (1953).

[55] ___ Tex. ___, 358 S.W.2d 590, 600 (1962).

[56] *Id.* at 601.

[57] In the instant case, the Texas Supreme Court relied heavily upon the case of Grunwald-Marx, Inc. v. Los Angeles Joint Bd. Amalgamated Clothing Workers, 52 Cal. 2d 568, 343 P.2d 23 (1959). However, the question in that case involved jurisdiction over the parties to a valid collective bargaining agreement which required arbitration in case of disagreement. The union failed to arbitrate in breach of their agreement. In the *George* case, Plaintiff had breached no agreement with the employer.

[58] If the union employees had breached their no-strike agreement with the employer, the state court had concurrent jurisdiction with federal district courts to grant damages for business losses caused by the strike. Labor-Management Relations Act (Taft-Hartley Act), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958). Teamster Union v. Lucas Flour Co., 369 U.S. 95 (1962), 17 Sw. L.J. 198 (1963); Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

Torts — Contractor's Liability for Injuries to Third Parties — Effect of Acceptance of Work

Defendant contracted with the county to move a fence line to clear the right of way for highway construction. After completion of the project, the county accepted Defendant's work and turned the right of way over to the State, whose own contractor and subcontractor began paving operations. Subsequently, Plaintiff was injured when he stepped into a hole left unmarked and unfilled after Defendant removed the fence. The jury found Defendant and the State's subcontractor negligent and rendered judgment for Plaintiff. Defendant appealed on the ground that, except for inherently dangerous structures and hidden defects, his liability to third parties terminated upon "acceptance" of his work. *Held:* An independent contractor's liability to third parties is based upon negligence and does not terminate as a matter of law with "acceptance" of the completed work by the employer. *Strakos v. Gehring*,—Tex.—, 360 S.W.2d 787 (1962).

The rule in Texas[1] has been, with certain exceptions, that an independent contractor is not liable for injuries caused to third persons after his work has been accepted by his contractee.[2] This rule is still followed in many jurisdictions[3] for a variety of reasons. One is that "acceptance" comes only after an inspection which would detect all but hidden defects. The failure of the contractee to detect obvious defects is considered intervening negligence which, as a matter of law, breaks the chain of causation between the contractor's negligence and the injury to the third party.[4] Another reason is that the contractor no longer has the right, duty, or ability to control the work.[5] In addition, there is language in some cases that adoption of a contrary rule would so burden a contractor with potential liability that prudent men would be discouraged from engaging in

[1] See Hartford v. Coolidge-Locker Co., 314 S.W.2d 445 (Tex. Civ. App. 1958); James v. Beck, 109 S.W.2d 787 (Tex. Civ. App. 1937) *error ref.*; Mansfield Constr. Co. v. Gorsline, 292 S.W. 187, *overruling motion for rehearing*, 288 S.W. 1067 (Tex. Comm. App. 1927). See also 37 Texas L. Rev. 354 (1959).

[2] The term "contractee," sometimes referred to as the employer, is used to designate the landowner or other party for whom the contractor does the work.

[3] Reynolds v. Manley, 223 Ark. 314, 265 S.W.2d 714 (1954); Del Gaudio v. Ingerson, 142 Conn. 564, 115 A.2d 665 (1955); Russell v. Arthur Whitcomb, Inc., 100 N.H. 171, 121 A.2d 781 (1956). See Annot., 58 A.L.R.2d 865, 873 (1958); Annot., 13 A.L.R.2d 191, 201 (1950), for a complete list of jurisdictions.

[4] See Ford v. Sturgis, 14 F.2d 253 (D.C. Cir. 1926); Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N.E. 1 (1919); First Presbyterian Congregation v. Smith, 163 Pa. 561, 30 Atl. 279 (1894); Curtin v. Somerset, 140 Pa. 70, 21 Atl. 244 (1891).

[5] See Reynolds v. Manley, 223 Ark. 314, 265 S.W.2d 714 (1954); Cunningham v. T. A. Gillespie Co., 241 Mass. 280, 135 N.E. 105 (1922); Russell v. Arthur Whitcomb, Inc., 100 N.H. 171, 121 A.2d 781 (1956); First Presbyterian Congregation v. Smith, *supra* note 4.

such occupations.[6] Further, since most contractor-liability cases involve realty or the structures thereon, many courts have stressed the importance of possession and control. Analogizing the situation to the landlord-tenant cases, some courts have refused to impose liability upon the contractor after he has surrendered possession and control upon which liability is based.[7]

The origin of the rule of non-liability to third parties for negligence after acceptance of the work can be traced back to *dictum* in the early case of *Winterbottom v. Wright*.[8] Although decided correctly on its pleadings,[9] certain statements by the court were subsequently construed to support the rule that without privity of contract there can be no recovery in tort.[10] Though subsequent decisions engrafted certain exceptions on the rule,[11] until the decision in *MacPherson v. Buick Motor Co.*,[12] manufacturers and contractors were liable for negligence only to those in privity of contract. The *MacPherson* case did away with the requirement of privity and imposed liability upon the manufacturer for negligence based upon the forseeability of the injury.[13] Although the rationale of *MacPherson* was broad enough to eliminate the privity requirement for contractors as well as manufacturers, Texas was one of the jurisdictions which adopted its rule as to manufacturers while refusing to apply it to contractors.[14] It is often stated that the two situations are distinguishable.[15] Arguably, it is easier to detect defects in the manu-

[6] See Reynolds v. Manley, *supra* note 5; Schott v. Ingargolia, 180 So. 462 (La. App. 1938); Curtin v. Somerset, 140 Pa. 70, 21 Atl. 244 (1891).

[7] See Ford v. Sturgis, 14 F.2d 253 (D.C. Cir. 1926) overruled on this point by Hannah v. Fletcher, 231 F.2d 469 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 989 (1956); Williams v. Edward Gillen Dock, Dredge & Constr. Co., 258 Fed. 591 (6th Cir. 1919); Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N.E. 1 (1919); Daugherty v. Herzog, 145 Ind. 255, 44 N.E. 457 (1896); First Presbyterian Congregation v. Smith, 163 Pa. 561, 30 Atl. 279 (1894).

[8] 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842). The *Winterbottom* case is discussed in Tucker & Kuhn, *The Decline of the Privity Rule in Tort Liability*, 11 Pitt. L. Rev. 236, 240 (1950). See also Feezer, *Tort Liability of Manufacturers and Vendors*, 10 Minn. L. Rev. 1 (1925).

[9] Plaintiff sought to recover for injuries claiming reliance upon a contract to which he was not a party.

[10] See Savings Bank v. Ward, 100 U.S. 195 (1879); Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865 (8th Cir. 1903); Tucker & Kuhn, *op. cit. supra* note 8, at 236.

[11] See Huset v. J. I. Case Threshing Mach. Co., *supra* note 10 (imminently dangerous articles); Thomas v. Winchester, 6 N.Y. 397 (1852) (mislabeled drugs); Heaven v. Pender, 11 Q.B.D. 503 (1883) (implied invitation); Tucker & Kuhn, *op. cit. supra* note 8, at 240-42.

[12] 217 N.Y. 382, 111 N.E. 1050 (1916). The *MacPherson* case is discussed in 13 Texas L. Rev. 514 (1935).

[13] See Prosser, Torts § 84 (2d ed. 1955).

[14] See Jones v. Beck, 109 S.W.2d 787 (Tex. Civ. App. 1937) *error ref.* (holding contractor not liable); Johnson v. Murray Co., 90 S.W.2d 920 (Tex. Civ. App. 1936) *error dism.* (holding manufacturer liable). See also 37 Texas L. Rev. 354, 355 (1959).

[15] See 62 Harv. L. Rev. 145 (1948). As stated by the court in the principal case, "few

facture of standardized goods than in the construction or design of buildings or construction projects. In addition, structures created by contractors generally outlive chattels which are manufactured. Finally, the contractor usually follows specifications set by the party letting the contract, and the latter normally inspects before accepting. The manufacturer, on the other hand, follows his own specifications and does his own inspecting.[16]

Even those jurisdictions that have a rule of non-liability for contractors have modified it by exceptions. The most notable applies to contractors of structures deemed imminently or inherently dangerous.[17] The inherently dangerous quality of the structure may arise from its very nature,[18] or from negligent construction of what would ordinarily be a safe structure.[19] For the exception to apply in the latter type situation, the defect must be hidden, *i.e.*, such that a reasonable inspection on the part of the landowner or employer would not discover it. If it could have been discovered by such inspection, the courts are likely to apply the general rule on the theory that the intervening negligence on the part of the employer breaks the chain of causation.[20] In fact, the injured third party often has the burden to show absence of knowledge of such defect on the part of the landowner or employer as an element in his suit against the contractor.[21] Liability of the contractor under this exception presupposes either actual or constructive knowledge of the dangerous condition of the structure and the ability to foresee the danger to those coming into contact with it.[22]

Another exception to the general rule of non-liability is in cases in which the contractor's act implies an invitation to third persons to come into contact with the structure.[23] Also, if the contractor's

courts have squarely considered what distinctions, if any, prevent the MacPherson rule . . . from applying to contractors." 360 S.W.2d at 792. Most of the distinctions have been made by the legal analysts, not the courts.

[16] See Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N.E. 1 (1919). *But see* Foley v. Pittsburg-Des Moines Steel Co., 363 Pa. 1, 68 A.2d 517 (1949) (stating that there is no logical distinction between chattels and structures).

[17] See Kuhr Bros., Inc. v. Spahos, 89 Ga. App. 885, 81 S.E.2d 491 (1954); Berg v. Otis Elevator Co., 64 Utah 518, 231 Pac. 832 (1924); Rousch v. Johnson, 139 W. Va. 607, 80 S.E.2d 857 (1954). See also cases collected in Annot., 58 A.L.R.2d 865, 882 (1958); Annot., 13 A.L.R.2d 191, 234 (1950).

[18] See Berg v. Otis Elevator Co., *supra* note 17.

[19] See Freeman v. Mazzera, 150 Cal. App. 2d 61, 309 P.2d 510 (1957).

[20] See Del Gaudio v. Ingerson, 142 Conn. 564, 115 A.2d 665 (1955); Sutton v. Otis Elevator Co., 68 Utah 85, 249 Pac. 437 (1926).

[21] See Sutton v. Otis Elevator Co., *supra* note 20.

[22] See Galbraith v. Illinois Steel Co., 133 Fed. 485 (7th Cir. 1904); Del Gaudio v. Ingerson, 142 Conn. 564, 115 A.2d 665 (1955); Sutton v. Otis Elevator Co., 68 Utah 85, 249 Pac. 437 (1926); Berg v. Otis Elevator Co., 64 Utah 518, 231 Pac. 832 (1924).

[23] See Colbert v. Holland Furnace Co., 333 Ill. 78, 164 N.E. 162 (1928); Wood v.

act is found to have created a nuisance *per se*, liability may extend to third parties after acceptance of the work.[24] Of course, if a defect is deliberately concealed by the contractor or if fraud is present, the general rule is said not to be applicable.[25]

The exceptions, particularly the "inherently dangerous" type, are liberally applied. As a result, even courts which pay lip service to the general rule of non-liability decide most cases under one of the exceptions.[26]

Even though the harshness of the general rule has been considerably modified by the recognized exceptions, objections still exist to the necessity of its application. The court in the instant case recognized that justice could be achieved under the rule of non-liability by applying one of the recognized exceptions.[27] Nevertheless, the court thought that such a holding would be unnecessarily artificial and complicated. The majority states, "[A]fter having first decided that there was an acceptance of the work, we would then have to decide issues involving all the various exceptions to the rule and in case any exception was found applicable, the basic issues of negligence and proximate cause would still remain for consideration."[28] Therefore, the doctrine of non-liability after acceptance was rejected in order to restore both logic and simplicity to the law.[29] The holding is more logical because the purported distinctions[30] between the manufacturers and contractors situations are not persuasive; simplicity is restored to the law by bringing the contractor's liability after acceptance within the general tort rules.

The court's rejection of the non-liability rule means that acceptance of the work by the contractee no longer establishes the absence of proximate cause of the injury as a matter of law. Under the new rule, acceptance of the work is merely one of the factors for jury consideration in determining whether the chain of causation between defendant's negligence and plaintiff's injury has in fact been broken. Another factor the jury will consider in determining proximate cause under the new rule is the foreseeability of injury resulting from the

Sloan, 20 N.M. 127, 148 Pac. 507 (1915); Sealise v. F. M. Vanzie & Co., 301 Pa. 315, 152 Atl. 90 (1930).

[24] See Queen v. Craven, 95 Ga. App. 178, 97 S.E.2d 523 (1957); Brown v. Welsbach Corp., 301 N.Y. 212, 93 N.E.2d 640 (1950); Schumacher v. Carl G. Neumann Dredging & Improvement Co., 206 Wis. 220, 239 N.W. 459 (1931).

[25] See Pennsylvania Steel Co. v. Elmore & Hamilton Contracting Co., 175 Fed. 176 (C.C.N.D.N.Y. 1909); Paul Harris Furniture Co. v. Morse, 10 Ill. 2d 28, 139 N.E.2d 275 (1956); Holland Furnace Co. v. Nauracaj, 105 Ind. App. 574, 14 N.E.2d 339 (1938).

[26] See Annot., 58 A.L.R.2d 865, 870-71 (1958).

[27] 360 S.W.2d at 791 n.4.

[28] 360 S.W.2d at 791.

[29] *Ibid.*

[30] See note 15 *supra*.

unsafe condition of the land or structure. The length of time between construction and injury will have a definite bearing upon foreseeability,[31] just as will the location of the land or structure. Under the new rule, the fact that the employer or contractee discovers the dangerous condition is also material to the question of proximate cause.[32] Although a majority of the jurisdictions still follow the old rule of non-liability after acceptance,[33] the rule adopted by the court in the instant case is supported by most of the modern writers[34] and cases.[35]

According to the dissent, the defendant complied with everything the contract with the county required him to do;[36] negligence was found in leaving the holes unfilled. Since filling was not required by the contract, the dissenting justices feel that the majority is departing from well settled Texas law in imposing liability upon the contractor for the result of a contract rather than negligence in the performance thereof.[37] Upon motion for rehearing, the majority somewhat clarifies this point. It indicates that a contrary result might have been reached if the defendant had merely followed directory contractual provisions calling for leaving the holes unfilled. Under such facts, the leaving of the holes unfilled would have been considered the act of the county and not that of the defendant-contractor. In the instant case, however, the agreement was silent as to the filling of the holes, and defendant's liability is based not upon contract, but upon breach of duty owed by anyone working on a

[31] 360 S.W.2d at 791. See also Howard v. Redden, 93 Conn. 604, 107 Atl. 509 (1919). But lapse of time should not, as a matter of law, affect causation where it is shown that the defect was a substantial cause: Hale v. De Paoli, 32 Cal. 2d 228, 201 P.2d 1 (1948) (lapse of 18 years); Foley v. Pittsburg-Des Moines Steel Co., 363 Pa. 1, 68 A.2d 517 (1949) (lapse of 13 months).

[32] 360 S.W.2d at 793. The court, however, indicates it will not follow Russell v. Whitcomb, Inc., 100 N.H. 171, 121 A.2d 781 (1956), as to the "qualification" of the modern rule that if the employer discovers the danger, his responsibility "supersedes" that of the contractor. In accord with Russell v. Whitcomb, *supra,* are Miner v. McNamara, 81 Conn. 690, 72 Atl. 138 (1909); Price v. Johnston Cotton Co. of Wendel, 226 N.C. 758, 40 S.E.2d 344 (1946); Howard v. Reinhart & Donovan Co., 196 Okla. 506, 166 P.2d 10 (1946). The so called "qualification" is not applied if the contractor himself knows of the danger. See Murphy v. Barlow Realty Co., 206 Minn. 527, 289 N.W. 563 (1939).

[33] 360 S.W.2d at 800. See note 3 *supra.*

[34] See 2 Harper & James, Torts § 18.5 (1956); Prosser, *op. cit. supra* note 13, § 85; Tucker & Kuhn, *op. cit. supra* note 8, at 249; 10 Ark. L. Rev. 152 (1955); 37 Texas L. Rev. 354, 357 (1959); Annot., 58 A.L.R.2d 891 (1958).

[35] See Hannah v. Fletcher, 231 F.2d 469 (D.C. Cir. 1956); Cosgriff Neon Co. v. Matthews, ___ Nev. ___, 371 P.2d 819 (1962); Russell v. Arthur Whitcomb, Inc., 100 N.H. 171, 121 A.2d 781 (1956); Foley v. Pittsburg-Des Moines Steel Co., 363 Pa. 1, 68 A.2d 517 (1949); Grodstein v. McGivern, 303 Pa. 555, 154 Atl. 794 (1931); Krisovich v. John Booth, Inc., 181 Pa. Super. 5, 121 A.2d 890 (1956). *But see* Reynolds v. Manley, 223 Ark. 314, 265 S.W.2d 714 (1954).

[36] 360 S.W.2d at 802.

[37] *Id.* at 799, *citing* Glade v. Dietert, 156 Tex. 382, 295 S.W.2d 642 (1956).

highway "to refrain from creating conditions which are dangerous to other persons using the same, or to warn of dangerous conditions should the same be created."[38]

Regardless of the validity of the dissent's criticism regarding the imposition of liability for the result of a contract (rather than negligence), it at least focuses upon a caveat for future consideration by contractors. Other far-reaching effects of the new rule on contractor's liability in Texas are yet to be seen. One, however, will probably be that premiums for liability insurance of contractors will be increased. This increase in cost will be passed on by higher construction prices. Also, as a result of the decision, contractors will have to be more cautious in undertaking jobs whose plans and specifications call for foreseeably dangerous structures.

The holding of the instant case is to contractors in Texas what *MacPherson* is to manufacturers generally. It removes the last vestige of an unsupportable legal shield having its origin in misinterpretation of *dictum*[39] and carried over by artificial distinctions.[40] The modern rule of contractor liability for negligence based upon causation in fact plus foreseeability of injury where third parties are concerned has much more justification in logic and in fairness than does the arbitrary proposition that the chain of causation ends as a matter of law with acceptance of the work. Public policy dictates, as the Texas Supreme Court accurately stated, that the "acceptance of defective work should not be a legal excuse for the negligent performance of that work, nor for the leaving of premises in a dangerous condition."[41]

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[38] 360 S.W.2d at 803-4.
[39] See Tucker & Kuhn, *op. cit. supra* note 8, at 246; 37 Texas L. Rev. 354 (1959).
[40] See notes 15, 16 *supra*.
[41] 360 S.W.2d at 792.