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Recommended Citation

Frank W. Elliott, *Notes - Admiralty-Claims Agent's Misrepresentation of Law Held Not To Vitiating Seaman's Agreement Releasing Shipowner-Thompson v. Coastal Oil Co., 218 F.2d 664 (3d Cir. 1955)*, 34 Tex. L. Rev. 125 (1955).

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NOTES

ADMIRALTY—CLAIMS AGENT'S MISREPRESENTATION OF LAW HELD NOT TO VITIATE SEAMAN'S AGREEMENT RELEASING SHIPOWNER.—*Thompson v. Coastal Oil Co.*, 218 F.2d 664 F.2d 664 (3d Cir. 1955).

The plaintiff, a seaman, was attacked and injured by a fellow crewman. A claims agent told him that he had a weak case unless he could prove that the shipowner had notice of the assailant's dangerous propensities. Without independent medical advice concerning the severity of his injury and without legal advice concerning the validity of his claim, the plaintiff negotiated a settlement releasing the shipowner. The injuries proved to be more serious than the plaintiff had thought, and he sued the shipowner. Relying upon *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2d Cir. 1952), decided after the release was executed, he contended, *inter alia*, that the agent had erroneously represented the scope of the shipowner's liability. The district court set aside the release and rendered judgment for the plaintiff. *Reversed and remanded*. The majority, speaking colloquially, refused to give the *Keen* decision the retroactive effect of making the agent's statement a misrepresentation of law. On rehearing two judges dissented with respect to this point.

Seamen are considered wards of admiralty and in scrutinizing their releases courts treat them as courts of equity treat young heirs dealing with their expectancies, cestuis que trustent with their trustees, or wards with their guardians. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Harden v. Gordon*, 11 Fed. Cas. 480, No. 6047 (C.C.D. Me. 1823). In release cases where seamen's injuries prove to be more serious than originally supposed, the impact of this policy upon the law of mistake has resulted in a liberal attitude toward granting rescission. *Garrett v. Moore-McCormack Co.*, *supra*; cf. *Callen v. Pennsylvania R.R.*, 332 U.S. 625 (1948). If a settlement is made, seemingly a fact issue is presented: did the parties assume the extent of the injuries then known as the basis of relief, or did they intend to compromise the claim regardless of the possibility of more serious developments? See 5 WILLISTON, CONTRACTS § 1551 (rev. ed. 1937). However, the tenor of some decisions involving seamen indicates reliance upon a presumption that the releasor had in mind only the seriousness of injuries known when he signed his release. In *Stuart v. Alcoa S.S. Co.*, 143 F.2d 178, 179 (2d Cir. 1944), the court said that the trial judge had overstated the vulnerability of seamen's releases in declaring that they meant practically nothing; nevertheless, it set aside the instrument involved, apparently on the ground that the plaintiff's injuries proved more serious than previously contemplated. Similarly, it has been indicated that relief will be granted whenever the prognosis relied upon is made by the defendant's physician and proves to be incorrect. *United States v. Johnson*, 160 F.2d 789 (9th Cir. 1947), *reversed in part on other grounds*, 333 U.S. 46 (1948); *Bonici v. Standard Oil Co.*, 103 F.2d 437 (2d Cir. 1939), *cert. denied*,

308 U.S. 560 (1939). However, where the seaman has utilized a physician of his own choosing, relief for mistake may be denied. *Sitchon v. American Export Lines*, 113 F.2d 830 (2d Cir. 1940), *cert. denied*, 311 U.S. 705 (1940). In the principal case the court adopts a more stringent view in stating that the purpose of a settlement presupposes a joint approximation of the future, thus casting on the seaman the risk of subsequent developments, even though the prognosis is made by a neutral party rather than by a doctor chosen by the plaintiff. Of course, where a mistake relates to an injury foreign to those considered by the parties in the first instance, a release will not be given effect. See, e.g., *Hume v. Moore-McCormack Lines*, 121 F.2d 336 (2d Cir. 1941), *cert. denied*, 314 U.S. 684 (1941).

Formerly the courts considered a misrepresentation of law an insufficient ground for rescission because it was an opinion not justifying reliance. 5 WILLISTON, CONTRACTS § 1591 (rev. ed. 1937). But the federal courts have tended to grant relief for a mistake of law induced by a misrepresentation either where an element of fraud is present or where the parties' relationship is such that reliance by one on the other's statements may be expected. *Griswold v. Hazard*, 141 U.S. 260 (1891); *Snell v. Atlantic Fire & Marine Ins. Co.*, 98 U.S. 85 (1878); 3 CORBIN, CONTRACTS § 618 (1951). Similarly, between a layman and one who is supposed to have superior legal knowledge, even innocent misstatements of law have been held actionable. *Camerlin v. New York Central R.R.*, 199 F.2d 698 (1st Cir. 1952); 5 WILLISTON, CONTRACTS §§ 1495, 1500 (rev. ed. 1937). In consonance with the policy of treating seamen as wards of admiralty it seems that any material misrepresentation of law chargeable to a shipowner would justify setting aside a release signed in reliance upon it. However, the situation presented in the principal case calls for inquiry into the propriety of extending this policy to statements, later shown to be erroneous, concerning undecided points of law.

Presumably, most seamen are ignorant of legal principles and, in considering the wisdom of signing a release, will be influenced by the opinion of one who is conversant with the law. Cf. *Camerlin v. New York Central R.R.*, *supra*. Consequently, in determining the validity of a release the federal courts carefully examine the sufficiency of legal advice accorded a seaman and frequently decline to uphold the agreement if he was without benefit of legal counsel and was unfamiliar with his legal rights. *Muruaga v. United States*, 172 F.2d 318 (2d Cir. 1949); *Hume v. Moore-McCormack Lines*, *supra*. An attorney settling with a seaman does so in a fiduciary capacity. *Blake v. W. R. Chamberlin & Co.*, 176 F.2d 511 (9th Cir. 1949). A seaman's release will be avoidable unless he is appraised of all causes of action in his favor and has a full understanding of his legal rights. *Waters v. United States*, 191 F.2d 212 (9th Cir. 1951); *Bay State Dredging & Contracting Co. v. Porter*, 153 F.2d 827 (1st Cir. 1946). In view of the fiduciary nature of the duty owed by one securing a seaman's release, it appears that he, not the seaman, should bear the risk of mistake in positively asserting a principle of law which is yet undecided.

Frederick W. Robinson

BANKS AND BANKING—BILLS AND NOTES—RIGHTS OF DEPOSITORY BANK AGAINST DRAWER OF CHECK.—*City State Bank v. Lummus*, 277 S.W.2d 262 (Tex.Civ.App.—Amarillo 1954, error ref'd n.r.e.).

Because of failure of consideration the defendant stopped payment of a check deposited with the plaintiff bank, which before receiving notice of the stop order had permitted the payee-depositor to withdraw the amount represented by the check. The trial court entered judgment for the defendant, *Reversed and rendered*. The court stated, *inter alia*, that the defendant had the burden of establishing that the bank "had not become a party thereto for value."

Before the matter was regulated by statute most jurisdictions held that title to a deposited item presumptively passed to the bank, *Gonyer v. Williams*, 168 Cal. 452, 143 Pac. 736 (1914); *Craige v. Hadley*, 99 N.Y. 131, 1 N.E. 537 (1885), but a substantial minority presumed a relationship of principal and agent. *First Nat'l Bank v. Fleming State Bank*, 74 Cal. 309, 221 Pac. 891 (1924). Before 1929 Texas courts followed the majority rule, *Farmers' State Bank v. Hardie*, 230 S.W. 524 (Tex.Civ.App. 1921), but in that year a short bank collection statute adopted the minority rule. TEX. LAWS 1st Called Sess. 1929, c.97 subc. VII, art. 2. See also *Holt v. First State Bank*, 32 S.W.2d 386 (Tex.Civ.App. 1930).

Most of the eighteen states which have adopted the Bank Collection Code, produced by the American Bankers' Association, hold that unless the parties agree otherwise, the bank does not become owner of the item until the proceeds are collected. *Schram v. Askegaard*, 34 F.2d 348 (D. Minn. 1929); *Twin Falls Bank & Trust Co. v. Pringle*, 55 Idaho 451, 43 P.2d 515 (1935); *Farmers' Exchange Bank v. Farm & Home Savings & Loan Ass'n*, 332 Mo. 1041, 61 S.W.2d 717 (1933); *State v. South Omaha State Bank*, 129 Neb. 43, 260 N.W. 815 (1935). These decisions seem based on a literal interpretation of the statutes. However, some states with the model code have held that when the amount of the item deposited has been withdrawn, the bank becomes the owner of the item and the statute does not apply. This conclusion is buttressed by the reasoning that (1) the statute applies only when the deposit is explicitly for collection, *Lawton v. Lower Main Street Bank*, 170 S.C. 334, 170 S.E. 469 (1933); (2) the statute is for the benefit of the bank and the bank can waive its status of agent, *Community State Bank v. Durbin*, 98 N.E.2d 604, (Ind. App. 1951); and (3) the checking and withdrawal of the deposit constitute an "agreement" to pass title, although this can be rebutted by showing that the deposit was intended for collection. *Blatz Brewing Co. v. Richardson & Richardson, Inc.*, 245 Wis. 567, 15 N.W.2d 819 (1944).

Under the Texas Bank Collection Act of 1943, which derived its provisions from the model code, the bank is the agent of the depositor, except as to holders in due course, unless there is an agreement to the contrary, and this agency relationship continues until the bank receives the proceeds of the item. If the bank honors checks against the deposit it is deemed to be a creditor secured by a lien on the item. TEX. CIV. STAT. (Vernon, 1948) art. 342-702. On facts similar to those in the principal

case, it was held that the statutory exceptions concerning agreements and holders in due course rendered the statute inapplicable, and the bank became the owner when the depositor withdrew the money represented by the check. *First Nat'l Bank v. Moore*, 220 S.W.2d 694 (Tex. Civ. App. 1949, error dism'd). However, a cogent argument has been made that a bank cannot be a holder in due course until the proceeds of the check are collected, since it remains an agent until that time. See Sneed and Morrison, *Bank Collections—A Comparative Study*, 29 TEXAS LAW REVIEW 713, 724 (1951). It is further submitted that the exception concerning holders in due course for value refers to *subsequent* holders, and not to the depository bank. The model Bank Collection Code contains the word "subsequent," but does not employ it in reference to the depository bank.

The bank must qualify as a holder in due course to avoid the maker's personal defense of failure of consideration. TEX. CIV. STAT. (Vernon, 1948) art. 5935, § 57. To attain that status the bank must be a "holder" of the check. The Negotiable Instruments Law defines "holder" as the payee or indorsee of a bill who is in possession, or the bearer thereof. "Bearer" is defined as the person in possession of a bill or note which is payable to bearer. TEX. CIV. STAT. (Vernon, 1948) art. 5948, § 191. The decisions have not been uniform because of the varied meanings attributed to the term "possession." In some states a holder is the possessor of the paper itself who demands payment for himself or as agent for another, including a bank holding the paper for collection. *Mechanics and Metals Nat'l Bank v. Termini*, 117 Misc. 309, 191 N.Y.S. 334 (App. Div. 1921); *Forbes State Bank v. Higgins*, 58 S.D. 497, 237 N.W. 735 (1931). However, it seems the better view that one having mere physical custody of a check for collection is not the holder thereof, *Commercial & Savings Bank v. Southern Trust & Commerce Bank*, 74 Cal. App. 734, 241 Pac. 945 (1925); to be so classified the claimant must have a beneficial interest in the check and be entitled at law to recover the proceeds. *National Exchange Bank v. Wiley*, 195 U.S. 257 (1904); *Bower v. Casanave*, 44 F.Supp. 501 (S.D.N.Y. 1941); *Crocker-Woolworth Nat'l Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456 (1903); *Pryor v. American Trust & Banking Co.*, 15 Ga. App. 828, 84 S.E. 312 (1915); *Buckman v. Hill Military Academy*, 182 Ore. 621, 189 P.2d 575 (1948).

In the principal case the court did not insist on proof of a beneficial interest in the check, but nonetheless considered the bank to be a holder and applied section 24 of the NIL, stating that every person whose signature appears on an instrument is deemed prima facie to have given value. TEX. CIV. STAT. (Vernon, 1948) art. 5933, § 24. Since the drawer failed to establish that the bank did not give value for the check, the bank was presumed a holder in due course. By virtue of the exception in article 342-702 respecting holders of negotiable instruments, as construed by the *Moore* case, the case was removed from the operation of that statute. Other jurisdictions with similar collection statutes acknowledge the agency relationship but consider the bank a holder in due course to the extent of withdrawals made by the depositor before notice of dishonor. *Nat'l Deposit Bank v. Ohio Oil Co.*, 250 Ky. 288, 62 S.W.2d 1048 (1933); *Citizens' Bank v. Kilpatrick*, 231 S.W.2d 301 (Mo. App. 1950);

Western Smelting & Refining Co. v. First Nat'l Bank, 150 Neb. 477, 35 N.W.2d 116 (1948). The bank's statutory lien on the check is a beneficial interest which makes it a holder under either definition.

Texas courts have held that if all parties know that a deposit is for collection, the owner retains a beneficial interest, *Behringer v. City Nat'l Bank*, 296 S.W. 674 (Tex.Civ.App. 1927), and when an indorsee takes legal title as agent of the payee, he is subject to all defenses to which the payee is subject. *Blum v. Loggins*, 53 Tex. 121 (1880); *King v. Wise*, 282 S.W. 570 (Tex.Comm. App. 1926); *National Trust & Credit Co. v. Oliver*, 203 S.W. 608 (Tex.Civ.App. 1918). Therefore, it seems that a depository bank should be treated as a holder only to the extent that it can establish a beneficial interest in the item by virtue of the lien conferred by article 342-702. Section 27 of the NIL provides that where a holder who has a lien on an instrument is deemed a holder in due course for value to the extent of the lien, TEX. CIV. STAT. (Vernon, 1948) art. 5933, § 27, but he must show his advancements on the instrument to perfect the lien. *Chapman v. Dallas*, 267 S.W. 535 (Tex.Civ.App. 1924). Article 342-702 and section 27 of the NIL seemingly require the bank to prove that it has advanced money against a deposited item and thus has acquired a beneficial interest which alters its status as agent and permits it to avoid defenses good against the payee. If so, the court's statement concerning burden of proof in the principal case is questionable, though the result reached is sound.

Frank W. Elliott, Jr.

DEDICATION—IMPLIED DEDICATION MANIFESTED BY LANDOWNER'S CONDUCT.—*Trappey's Sons, Inc. v. New Iberia*, 73 So.2d 423 (La. 1954).

The defendant city opened a street across the plaintiff's land for use as a by-pass while a nearby street was being paved. After the new way had been used a few years the plaintiff conveyed to the city an easement apparently corresponding with the way then in use. The following year he executed a correction deed designed to alter the right of way previously designated. Thereafter he sought an injunction and certain other relief against the city. The lower court denied relief, relying upon a tacit dedication. On appeal the plaintiff contended that the correction deed, accepted by the city, was controlling and that the permissive prior use should not be regarded as evidencing a dedication other than the contractual one. *Affirmed*. The court concluded that despite the correction deed a dedication could properly be implied in view of the plaintiff's acquiescence in public maintenance and use of the original way.

A dedication is implied when a landowner's acts manifest an intention to devote his property to public use, see *Kingman v. Wagner*, 168 Kan. 558, 213 P.2d 979, 982 (1950) (dictum), if public use—usually coupled with maintenance—is of such a character as to manifest an acceptance of the dedication. *Atlantic Coast Line Ry. v. Sweatman*, 81 Ga. App. 269, 58 S.E.2d 553 (1950). Many opinions, like that in the principal case, invoke the principle of estoppel in pais. *Cincinnati v. White*, 31 U.S. (6 Pet.) 431 (1832).

Most courts hold that public rights may be acquired by prescription, relying upon either a presumed antecedent exercise of the power of eminent domain, *Windham v. Jubinville*, 92 N.H. 102, 25 A.2d 415 (1942), or a presumed prior dedication. See *Couture v. County of Dade*, 93 Fla. 342, 112 So. 75 (1927) (dictum). A few courts refuse to recognize prescriptive public rights, reasoning that the doctrine of prescription traditionally has rested upon the fiction of a lost grant, *Piper v. Voorhees*, 130 Me. 305, 155 Atl. 556 (1931), and that the unorganized public cannot take under a grant. See *Gore v. Blanchard*, 96 Vt. 234, 118 Atl. 888, 891 (1922). ANGELL, HIGHWAY § 131 (1858); Comment, 6 TEXAS LAW REVIEW 365 (1928). Courts adopting this view treat continued public use either as evidence of the owner's intent to dedicate, *German Bank v. Brosz*, 32 Ind. App. 77, 69 N.E. 300 (1903), or as a basis for presuming intent to dedicate, *La Chappelle v. Jewett City*, 121 Conn. 381, 185 Atl. 175 (1936); *Pittsburgh, C.C. & St. L. Ry. v. Crownpoint*, 150 Ind. 536, 50 N.E. 741 (1898).

Any period of use may be treated as evidence of an intent to dedicate, *Hankins v. Pine Bluff*, 217 Ark. 226, 229 S.W.2d 231 (1950), but a court is unlikely to invoke a presumption against the owner unless the use has continued over a substantial period. Some courts have resorted to the analogous statutory limitation period. *Dunaway v. Windsor*, 197 Ga. 705, 30 S.E.2d 627 (1944). Expiration of the period constituting a bar to real actions is usually sufficient of itself to create the presumption, *Atlantic Coast Line Ry. v. Sweatman*, 81 Ga. App. 269, 58 S.E.2d 553 (1950), particularly where other evidence tends to show the intent to dedicate. *Kendall-Smith Co. v. Lancaster County*, 84 Neb. 654, 121 N.W. 960 (1909). However, the presumption may arise from a shorter public use accompanied by other acts indicating the intent. In re *Petition of Bryant*, 323 Mich. 424, 35 N.W.2d 371 (1949). The presumption has been held conclusive, *Diamond Match Co. v. Savercool*, 218 Cal. 665, 24 P.2d 783 (1933), where the use was with the owner's full knowledge, although without his permission, and without objection by anyone. *Hare v. Craig*, 206 Cal. 753, 276 Pac. 336 (1929).

Under either theory, it is the adverse possession and use which establishes the street; it seems immaterial which approach is utilized—presumption of dedication, evidence of intent to dedicate, or acquisition of a prescriptive right—in light of the identical conclusion reached. See *Walcott Township v. Skauge*, 6 N.D. 382, 71 N.W. 544 (1897).

To establish a prescriptive right or raise a presumption, it is apparent that adverseness, or claim of right is needed. *Summerville v. Duke Power Co.*, 115 F.2d 440 (4th Cir. 1940); *King County v. Hagen*, 30 Wash.2d 847, 194 P.2d 357 (1948). While it is normally immaterial whether the street is created by dedication or by prescription, the landowner who believes his permission rebuts the element of adverseness or claim of right necessary to establish a prescriptive right may find his conduct construed as creating a presumptive intent to dedicate. Mere permissiveness alone, however, does not establish a highway by prescription, *Swinford v. Roper*, 389 Ill. 340, 59 N.E.2d 863 (1945), or raise a presumption of dedication, *Stanley v. Mullins*, 187 Va. 193, 45 S.E.2d 881 (1948). If the permission is revocable at will, and the public has not obtained full dominion

over the way, no public right is established. See *Stanley v. Mullins*, *supra*. Similarly, if the allowed public use is consistent with the landowner's assertion of ownership, no public right is created. In *Gage v. Mobile & Ohio R.R.*, 84 Ala. 224, 4 So. 415 (1888), where the owner permitted public use of an alley connecting his wharves with the main streets, the court said that enjoyment with consent, consistent with the rights and interests of the true owner, evidences no conveyance to the public and establishes no adverse right.

However, adverseness may be inferred from the parties' situation and the manner, character, and frequency of the exercise of the right. *Hansen v. Green*, 275 Ill. 221, 113 N.E. 982 (1916). The final determination apparently turns upon the proposition that the public use must be predicated on the belief or assertion of a public right. *Sprow v. Boston & A. R.R.*, 163 Mass. 330, 39 N.E. 1024 (1895). Consent or acquiescence may frequently amount to an implied recognition of the adverse claim of the public, *Town of Exeter v. Meras*, 80 N.H. 132, 114 Atl. 24, 25 (1921) (dictum); hence a cautious landowner will often take other precautionary measures. Payment of taxes, *Beauman v. Boeckeler*, 119 Mo. 189, 24 S.W. 207 (1893), conveyancing, *Hall v. Baltimore*, 56 Md. 187 (1881), and the erection of bars or gates across the way are evidence in rebuttal of the public's rights. See *People v. Sayig*, 101 Cal. App.2d 890, 226 P.2d 702 (1951).

The owner cannot limit the duration of his dedication, *San Francisco v. Canavan*, 42 Cal. 541 (1872), for he cannot attach to the dedication any condition or limitation inconsistent with its legal character or tending to remove the property from the control of the public authorities. *Darling v. Christensen*, 166 Or. 17, 109 P.2d 585 (1941). The dedication will be effective regardless of such a condition. *Camdenton v. Sho-Me Power Corp.*, 361 Mo. 790, 237 S.W.2d 94 (1951).

The confusion between the doctrines of prescription and implied dedication may be eliminated by declaring mere public use insufficient by itself to raise a presumption, over the owner's objection, of an intent to dedicate. Only where the owner is fully cognizant of and makes no objection to the use, the character of which would evidence to prudent men the public adverse claim, should it be presumed that he intended to dedicate the property to the public. See *Robison v. Gebauer*, 98 Neb. 196, 152 N.W. 329 (1915); 1 ELLIOTT, ROADS AND STREETS, § 179 (3d ed. 1911).

On the other hand, where the use continues for the requisite statutory period and the elements necessary to establish a prescriptive right in the public are present, the necessary protection of public rights should not be jeopardized by a declaration that in all cases prescriptive use is mere evidence of dedication, or raises a presumption of dedication.

Monty Barber

DISCOVERY—AMOUNT OF INDEMNITY INSURANCE HELD NOT DISCOVERABLE FOR SOLE PURPOSE OF EVALUATING CASE FOR SETTLEMENT. — *Jeppesen v. Swanson*, 68 N.W.2d 649 (Minn. 1955).

In an action alleging that personal injuries were caused by the negligence of the relator's truck driver, the plaintiff moved for and obtained

an order, pursuant to MINN. R. CIV. P. 34, for the production of the relator's indemnity insurance policy. The affidavit in support of the motion stated only that the plaintiff's attorneys could not "properly evaluate a figure for settlement or trial" without knowing the extent of insurance coverage. On the relator's application the appellate court prohibited enforcement of the order.

MINN. R. CIV. P. 34, identical with FED. R. CIV. P. 34, requires that documents sought to be discovered constitute or contain evidence relating to matters within the scope of examination permitted by the rule governing depositions, MINN. R. CIV. P. 26.02, FED. R. CIV. P. 26 (b). That rule provides that a "witness may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." The further provision that "It is not grounds for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence . . ." was adopted to prevent stringent interpretation. 4 MOORE, FEDERAL PRACTICE 26.17 (2d ed. 1950). TEX. R. CIV. P. 167 states that documents sought by discovery must "constitute or contain evidence" and does not refer to the more liberal test of relevancy to the subject matter.

In the principal case the majority opinion interprets "relevant to the subject matter of the action" as meaning relevant to the substantive issues of trial, relying on *Hickman v. Taylor*, 329 U.S. 495 (1947), for the proposition that discovery was designed to facilitate ascertainment of the precise issues and of the facts (or information leading to the facts) related to the issues. However, in denying discovery of an attorney's "work product" in that case the Court explicitly considered the practical effect of the statute, particularly the idea that to allow discovery would tend to make the bar parasitic; it was not concerned with verbal niceties of statutory language. To bolster their position the Minnesota court analogized discovery of the defendant's insurance coverage and the extent of his private fortune. In support of the analogy the court quoted the entire opinion of *McClure v. Boeger*, 105 F. Supp. 613 (E.D. Pa. 1952), which also denied discovery of insurance as not relevant to the substantive issues of trial. The dissent in the principal case distinguished discovery of defendant's financial resources in that, unlike insurance coverage, sufficient information is readily available before trial by garnishment proceedings or by access to private credit agencies.

It has been asserted that the insurance contract virtually substitutes the insurance company as a party defendant by placing it in control of the entire defense, and that a person injured by the insured has an interest in the contract, analogous to that of a third-party beneficiary, which justifies requiring that its terms be disclosed to him. *Brackett v. Woodall Food Products*, 12 F.R.D. 4, (D. Tenn. 1951); 32 NEB. L. REV. 106 (1952); 5 STAN. L. REV. 322, 324, 326 (1953); *Maddox v. Grauman*, 265 S.W.2d 939 (Ky. 1954). Accord, *Orgel v. McCurdy*, 8 F.R.D. 585 (S.D.N.Y. 1948). Allowing discovery of insurance would eliminate the possibility of a fraudulent settlement obtained by a false disclosure concerning insurance coverage—a possibility which the plaintiff has no other means of avoiding short of industrial espionage. See *Toppass v. Perkins' Adm'x*,

268 Ky. 186, 104 S.W.2d 423 (1937); *Pattison v. Highway Ins. Underwriters*, 278 S.W.2d 207 (Tex.Civ.App. 1955, error ref'd n.r.e.).

The relevancy of insurance disclosure to the subject matter of the action depends upon the scope attributed to "subject matter." Are settlement tactics a part of the judicial process which should be guided by court rules? As an indication of the practical relevancy of insurance to the great mass of out-of-court negotiations assume that *D*'s alleged negligence has resulted in personal injuries to the extent of \$30,000. For simplicity, further assume that *D* is solvent and that *P* has an even chance of recovery; thus there is a theoretical settlement value of \$15,000. See Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954). What is the importance of the amount of *D*'s insurance with *X* company?

If *D*'s insurance with *X* company were below this \$15,000 theoretical settlement value (e.g., \$10,000), it would normally profit both *D* and *X* to disclose the low limit of coverage and hope for settlement. If the insurance coverage should exceed the damages, *D* would be indifferent to disclosure and *X* would probably go to trial unless *P* offered to settle for the settlement value or less. If, however, the policy limit should lie between the settlement value and maximum damages (e.g., \$20,000) *D* would be anxious to disclose and settle within policy limits rather than risk the possible personal loss of \$10,000. But *X*, who has complete control of defense and settlement, would ordinarily profit by taking a substantially free ride to trial on its limited liability of \$20,000; by the above hypothesis that there is an even chance of losing the case, the settlement value to *X* is only \$10,000. Thus if *X* accepted \$16,000 in settlement, he would avoid the possibility of losing an additional \$4,000, but would sacrifice \$6,000 above its theoretical settlement value. However, the rule in most states is that an insurer must show due care or good faith in dealing with the defendant's interest while negotiating for settlement; hence, if *X* gambles *D*'s money by refusing to settle within the policy limit, it may be found liable for damages awarded to the injured person exceeding the policy limit. See, e.g., *G. A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex.Comm.App. 1929); Keeton, *Liability Insurance and Responsibility for Settlement*, *supra*. But *X* has no such liability unless *P* has unconditionally offered to settle within the limit, *Jones v. Highway Ins. Underwriters*, 253 S.W.2d 1018 (Tex.Civ.App. 1952 error ref'd n.r.e.), and it is unlikely that *P* will do so unless he is cognizant of the insurance coverage. But if *D* is judgment proof and thus has no risk of monetary loss, it seems that as a matter of law he has no existing interest which *X* could negligently or in "bad faith" represent.

Thus in no case would disclosure jeopardize *D*'s interest, and disclosure may lead to a settlement offer safely within the policy limit. On the other hand, *X* would normally prefer secrecy, particularly if the coverage should exceed the settlement value. If *P* should insist on a settlement higher than the theoretical settlement value, *X* can still protect its interest by refusing settlement if it acts consistently with its obligation to *D*. But non-disclosure may mean many things to *P*: *X* may be awaiting the eve of trial to disclose the low policy limits, to possibly avoid excess liability by keeping *D* from disclosing the limit, or to delay in expectation that *P*

might settle below the policy coverage and settlement value. In the negotiations *P* has all his cards on the table while *X* may be bluffing. Thus a forced disclosure would protect *D*, would assure *P* of a bargaining position based on mutual knowledge, and would deprive *X* only of the bargaining power inherent in secrecy, bluffing or fraud. In California, compelling disclosure in a proceeding to perpetuate testimony seems to have been accepted as fair to all sides of the triangle. See *Superior Ins. Co. v. Superior Court*, 37 Cal.2d 749, 235 P.2d 833 (1951); Sedgwick, *Personal Injury Litigation from the Insurance Company-Defendant Point of View*, 23 UTAH B. BULL. 101, 111 (1951).

The prophylactic effect of just bargaining based on mutual knowledge—*i.e.*, swifter settlements and prevention of fraud—indicates the practical relevancy of insurance to the “subject matter of the action.” It appears that these considerations, rather than the strict interpretation relied upon in the principal case, express the objectives of modern rules of civil procedure.

Maco Stewart

HOMESTEAD—SALE WITH OPTION TO REPURCHASE AS ESCAPE FROM CONSTITUTIONAL PROHIBITION AGAINST MORTGAGING THE HOMESTEAD.—*Rosinbaum v. Billingsley*, 272 S.W.2d 591 (Tex.Civ.App.—Eastland 1954, error ref'd n.r.e.).

The plaintiffs conveyed their homestead by warranty deed to the defendant, who simultaneously executed a contract allowing the plaintiffs to remain in possession without paying rent and giving them an option to repurchase within eight months. After the option to repurchase had expired, the plaintiffs sued to cancel the deed on the ground that the transaction was void as a mortgage of their homestead. *Held*, the deed was valid as a sale with an option to repurchase; it was not intended as a mortgage since the relationship of debtor and creditor did not exist between the parties.

A mortgage of the homestead by a married couple or a pretended sale with a condition of defeasance is void in Texas, except where given as security for purchase money or improvements. TEX. CONST. art. 16 § 50; *Burkhardt v. Lieberman*, 138 Tex. 409, 159 S.W.2d 847 (1942). Since only pretended sales involving a condition of defeasance are prohibited, *Red River Nat'l. Bank v. Latimer*, 110 S.W.2d 232 (Tex.Civ.App. 1937), an actual sale with a provision whereby the seller may reacquire title is valid. *Astugueville v. Loustauau*, 61 Tex. 233 (1884).

The courts consider several factors in determining whether a transaction is a mortgage or a sale with an option to repurchase. The most persuasive indication of a mortgage is the existence of a debt to be secured, *i.e.*, a debtor-creditor relationship. *John T. Hardie & Co. v. Campbell*, 63 Tex. 292 (1885); *Ruffier v. Womack*, 30 Tex. 332 (1867). Evidence that the purchase price was less than the reasonable market value and the absence of a specific time or price for repurchase also indicate a mortgage. *Gray v. Shelby*, 83 Tex. 405, 18 S.W. 809 (1892); *Mansfield v. Orange Inv. Co.*, 260 S.W. 307 (Tex.Civ.App. 1924). When combined with the primary factors, retention of possession by the grantor and repayment of the alleged purchase price with interest lend support to the finding

of a mortgage. *Kainer v. Blank*, 24 S.W. 851 (Tex.Civ.App. 1894). However, the presence of these secondary factors alone do not evidence a mortgage as a matter of law, but the intention of the parties, the controlling element, is a question for the jury. *Alstin v. Cundiff*, 52 Tex. 453 (1880); *Mansfield v. Orange Inv. Co.*, *supra*.

Correlatively, the existence of an option resting with the grantor to repurchase at a specific time is indicative of a valid conveyance and option to repurchase. *Brannon v. Gartman*, 288 S.W. 817 (Tex.Comm.App. 1926); *Ruffier v. Womack*, *supra*.

Generally, the intent of the parties will control over the form and ostensible meaning of the conveyance. *John T. Hardie & Co. v. Campbell*, *supra*. This is just, since the grantor's right to defend his homestead should not be made to depend solely on the instruments. *Mosher Steel & Machinery Co. v. Nash*, 6 S.W.2d 158 (Tex.Civ.App. 1928, error dism'd). Where the true intent is not disclosed by the instruments, the jury must ascertain it from all the facts and circumstances of the case, *Alstin v. Cundiff*, *supra*, and parol evidence is admissible to show the character of the transaction. *Young v. Fitts*, 183 S.W.2d 186 (Tex.Civ.App. 1944, error ref'd, want of merit); *Mansfield v. Orange Inv. Co.*, *supra*.

If the courts intend to follow the spirit and purpose of the constitutional prohibition against mortgaging the homestead, use of the sale with an option to repurchase, although clearly recognized in Texas, should be narrowly confined. However, the homestead is often the most valuable asset owned by a family, and this device provides a means for raising needed capital. The risk involved in the sale with an option to repurchase may prevent its widespread use, but if necessity compels resort to this method of financing, the courts should first be certain that an actual sale was intended, and then enforce the obligations imposed by the transaction. To protect the homestead owner from hasty action in an emergency, the courts seem to require that (1) the buyer pay the reasonable market value of the property; (2) the option to repurchase rests with the seller; and (3) there exist no debtor-creditor relationship. The principal case indicates these requirements may be satisfied even where the seller remains in possession without paying rent and retains an option to buy back at the original selling price.

William E. Watson, Jr.

INCOME TAX—SELLER IN POSSESSION OF PERSONAL PROPERTY HELD TO RECOGNIZE INCOME AT DATE OF BILLING.—*Pacific Grape Products Co.*, 17 T.C. 1097, *rev'd*, 219 F.2d 862 (9th Cir. 1955).

A canner of fruit products reported its income on a calendar-year accrual basis. During the canning season contracts of sale were signed, and according to trade custom the taxpayer billed buyers for goods on hand at the end of the year. Although completely processed, the goods were not labeled, cased, segregated, or paid for. The Commissioner sought to defer recognition of income to the following year when the goods were shipped. *Held*, the seller's method of recognizing income upon billing clearly reflected income.

"Gross income" includes income derived from the sale of property. INT. REV. CODE §§ 22(a) 111 (1939). If the accounting method is to reflect income clearly, as § 41 requires, a proper determination of when a sale has been made is essential, although sometimes difficult. *Comm'r v. Segall*, 114 F.2d 706 (6th Cir. 1940); 2 MERTENS, FEDERAL INCOME TAXATION § 12.118 (1942). The regulations make transfer of title conclusive in determining when a sale from inventory is consummated; thus it is necessary to consult local property law. U.S. Treas. Reg. 118, § 39.22(a)-5 (1942); *Modesto Dry Yards, Inc.*, 14 T.C. 374 (1950).

The principal case involved fungible goods which the seller had completely processed and had stacked according to variety, size, and grade. It is generally recognized that an undivided share of a specific mass of fungible goods may be sold, the buyer and the seller becoming owners in common of the mass. UNIFORM SALES ACT § 6(2); *Horr v. Barker*, 6 Cal. 489 (1856). Applying the "title" test, the court looked to the law of California, where the Sales Act has been adopted, CALIF. CIVIL CODE §§ 1721-1800 (Deering, 1949), and determined that the common understanding in the canning industry is that title passes upon billing and that the parties so intended. 219 F.2d at 865.

This reasoning is contrary to generally-accepted commercial law concepts concerning transfer of title. The fungible goods doctrine applies to a *specific* mass of goods. UNIFORM SALES ACT § 6. At the time of billing, the buyers apparently were unaware of where the goods were located, and therefore could not have intended to become joint owners of this specific mass. VOLD, SALES § 72 (1931). Also, since no mass existed at the time of signing, the contract was for the sale of future goods; to pass title, an appropriation to the contract was necessary, UNIFORM SALES ACT § 19, Rule 4(1); *Proctor & Gamble Co. v. Peters, White & Co.*, 187 App. Div. 376, 176 N.Y.S. 169, *rev'd* 233 N.Y. 97, 134 N.E. 849 (1922), in addition to completion of processing. UNIFORM SALES ACT § 17. The necessity for subsequent appropriation cannot be obviated by the intention of the parties. 2 WILLISTON, SALES § 275a (rev. ed. 1948); VOLD, *supra*.

Assuming that the principal case accurately interpreted and applied California law, its approach nevertheless reflects the difficulty in ascertaining when a sale has been consummated. It has frequently been said that the "title" test is not conclusive. See *Comm'r v. Segall*, *supra*; *Brown Lumber Co. v. Comm'r*, 35 F.2d 880 (D.C. Cir. 1929); Comment, 22 NOTRE DAME LAW. 336 (1947). In *United States v. Utah-Idaho Sugar Co.*, 96 F.2d 756 (10th Cir. 1938), contracts for the sale of sugar stored in different warehouses by the seller but not delivered, appropriated to the contract, or specified by the seller in the taxable year, were held to constitute "sales" when the contracts were signed. The court declared that it was unnecessary to determine the incidence of "title" and based its decision on the creation of a "present, binding, and enforceable obligation of sale on the . . . taxpayer . . . and buyer. . . ." for tax purposes. *Id.* at 759. Yet no case has been found where a seller, continuously retaining pos-

session, had to recognize income in a period different from the one in which "title" passed.

Use of the "title" test tends to create an illusion of certainty and thus to obscure actualities upon which decision should turn. Commercial law has recognized that neither a legal doctrine nor a court decision can be based upon "title" as a uniform and invariable concept. Instead, emphasis is placed upon the operative facts. Corbin, *The Uniform Commercial Code—Sales*, 59 YALE L.J. 821 (1950). Since the process of determining what is a "sale" for income tax purposes is still in its comparative infancy, the facts in each tax case assume even greater importance.

Apart from the question of title, the court in the principal case thought that the seller's method of accounting clearly reflected income. The system had been adopted and consistently applied by the canning industry; it was reasonably adapted to its purposes and should not, the court said, be condemned by abstruse legal reasoning. 219 F.2d at 869. The court utilized a sound, pragmatic approach in considering the extrinsic facts and the parties' treatment of the contract. See Comment, 46 YALE L.J. 272 (1936). Several of these facts had proven significant in previous cases: at the agreed billing date the canner had completed processing the goods and had incurred the attributable expenses, see *United States v. Anderson*, 269 U.S. 422 (1926); shipping and brokerage expenses relating to the merchandise were determinable with reasonable accuracy and had been accrued, see *Harrold v. Comm'r*, 192 F.2d 1002 (4th Cir. 1951); sufficient goods were on hand to fill all outstanding orders and any pledged goods would have been freed for shipment to buyers, see Friedman, *Field Warehousing*, 42 COLUM. L. REV. 991 (1942); and the goods were held at the risk of the buyers, see *Ohio Brass Co.*, 17 B.T.A. 1199 (1929). Further, there was a binding contract requiring payment by the buyers, see *United States v. Utah-Idaho Sugar Co.*, *supra*; no external factor rendered ultimate completion of the contracts by either the seller or buyers contingent, see *The Federal Machine & Welder Co. v. Comm'r*, 11 T.C. 952 (1948), *aff'd*, 184 F.2d 843 (6th Cir. 1950); and the seller's right to the proceeds was fixed according to the understanding and custom in the industry. See *United States v. Amalgamated Sugar Co.*, 72 F.2d 755 (10th Cir. 1934).

Of course, an accounting method of itself is not conclusive. *Brown v. Helvering*, 291 U.S. 193 (1934). But where an industry's established practice is to recognize a sale when a contract has been substantially completed, an accounting method reflecting the business practice should be determinative. To rely upon such considerations as these rather than upon obscure legal reasoning is both realistic and modern. See S. REP. NO. 1622, 83d Cong., 2d Sess. 62 (1954) (seeking to increase the similarity between income tax and business accounting); *Beacon Publishing Co. v. Comm'r*, 218 F.2d 697 (10th Cir. 1955); MAGILL, TAXABLE INCOME 215 (rev. ed. 1945). Even if the transfer of "title" is treated as determinative, at least the accounting method should be considered an important operative fact in determining who has "title."

Towner Leeper

LIMITATION OF ACTIONS—FILING OF PLAINTIFF'S PETITION DOES NOT TOLL RUNNING OF LIMITATION PERIOD ON COUNTERCLAIM.—*Raney v. White*, 267 S.W.2d 199 (Tex. Civ.App.—San Antonio, 1954, error ref'd).

The plaintiff sued for the reasonable rental value of a holdover tenancy. Thirteen years later the defendant counterclaimed for the value of repairs and improvements on the property, a claim which the plaintiff's petition had anticipated without admitting. The plaintiff's plea of limitation to the defendant's counterclaim was sustained. *Affirmed*.

The holding reiterates the basic Texas rule, see *Fowler v. Stoneum*, 11 Tex. 478 (1854), but many old cases made an exception for liquidated "set-offs," *i.e.*, liquidated counterclaims opposing liquidated claims, limiting the basic rule to pleas in reconvention and to unliquidated set-offs. See *Walker v. Fearhake*, 52 S.W. 629 (Tex.Civ.App. 1899). Pleas in reconvention were counterclaims arising out of the same transaction as the plaintiff's claim. *Egery v. Power*, 5 Tex. 501 (1851). And while set-offs usually involved liquidated claims, 1 TIDD, PRACTICE *644 (1828), there is some authority that set-off in Texas included an unliquidated counterclaim opposing an unliquidated claim where they involved breach of unrelated contracts. *Sanders v. Bridges*, 67 Tex. 93, 2 S.W. 663 (1886). Other Texas cases have cast doubt on the exception of liquidated set-offs recognized in *Walker v. Fearhake*, *supra*, at least one assuming without discussion that the limitation period for any counterclaim, including a set-off, is not interrupted until it is properly asserted in court. *Uvalde Construction Co. v. Joiner*, 132 Tex. 593, 126 S.W.2d 22 (1939) (*semble*); see Comment, 18 TEXAS LAW REVIEW 209 (1939).

No appellate case directly involving the validity of the set-off exception has been decided since *Uvalde Construction Co. v. Joiner*, *supra*. The principal case follows the basic rule that the limitation period for a counterclaim runs until it is filed, but the claim was not a liquidated (set-off-type) counterclaim. Similarly, a federal court has followed the rule in applying a Texas limitation statute to bar an unliquidated counterclaim for damages arising out of a construction contract upon which the plaintiff's claim rested. *Texas Water Supply Corp. v. RFC*, 204 F.2d 190 (5th Cir. 1953). One case purporting to state a rule regarding set-off actually involved a defense improperly pleaded as a set-off. See *Stagal Oil Co. v. Bartholomew*, 144 S.W.2d 1012 (Tex.Civ.App. 1940, error dism'd by agreement); see also, *Dallas Joint Stock Land Bank v. Sneed*, 91 S.W.2d 1102 (Tex.Civ.App. 1936). Defenses, *i.e.*, matters that would serve to defeat the plaintiff's cause of action, as distinguished from claims for affirmative relief, are not generally subject to statutes of limitation. *Morris-Buick Co. v. Davis*, 127 Tex. 41, 91 S.W.2d 313 (1936); *Murphy v. Sills*, 268 S.W.2d 296 (Tex.Civ.App. 1953, error dism'd); *Runnells County v. Gulf Oil Corp.*, 209 S.W.2d 969 (Tex.Civ.App. 1948, error ref'd).

In most jurisdictions any counterclaim not barred when an action is begun can be urged during the pendency of the action, regardless of limitation. *Tom Reed Gold Mines Co. v. Brady*, 55 Ariz. 133, 99 P.2d 97 (1940); *Jones v. Mortimer*, 28 Cal.2d 627, 170 P.2d 893 (1946); *National*

Retailers Mutual Ins. Co. v. Gross, 142 Ohio St. 132, 50 N.E.2d 258 (1943). Radically different and complex rules are applied where limitations have already run on a counterclaim when the plaintiff commences his action. See *California Trust Co. v. Gustason*, 15 Cal.2d 268, 101 P.2d 74 (1940); *Francisco v. Francisco*, 120 Mont. 468, 191 P.2d 317 (1947); *Bryant v. Swetland*, 48 Ohio St. 194, 27 N.E. 100 (1891). In all jurisdictions other than Texas distinctions between types of counterclaims have not been considered in ascertaining the tolling effect of a plaintiff's filing suit at a time when a counterclaim is not barred. See Annot., 127 A.L.R. 909 (1940).

The solitary stand taken by Texas in making a distinction favoring set-offs was based upon doubtful authority before 1941, and the cases supporting it had offered no practical reason why a liquidated counterclaim should be treated more leniently than a claim arising out of the same transaction as the plaintiff's claim. The distinction has even less basis since the adoption of the Texas Rules of Civil Procedure, even though limitation statutes are substantive laws which the new procedural rules cannot change. TEX. CIV. STAT. (Vernon, 1948) art. 1731a. The rules group all the old types of counterclaims, and some new ones, into one category, "permissive counterclaims," without regard to the set-off and reconvention concepts. See TEX. RULES CIV. P. 97. Since the rules have also made some counterclaims compulsory, following the set-off exception today would result in some of these being barred by letting limitations run until the counterclaim is filed, while some permissive counterclaims would be privileged to have limitations tolled by the filing of plaintiff's petition.

The few cases decided since 1941 indicate that Texas is still not disposed to follow the majority rule that the limitation period for all counterclaims is interrupted by the commencement of the plaintiff's action. But those cases are not conclusive that in Texas the period continues to run for all counterclaims after the plaintiff's petition is filed, since the post-1941 cases involve only counterclaims similar to reconvention. They do not conclude the question concerning other types of permissive counterclaims, particularly those resembling liquidated set-offs, for which the courts could revive the old set-off distinction. Texas courts have thus far not made a distinction favoring the new compulsory counterclaims provided for in the Texas and Federal procedural rules, but the point was not discussed in the two cases involving compulsory-type counterclaims. See *Texas Water Supply Corp. v. RFC*, *supra*, and the principal case; TEX. RULES CIV. P. 97; FED. R. CIV. P. 13. Were Texas courts to hold the period interrupted, at the filing of plaintiff's petition, for some or all counterclaims, it might make no difference in cases like the principal one because of the long delay in prosecution of the counterclaim. See TEX. CIV. STAT. (Vernon, 1948) arts. 5526, 5527.

Texas courts should use the opportunity afforded by the new grouping of counterclaims to clarify and make realistic the rules governing limitation of counterclaims. Because of the confused rulings concerning the tolling effect of the plaintiff's commencement of action, *stare decisis* is not a strong impediment to reform, although it might preclude adoption

in Texas of the majority rule that the period is interrupted for all counterclaims. But the baseless set-off distinction that favors liquidated claims should be conclusively denied, and the courts should consider a rule that the filing of the plaintiff's petition interrupts the period for a compulsory counterclaim—one that would usually involve much the same issues and evidence as the plaintiff's action. If this latter step is beyond judicial power, legislative action should be taken.

Robert A. Fairey

PRACTICE AND PROCEDURE—BROAD SUBMISSION OF SPECIAL ISSUE ALLOWED IN ACTION BASED UPON INTENTIONAL ASSAULT.—*Greiger v. Vega*, 271 S.W.2d 85 (Tex. Sup. 1954).

The defendant pleaded self-defense in a wrongful death action predicated upon the intentional killing of the plaintiff's son. The only special issue submitted was "Do you find from a preponderance of the evidence that the action of . . . [the defendant] in shooting and killing the deceased . . . was wrongful?" The plaintiff requested the following special issues: (1) At the time the deceased was killed, was he assaulting the defendant? (2) Was the assault of such a nature as to produce in the defendant a reasonable expectation of death or serious bodily injury? (3) Did the defendant use more force than was necessary in his self-defense? (4) Had the defendant at his disposal other reasonable means of repelling the attack? The trial judge ruled that each of the plaintiff's requested issues was comprehended by the instruction defining the term "wrongful." *Affirmed.*

If a case is submitted on special issues, the court must submit each issue "distinctly and separately," TEX. RULES CIV. P. 277, but only the "controlling issues made by the written pleadings and the evidence" need be submitted. TEX. RULES CIV. P. 279. Seemingly, in framing submissible issues no distinction should be drawn between negligence and non-negligence cases. However, the rule is otherwise.

It is well settled that submission of very broad issues in negligence cases is reversible error. *Roosth & Genecov Production Co. v. White*, 152 Tex. 619, 262 S.W.2d 99 (1953); *Wichita Falls & Oklahoma Ry. v. Pepper*, 134 Tex. 360, 135 S.W.2d 79 (1940); *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 240 S.W. 517 (1922); *Gulf C. & S. F. Ry. v. Mangham*, 95 Tex. 413, 67 S.W. 765 (1902). The leading case is *Fox v. Dallas Hotel Co.*, *supra*, holding it error to submit the issue of the plaintiff's "contributory negligence in his conduct in, around, or about the elevator, or the shaft thereof, prior to or at the time he was injured." On the basis of the statute then in force, TEX. CIV. STAT. (Vernon, 1925) art. 2189 (presently embodied in TEX. RULES CIV. P. 277), the court established the rule that an issue must be submitted "distinctly and separately" on each group of facts pleaded which, if proved, would constitute a separate ground of recovery or defense.

This restrictive interpretation, however, does not generally prevent the submission of broad issues in non-negligence cases. For example, *Hough v. Grapotte*, 127 Tex. 144, 90 S.W.2d 1090 (1936), held that residence and intention were merely elements of the "controlling" issue of domicile, and *Houston v. Lurie*, 148 Tex. 391, 224 S.W.2d 871 (1949), upheld a

submission of the issues that certain buildings constituted "serious fire hazard[s]" and that they could be repaired without "substantial reconstruction," even though each issue embraced a number of subsidiary factual questions. Similarly, a submission of the issue that a defendant's conduct made living with him "insupportable" was approved in a divorce action. *Howell v. Howell*, 147 Tex. 14, 210 S.W.2d 978 (1948). Contra, *Egan v. Egan*, 235 S.W.2d 659 (Tex.Civ.App. 1921, error dism'd). And it was not error to submit an issue of "assault and battery" in those terms. *Whitaker v. Haynes*, 128 S.W.2d 532 (Tex.Civ.App. 1939, error dism'd, judgm't correct).

The identical submission which formed the seed of controversy in the principal case was considered previously in *McMurrey Corp. v. Yawn*, 143 S.W.2d 664 (Tex.Civ.App. 1940, error ref'd) and *Barrow v. Barclay*, 269 S.W. 235 (Tex.Civ.App. 1925, error ref'd). It seems that the cases sanctioning broad submissions have relied principally on the precept that only the "controlling" issues need be submitted. See TEX. RULES CIV. P. 279. This apparently does not comport with the narrow construction propounded in the *Fox* case, that each separate ground of recovery or defense constitutes an issue which must be submitted "separately and distinctly." Resolution of this inconsistency hinges on the definition given "controlling," but the Rules themselves may be at least theoretically inconsistent.

In a recent negligence case, *Roosth & Genecov Production Co. v. White*, *supra*, the trial judge submitted generally the issue that a derrick was defective, instead of submitting separate issues concerning various alleged defects. It was argued that he had properly submitted the "controlling" issue, and that two cases previously mentioned, *Houston v. Lurie*, *supra*, and *Howell v. Howell*, *supra*, represented a trend toward reducing the number of issues by grouping a greater number of factual elements within a single issue. The court distinguished those two cases as not being negligence cases, and affirmed the rule of *Fox v. Dallas Hotel Co.*, *supra*. The court of civil appeals in the principal case, *Vega v. Grieger*, 264 S.W.2d 498, 500 (1954), apparently believed the *Roosth* case condemned a broad submission, but on appeal, the supreme court expressly repudiated that idea and commended this manner of submission in other than negligence cases. 271 S.W.2d at 88.

Although there may be practical reasons for distinguishing the submission of issues in a negligence case, it is suggested that the rules mentioned above, requiring the court to submit "distinctly and separately" the "controlling issues made by the written pleadings and the evidence," should have the same effect in all types of cases. There is a decided trend toward reducing the complexities of trial; however, the well-established precedent makes it unlikely that the courts will soon depart from submission of detailed special issues in negligence cases. See especially the assertion in the *Roosth & Genecov* case, *supra*, that to change the practice by judicial decision would cause "undue confusion."

Joseph J. French, Jr.

TAXATION—VALIDITY OF TAXING SCHEME SYSTEMATICALLY EXCLUDING BANK DEPOSITS FROM ASSESSMENT.—*Whelan v. State*, 24 Tex.Sup.Ct.Rep. 484 (1955).

The petitioner, who had been adjudged liable for delinquent taxes,

contended, *inter alia*, that the trial court had erred in excluding evidence that bank deposits had been deliberately and systematically excluded from the assessment rolls. *Reversed and remanded*; the systematic exclusion of bank deposits from the tax rolls is contrary to the constitution and the statutes; if the taxpayer can prove substantial injury, he is entitled to relief.

Bank deposits are clearly subject to taxation. TEX. CONST. art. 8, § 1; TEX. CIV. STAT. (Vernon, 1948) arts. 7145, 7147, 7149, 7152, 7162. The fact that an ordinary bank deposit creates a debtor-creditor relationship between the bank and the depositor does not alter its status as taxable property. *Campbell v. Riviere*, 22 S.W. 293 (Tex.Civ.App. 1893, error *ref'd*); *Campbell v. Wiggins*, 21 S.W. 730 (Tex.Civ.App. 1892), *aff'd*, 85 Tex. 424, 21 S.W. 599 (1892).

The state can no longer use the general property tax for general revenue purposes, TEX. CONST. art. 8, § 1a, but the tax is still the principal source of revenue for local taxing units. The problems involved in the principal case illustrate the difficulties in administering the general property tax and suggest a need for consideration of possible revisions in the taxing process, particularly concerning the taxation of bank deposits and money. At least four methods of dealing with the problems are possible: (1) exemption of money and bank deposits from taxation; (2) enforcement of the general property tax laws as they now stand; (3) taxation of money and bank deposits at a different valuation or rate; and (4) adoption of a different system of taxation.

Many factors, both practical and economic, favor an exemption of bank deposits and money. The general property tax originated when wealth was largely in the form of tangible property. See, *e.g.*, 1 GAMMEL, LAWS OF TEXAS 1319 (1837). As the forms of wealth multiplied, bank deposits and money were added to the tax rolls. 8 GAMMEL, LAWS OF TEXAS 1111 (1876). However, the accessibility of real property records led the assessors to center attention upon real property and improvements, and this is an established custom today. Most attempts to tax personal property have been thwarted by evasion and by rendition at a ridiculously low value. See Lutz, *Public Finance* 368 (4th ed. 1947). Bank deposits and money, in particular, are not being taxed. On December 31, 1953, over six billion dollars on deposit in Texas banks was subject to ad valorem taxation. THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, MEMBER BANK CALL REPORT No. 130—CONDITION OF MEMBER BANKS 16 (1954). On January 1, 1954, only twelve million dollars was rendered as "money on hand or on deposit." TEX. COMP. PUB. ACCTS. ANN. REP. pt. II at 414 (1954). This great discrepancy depicts the extent of evasion and the insignificant effect exemption of bank deposits and money would have on revenues.

Enforcement of the ad valorem tax on money and bank deposits would be extremely difficult. A depositor could convert these assets into tax-exempt securities before tax day and reconvert them afterwards. Further, a taxpayer could maintain his deposits in a non-taxing state or county, or transfer them temporarily to another jurisdiction to avoid tax assessment. In Texas money and bank deposits are taxable where

the owner resides, TEX. CONST. art. 8, § 11; cf. *Great Southern Life Ins. Co. v. City of Austin*, 112 Tex. 1, 243 S.W. 785 (1922); *Connor v. Waxahachie*, 13 S.W. 30 (Tex. Sup. 1889), but the administrative difficulties of discovering unrendered bank deposits in other states and counties are practically insuperable.

In the instant case the court correctly declared that taxing authorities have no right to decide what property shall escape taxation, and that it is the assessor's duty to ascertain each person's taxable property. In theory, if all bank depositors fail to render their deposits as the law requires, TEX. CIV. STAT. (Vernon, 1948) arts. 7193, 7204, each assessor must seek to ascertain from the banks the deposits, on assessment day, of each depositor subject to his authority, and assess it as "unrendered" property. TEX. CONST. art. 8, § 11; TEX. CIV. STAT. (Vernon, 1948) art. 7218. This would be an onerous, costly task, and from a political viewpoint, might be more than an elected official could be expected to do. Moreover, some assessors seem opposed to the tax on bank deposits and money for practical and personal reasons. See *The Austin American*, July 15, 1955, p. 1, col. 1. Many assessors who would otherwise favor taxing money and bank accounts believe the revenue derived would not justify the burden of administering and enforcing the tax.

The general property tax has been justified on the theory that the value of a citizen's property is a good measure of the extent to which he enjoys the benefits of government services and protection. Graves & Prober, *Equity Grounds for Property Taxation Re-examined*, LAND ECONOMICS 144 (May 1951). As a broad generality this theory is no doubt sound; however, it seems clear that many governmental services—e.g., police and fire-fighting protection, garbage and sewage disposal, construction and maintenance of streets and roads—are more directly beneficial to owners and users of real property than they are to owners of intangibles such as bank deposits. Hence the theory seems to justify allocating to these intangibles a proportionately lesser share of the tax burden. The general property tax has also been justified on the theory that the tax burden should be apportioned according to ability to pay and that gross wealth is a good measure of this ability. This argument, too, may be sound enough so far as it goes, though as a support for the general property tax it is seriously weakened by the fact that the authorities generally agree that the progressive net income tax is the best measure of ability to pay. See SHULTZ & HARRIS, AMERICAN PUBLIC FINANCE 372 (5th ed. 1949). But assuming its validity in this connection, it implies that bank deposits, which characteristically produce less income than does real estate, should be taxed at a lower rate or at a lower percentage of actual value. Many states so treat them. LUTZ, PUBLIC FINANCE 371 (4th ed. 1947). Other states have discarded the general property tax in favor of other systems of taxation. See SHULTZ & HARRIS, *supra*, at c. XXIX. It is evident that some change is needed in the tax laws to conform to the constitutional guarantee of "equal and uniform" taxation.

George Sladczyk, Jr.

TORTS—COMPARISON OF DUTY REQUIREMENTS IN MASTER-SERVANT AND LANDOWNER-INVITEE LITIGATION IN TEXAS.
—*Sears, Roebuck & Co. v. Robinson*, 280 S.W.2d 238 (Tex. Sup. 1955).

The plaintiff was injured in the course of his employment when he slipped and fell on an oily floor in the defendant's warehouse. The defendant, who was not covered by workman's compensation insurance, argued it owed no duty to the plaintiff since the dangerous condition of the floor was open and obvious. *Held*, for the plaintiff; to hold that an employer owes no duty to protect an employee from open and obvious defects would nullify the provision of the Workman's Compensation Act taking away the defense of assumed risk from non-subscribing employers.

The result in the present case was correct and did no violence to the usual elements of liability in employer-employee cases. According to the common law, the employer owes his employee the duty to provide a reasonably safe place to work, and if his employee is injured through a breach of this duty, he may show as a matter of defense that the employee knew or should have known of the danger, or that the employee assumed the risk. *Patton v. Dallas Gas Co.*, 108 Tex. 321, 192 S.W. 1060 (1917); *St. Louis Southwestern Ry. v. Hynson*, 101 Tex. 543, 109 S.W. 929 (1908); *Poindexter v. Receivers of the Kirby Lumber Company*, 101 Tex. 322, 107 S.W. 42 (1908). If an employer subject to the Workman's Compensation Act has not complied with it, he is deprived of these common-law defenses. TEX. CIV. STAT. (Vernon, 1948) art. 8306 § 1.

The present case is apparently the first in Texas in which it was argued that the employer owed his employee no duty where the danger was open and obvious. Probably the argument was urged chiefly because of the uncertainty created by *Robert E. McKee General Contractors v. Patterson*, 271 S.W.2d 391 (Tex. Sup. 1954). See Keeton, *Personal Injuries Resulting From Open and Obvious Conditions—Special Issue Submission in Texas*, 33 TEXAS LAW REVIEW 1 (1954). In that case an employee of the defendant's subcontractor was injured when his ladder slipped on a slick gymnasium floor. The defendant was held not liable because the defect was open and obvious and, the court said, the defendant owed no duty to the plaintiff. The court reverted to an economic master and servant theory that had full approval in the late nineteenth century. *Smith v. Baker*, [1891] A.C. 325, 346. ("[M]aster may carry on his work in a dangerous way and damage his servant—if the servant is foolish enough to agree to it."). But since the *McKee* case involved a landowner-invitee relationship the court purported to follow a series of Texas cases involving landowner-invitee litigation that were construed as authority for the holding. See *Houston National Bank v. Adair*, 146 Tex. 387, 207 S.W.2d 374 (1948); *A. C. Burton Co. v. Stasny*, 223 S.W.2d 310 (Tex. Civ. App. 1949, error ref'd); *Marshall v. San Jacinto Bldg., Inc.*, 67 S.W.2d 372 (Tex. Civ. App. 1933, error ref'd want of merit).

The reasoning of the *McKee* case necessarily involves a departure from usual theories of negligence. The elements of a cause of action for negligence are (a) a duty to act with reasonable care towards the in-

jured party; (b) a breach of that duty (*i.e.*, negligence); and (c) an injury resulting from the breach. PROSSER, TORTS § 30 (1941). If all the elements are proved, recovery will follow unless the defendant shows that the plaintiff was also negligent or that he voluntarily assumed the risk. To say that a landowner has no duty to protect an invitee against open and obvious defects is tantamount to declaring that the defendant is not negligent because the plaintiff was negligent or had assumed the risk. Such a qualification of the duty element is contrary to Texas cases where, even though an invitee's injury was caused by an open and obvious defect on the landowner's premises, a duty to protect her was found. *Walgreen Texas Co. v. Shivers*, 137 Tex. 493, 154 S.W.2d 625 (1941). The more rational view is that though an open and obvious defect is always relevant to the issue that a plaintiff has assumed the risk or has been contributorily negligent, it is irrelevant to the issue of the defendant's duty; *i.e.*, the defendant, though negligent, is not liable. *Camp v. J. H. Kirkpatrick Co.*, 250 S.W.2d 413 (Tex.Civ.App. 1952, error ref'd n.r.e.). The doctrine of the *McKee* case forces the plaintiff to anticipate and rebut defensive matters as a necessary element of his burden of proving the defendant's negligence.

In the *McKee* case the court relied upon cases in which there are dicta that the defendant owed no duty to the plaintiff, but in each of those cases the facts indicate that the court had determined as a matter of law that the plaintiff had either assumed the risk or that the defendant was not guilty of any negligent act. In this context it is difficult to distinguish between assumption of risk, *volenti non fit injuria*, and contributory negligence. *Schiller v. Rice*, 151 Tex. 116, 121, 246 S.W.2d 607, 610 (1952); *Wood v. Kane Boiler Works*, 150 Tex. 191, 195, 206, 238 S.W.2d 172, 174, 181 (1951). In *A. C. Burton Co. v. Stasny*, *supra*, the plaintiff walked through a plate glass window with his head down, thinking it was an open door. The defendant pleaded contributory negligence and assumption of risk as affirmative defenses. Although the court said that the defendant owed no duty, the record was such that it might have been held, as a matter of law, that the defendant was not negligent or that either of the affirmative defenses was established. In *Houston National Bank v. Adair*, *supra*, the plaintiff fell in descending stairs which she claimed were inadequately lighted, slick and without a proper hand rail. The court said that the defendant owed her no duty since the defects were open and obvious, but it had already decided the case on the ground that there was no evidence to raise a fact issue of the bank's negligence. See *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 528, 235 S.W.2d 609, 622 (1950). The court said further that the plaintiff "voluntarily exposed herself to such risks as existed." The duty of the bank to its customers was not contested; indeed, it was conceded. Similarly, the duty issue was not controlling in *Hausman Packing Co. v. Btdwey*, 147 S.W.2d 856 (Tex.Civ.App. 1941, error ref'd) (plaintiff injured while alighting from defendant's meat truck), and in *Marshall v. San Jacinto Bldg.*, *supra* (plaintiff injured hand in revolving door in defendant's building).

The landowner would be given ample protection in close cases by proper judicial surveillance of the issues of negligence, contributory negligence or *volenti non fit injuria*. The *McKee* decision introduces an un-

necessary, disturbing and regrettable complication in landowner-invitee cases. See *Camp v. J. H. Kirkpatrick Co.*, *supra*. The invitee's conduct should be considered a matter of defense as in *Schiller v. Rice*, *supra*.

J. C. Zbrank

TORTS—MUNICIPAL CORPORATIONS—CITY HELD LIABLE FOR FAILURE TO ERECT WARNING SIGNS WHERE STREET REPAIR CREATES A COLLISION HAZARD.—*City of Austin v. Schmedes*, 24 Tex.Sup.Ct.Rep. 369 (1955).

The plaintiff recovered judgment against the city for damages resulting from the city's failure to provide signs directing traffic where barriers erected in connection with street improvement had temporarily changed the flow of traffic and had created a hazard of collision between automobiles. The city contended that erection of traffic signs is a governmental function, and that it was consequently not liable for failure to give warning of traffic hazards apart from physical defects and obstructions in the street itself. *Affirmed*.

Generally, a municipal corporation is not liable for acts of its employees in the exercise of governmental functions, but it may be liable for their acts in connection with proprietary functions. *Houston v. Quinones*, 142 Tex. 282, 177 S.W.2d 259 (1944); *Amarillo v. Ware*, 120 Tex. 456, 40 S.W.2d 57 (1931); *Galveston v. Posnainsky*, 62 Tex. 118 (1884). In attempts to differentiate these functions various distinctions have been drawn; *e.g.*, between activities beneficial to the general public and activities for municipal benefit only, *Houston v. Quinones*, *supra*; between activities voluntarily undertaken and those required by law, *Houston v. Shilling*, 150 Tex. 387, 240 S.W.2d 1010 (1951); between profit-yielding activities and those performed without pecuniary return, *Houston v. Wolverton*, 277 S.W.2d 101 (Tex.Sup. 1955). These tests are of doubtful reliability, and in the principal case the court avows a restrictive attitude toward the doctrine of municipal immunity without reference to any of them.

The earliest American cases did not distinguish between municipal and private corporations in respecting tort liability. *Hoe v. Alexandria*, 12 Fed. Cas. 461, No. 6666 (D.C. Cir. 1802). The distinction between governmental and proprietary functions was first used as a means of conferring upon municipal corporations a partial immunity from liability in *Bailey v. New York*, 3 Hill 531 (N.Y. 1842), and it has been attacked as originating in mistake and continuing in fallacy. See Borchard, *Government Responsibility in Tort*, 36 YALE L.J. 1, 757, 1039 (1926); Barnett, *Liability of Municipal Corporations*, 16 ORE. L. REV. 250 (1937). The doctrine was originally justified as one fostering infant municipalities. Borchard, *Government Liability in Tort*, 34 YALE L.J. 129 (1924). It has outlived this justification and is now generally condemned as having little, if any, validity; but it is so deeply entrenched in precedents that instead of rejecting it outright, the courts have tended to bypass it, paying it lip service but consistently allowing recovery in certain types of cases.

Municipal immunity first began to disintegrate in motor vehicle cases

imposing common-law liability for negligence, Green, *Freedom of Litigation (III), Municipal Liability for Torts*, 38 ILL. L. REV. 355 (1944), and recent cases indicate other areas in which it has been limited. The prevailing view is that street repair and improvement is a proprietary function, *Dallas v. Maxwell*, 248 S.W. 667 (Tex.Comm.App. 1923); *Galveston v. Posnainsky*, *supra*, while traffic regulation is a governmental function. *Parson v. Texas City*, 259 S.W.2d 333 (Tex.Civ.App. 1953, error ref'd); *Baker v. Waco*, 129 S.W.2d 499 (Tex.Civ.App. 1939). The activity considered in the principal case, erecting traffic warnings, has both a governmental and a proprietary aspect. The tendency to give preponderant weight to the "proprietary" function of maintaining streets is observable in connection with other activities having a prominent governmental aspect. Promotion of public health is admittedly a governmental function, yet construction and maintenance of storm sewers, grading of streets to improve drainage, cleaning of streets, and weed-cutting have been held incident to street maintenance rather than to guarding public health. *Dilley v. Houston*, 148 Tex. 191, 222 S.W.2d 992 (1949); *Wichita Falls v. Mauldin*, 39 S.W.2d 859 (Tex.Comm.App. 1931); *Ostrom v. San Antonio*, 94 Tex. 523, 62 S.W. 909 (1901); *Houston v. Quinones*, *supra*. Likewise, protection against fire is generally viewed as a governmental function, but locating fire hydrants has been held a proprietary function. *Kling v. Austin*, 62 S.W.2d 689 (Tex.Civ.App. 1933). A collision with a fire truck caused by physical defects in a street resulted in municipal liability without regard to the fire protection activity in which the truck was engaged. *Port Arthur v. Wallace*, 141 Tex. 201, 171 S.W.2d 480 (1943).

Other jurisdictions generally reflect the same trend toward holding cities liable through the street doctrine. *Hattiesburg v. Hillman*, 76 So.2d 368 (Miss. Sup. 1954), held that the city's duty to maintain streets in safe condition extends to the neutral ground on either side of the traveled way. Poorly illuminated or located traffic and safety islands, traffic buttons, and traffic regulation devices which obstruct or create a danger to traffic have resulted in liability in spite of the basic city immunity for traffic regulation. *De Lahunta v. Waterbury*, 134 Conn. 630, 59 A.2d 800 (1948); *Rohwedder v. Chicago*, 322 Ill. App. 700, 53 N.E.2d 496 (1944); *East Coast Freight Lines, Inc. v. Baltimore*, 190 Md. 256, 58 A.2d 290 (1948); *Kamrutzer v. New York*, 265 App. Div. 636, 40 N.Y.S.2d 139 (1943); *Hamilton v. Dilley*, 120 Ohio St. 127, 165 N.E. 713 (1929); *Young v. Camden*, 187 S.C. 414, 198 S.E. 45 (1938). The extreme to which this trend has been carried is shown by *Splinter v. Nampa*, 70 Idaho 287, 215 P.2d 999 (1950), in which the city was held liable for permitting the location of a gas tank in an alley where it constituted a foreseeable explosion hazard.

Municipal immunity is still a defense, however, in connection with most municipal activities. See *Parson v. Texas City*, *supra* (faulty operation of traffic light for several days); *Ynsfran v. Burkhardt*, 247 S.W.2d 907 (Tex.Civ.App. 1952, error ref'd n.r.e.) (city failed to remove from a city-controlled corner vegetation which obstructed view of an intersection); *Presley v. Odessa*, 263 S.W.2d 293 (Tex.Civ.App. 1952). It seems that in the *Ynsfran* case the court could have held the city's conduct a breach of its duty to maintain streets in a safe condition. Similarly, the

strong dissent in the *Parson* case, asserting that the city's failure to repair the defective traffic light for several days made the street unsafe and constituted a violation of the city's duty, seems the better view.

Two recent Texas cases further illustrate the supreme court's attitude. In *Houston v. Wolverton*, *supra*, a city employee negligently injured the plaintiff while enroute to the city for the dual purpose of returning official reports (a governmental function) and having a city car inspected (a proprietary function); the court labeled the proprietary activity paramount, and held the city liable. In *Lebohm v. Galveston*, 275 S.W.2d 951 (Tex. Sup. 1955) the court held that a charter provision exempting the city from liability for negligence in maintaining the streets contravened the constitutional guarantee of a remedy for every injury. See 33 TEXAS LAW REVIEW 1099 (1955).

The current trend evident in these decisions is but one facet of the strong movement toward holding all levels of government liable for injuries resulting from the negligent performance of enterprise functions. Legislation is the panacea for this problem; the Federal Tort Claims Act, New York Court of Claims Act, and the Oklahoma statutory waiver of state, immunity exemplify steps thus far taken. But there is much the courts can do to clarify the present confusion. They seem to be groping for a manageable distinction between mechanical or operative activities and decisional functions. Some such fresh demarcation would be preferable to the oft-evaded and near meaningless line sought to be drawn between governmental and proprietary functions.

Tom Rush Moody, Jr.

TORTS — NEGLIGENCE — AUTOMOBILES — THE EMERGENCY DOCTRINE.—*Meyer v. Whisnant*, 121 N.E.2d 372 (N.Y. 1954).

The defendant motorist invoked the emergency doctrine to defeat his guest passenger's charge that he was negligent in colliding with a car which suddenly appeared in his lane. The trial court did not consider the emergency issue but held the defendant negligent as a matter of law for violating a traffic statute and submitted only issues of proximate cause to the jury. The appellate division reversed and dismissed as a *matter of law*, a judgment for the plaintiff, ruling the evidence insufficient to hold the defendant guilty of actionable negligence proximately causing the accident. *Affirmed*. The court concluded that the defendant was the helpless victim of what was, *beyond any dispute*, an emergency created independently of his own action.

The courts agree on only two aspects of the emergency doctrine: (1) the emergency must not be created by the actor's own tortious conduct, *Windsor v. McKee*, 22 S.W.2d 65 (Mo. App. 1929); *Casey v. Siciliano*, 310 Pa. 238, 165 Atl. 1 (1933); *Luce v. Chandler*, 109 Vt. 275, 195 Atl. 246 (1937); and (2) the necessity of choosing instantly between alternatives will lessen the degree of care ordinarily required. *Schmitt v. Emery*, 211 Minn. 547, 2 N.W.2d 413 (1942); *Weinberg v. Pavitt*, 304 Pa. 312, 155 Atl. 867 (1931); *American Products Co. v. Villwock*, 7 Wash.2d 246, 109 P.2d 570 (1941). The critical question is the degree of care

required. Some courts maintain the integrity of the general negligence standard and treat an emergency as a mere circumstance in applying the objective standard of ordinary care. *Car & General Ins. Corp. v. Keal Driveway Co.*, 132 F.2d 834 (5th Cir. 1943); *Triestram v. Way*, 286 Mich. 13, 281 N.W. 420 (1938); *Barkshadt v. Gresham*, 120 S.C. 219, 112 S.E. 923 (1922). Other courts acquit the defendant of negligence as a matter of law in emergency situations, thereby creating a separate and distinct standard of care. *Kardasinski v. Koford*, 88 N.H. 444, 190 Atl. 702 (1937) (instinctive action); *Polonofsky v. Dobrosky*, 313 Pa. 73, 169 Atl. 93 (1933) (honest exercise of his judgment).

Because of the courts' failure to crystallize the test actually utilized, most jurisdictions cannot be satisfactorily classified. Texas is a good example. Initially, the doctrine was explicitly stated as a mere aspect of the standard of ordinary care, *Hooks v. Orton*, 30 S.W.2d 681 (Tex.Civ. App. 1930), but later cases have destroyed the original clarity. *Beck v. Browning*, 129 Tex. 7, 101 S.W.2d 545 (1937); *Dallas Ry. & Terminal Co. v. Young*, 155 S.W.2d 414, 416 (Tex.Civ.App. 1941, error ref'd) (dictum urging the test of the actor's own best judgment).

Still unsettled is the question of what issues are to be submitted to the jury. *White v. Munson*, 162 S.W.2d 429 (Tex.Civ.App. 1942) (emergency issue submission unnecessary if issues of primary negligence and discovered perid are submitted); *Garner v. Prescott*, 234 S.W.2d 704 (Tex.Civ.App. 1950) (requiring inquiry concerning the presence of an emergency and inquiry concerning the defendant's exercise of the care that an ordinarily prudent person would use in the same or a similar emergency). In *Goolsbee v. Texas & N.O. R.R.*, 150 Tex. 528, 243 S.W.2d 386, 387 (1951), the supreme court said, ". . . the doctrine may be . . . invoked to lower the legal standard of care . . ." but it failed to voice a determinative formula resolving the conflicting and inconsistent language of the courts of civil appeals.

The *Garner* case represents the present tendency to incorporate the emergency doctrine as a factor in applying the standard of ordinary care. RESTATEMENT, TORTS § 296 (1934); Note, 1950 WIS. L. REV. 417.

Courts discussing the emergency doctrine have applied mental criteria such as decision and judgment but have not discussed the propriety of considering man's physical limitations, such as reaction time. The general negligence standard attributes to the reasonable man the physical qualities of the actor. PROSSER, TORTS § 36 and cases cited at 227 (1941). However, even when the "instinctive action" test is used the actor must not be "unfit" to act in some emergencies. *Miller v. Daniels*, 86 N.H. 193, 166 Atl. 30 (1933); PROSSER, TORTS § 37 at 242 (1941). At least one court implicitly recognizes physical limitations as an element in determining liability, but it recommends no means of measuring these limitations. *Morrison v. Boston & M.R.R.*, 86 N.H. 176, 180, 164 Atl. 553, 556 (1933) ("The plaintiff's position [that the defendant could have acted to avoid the collision] defies the natural limitations on the speed of the mental and physical activities of human beings.") If reaction time is accepted as a relevant factor in applying the standard of ordinary care, despite the difficulty of precise measurement, there may be some justification for the instant case and others excusing instinctive acts in an emergency as a matter of law.

No court has fully dealt with the basic problem of formulating a negligence standard prescribing the required physical skill. Should the courts require conduct like that of the driver of ordinary competence and response, as suggested in *Whicher v. Phinney*, 124 F.2d 929 (1st Cir. 1942), or consider the individual driver's particular experience, driver-training and reaction? These divergent views remain unresolved.

J. W. Gary

WILLS—INCORPORATION BY REFERENCE INTO HOLOGRAPHIC WILLS.—*Hinson v. Hinson*, 280 S.W.2d 731 (Tex. Sup. 1955); *Johnson v. Johnson*, 279 P.2d 928 (Okla. Sup. 1955).

The issue in each of the principal cases was whether a typewritten will, invalid for failure to comply with the requirements of an attested will, could be validated by a subsequently executed and unattested holographic document. *Held by the Texas Supreme Court*, an invalid non-holographic instrument cannot be validated either on the theory of incorporation by reference or republication by a subsequent holographic codicil. *Held by the Oklahoma Supreme Court*, the holographic codicil incorporated the prior invalid nonholographic will by reference, republished and validated it.

Generally all courts agree that a defective typewritten document can be validated by a subsequent attested instrument properly executed. This may occur by integration, *Kyle v. Jordan*, 187 Ala. 355, 65 So. 522 (1914); *Goethe v. Browning*, 146 S.C. 7, 143 S.E. 362 (1928); *In re Sleeper*, 129 Me. 194, 151 Atl. 150 (1930)—*i.e.*, the earlier, defective instrument and the later one are regarded as a single instrument in the physical sense, validated by proper execution of the later portion—or by republication or incorporation by reference. *Beall v. Cunningham*, 3 B. Mon. 390, 42 Ky. 390 (1843); *McCurdy v. Weall*, 43 N.J. Eq. 333, 7 Atl. 566 (1886); *Campbell v. Barrera*, 32 S.W. 724 (Tex. Civ. App. 1895). Thus, if the first will is defective because of improper execution, *Estate of Plumel*, 151 Cal. 77, 90 Pac. 192 (1907); *Beall v. Cunningham*, *supra*; *Kelly's Estate*, 236 Pa. 54, 84 Atl. 593 (1912), failure to sign the will, *Doe v. Evans*, 1 Crump & Mees 42, 149 Eng. Rep. 307 (1832); *Beall v. Cunningham*, *supra*; *McCurdy v. Weall*, *supra*, lack of testamentary capacity, *Brown v. Riffin*, 94 Ill. 560 (1880); *Manship v. Stewart*, 181 Ind. 299, 104 N.E. 505 (1914); *Stevens v. Myers*, 62 Ore. 372, 121 Pac. 434 (1912), or undue influence or fraud, *Estate of Baird*, 176 Cal. 381, 168 Pac. 561 (1917); *Taft v. Stearns*, 234 Mass. 273, 125 N.E. 570 (1920); *Campbell v. Barrera*, *supra*, a properly executed and attested codicil republishes or incorporates and revives the will so as to render it effective.

Most judicial opinions, including those in the principal cases, do not distinguish clearly between republication and incorporation by reference, but Atkinson contends that if the first will was never valid it cannot be revived or republished, but can be effective only on the theory of incorporation by reference. ATKINSON, WILLS, §§ 89, 90 (2d ed. 1953). This distinction is important since the doctrine of incorporation generally requires that the extrinsic document be in existence when

the will is executed, be referred to as being in existence, and be identified satisfactorily. ATKINSON, WILLS, § 80 (2d ed. 1953). The doctrine of republication, on the other hand, operates as a re-dating of the original will based on the presumed intent of the testator. ATKINSON, WILLS, § 91 (2d ed. 1953).

Because holographic wills must be entirely in the testator's handwriting, *Estate of Thorn*, 183 Cal. 512, 192 Pac. 19 (1920); *In re Will of Lowrance*, 199 N.C. 782, 155 S.E. 876 (1930); *Dean v. Dickey*, 225 S.W.2d 999 (Tex.Civ.App. 1949 error ref'd), they have presented additional obstacles to integration and incorporation. The courts have been strict in refusing to allow integration of nonholographic matter into a holographic will, *Estate of Thorn*, *supra*; *In re Wolcott's Estate*, 54 Utah 165, 180 Pac. 169 (1919), unless the nonholographic matter may be disregarded as surplusage. *In re Will of Lowrance*, *supra*; *Baker v. Brown*, 83 Miss. 793, 36 So. 539 (1903); *Gooch v. Gooch*, 134 Va. 21, 113 S.E. 873 (1922).

In each of the principal cases the court recognized that if the instrument in question had been a complete, integrated writing, partly typewritten and partly handwritten, it would have been invalid as a will for want of attestation. There remained for consideration the possibility that a holographic codicil may be regarded as incorporating and validating an invalid typewritten will. The few courts that have considered this possibility have divided evenly. Those that have rejected it have objected that by incorporation the extrinsic document would become "part and parcel" of a will which is valid only if wholly handwritten. *Sharp v. Wallace*, 83 Ky. 584 (1886); *Hewes v. Hewes*, 110 Miss. 826, 71 So. 4 (1916); *In re Watts' Estate*, 117 Mont. 505, 160 P.2d 492 (1945). The courts which allow incorporation do so on the basis that the extrinsic document does not become a "physical" part of the holographic will. *Estate of Plumel*, *supra*; *Rogers v. Agricola*, 176 Ark. 287, 3 S.W.2d 26 (1928); *In re Miller's Estate*, 128 Cal. App. 176, 17 P.2d 181 (1932). One writer has argued that incorporation should be recognized because there is no greater danger of fraud or undue influence than there is if extrinsic material is regarded as incorporated by an attested will. Comment, 16 TENN. L. REV. 741 (1941). Another writer contends that incorporation should be recognized since if printed words cannot be integrated into a holographic will, incorporation of an entire typewritten page cannot be logically justified. Mechem, *The Integration of Holographic Wills*, 12 N.C.L. REV. 213 (1934).

While the decision in the Oklahoma case cannot be justified according to the orthodox view of the doctrine of republication because the earlier instrument was never valid, language in many cases suggests that courts may overlook this requirement and allow republication. *Rogers v. Agricola*, *supra*; *Beall v. Cunningham*, *supra*; *McCurdy v. Weall*, *supra*. However, the decision is in line with the cases allowing incorporation. The Texas Supreme Court, which had not previously considered the problem, refused to recognize incorporation on the ground that the result would be, in effect, to recognize a holographic will not wholly in the decedent's handwriting. The decision followed the language in *Adams v. Maris*, 213 S.W. 622, 626 (Tex.Comm.App. 1919), which indicated that

nonholographic matter could not be incorporated into a holographic will, although the actual result reached in that case is difficult to justify on any other basis.

It seems to beg the question to reject the theory of incorporation on the ground that the extrinsic material becomes a "part" of the will and thus contravenes the precept that the will must be wholly handwritten by the testator. If the doctrine of incorporation by reference is to be recognized at all, it is difficult to justify the conclusion that it cannot be extended to include holographic wills. Since matter incorporated into an attested will is not required to be attested, it seems logically inconsistent to require that the matter incorporated into a holographic be in the testator's handwriting. That it is the testator's handwriting in the subsequent codicil that refers to and incorporates the extrinsic matter should be sufficient to insure the genuineness of the prior document.

William A. Stout

WILLS—POWER OF APPOINTMENT—EXECUTION BY A GENERAL RESIDUARY CLAUSE.—*Republic National Bank of Dallas v. Fredericks*, 274 S.W.2d 431 (Tex.Civ.App.—Dallas 1955, error granted).

The testator's father devised property "to the legatees and devisees of my said son, in accordance with his last will and testament, if he shall have a will, or if not, to his heirs at law. . . ." The testator's will, executed several years before his wife obtained a divorce, left all his property to her. At his death he had no property subject to his disposal other than that left by his father. In a contest between the testator's heir and his former wife, *held*, the testator was the donee of a testamentary general power of appointment which he had effectively exercised.

To exercise a power of appointment the donee must manifest an intent to do so in the manner specified by the donor. SIMES, LAW OF FUTURE INTERESTS § 269 (1936). The almost universal common-law rule is that a power of appointment not referred to in a will is presumed unexercised, *id.* at § 270; thus a typical residuary clause does not sufficiently manifest the requisite intent. *Arnold v. Southern Pine Lumber Co.*, 123 S.W. 1162 (Tex.Civ.App. 1909, error dism'd); *Carlisle v. Delaware Trust Co.*, 99 A.2d 764 (1953); *Methodist Episcopal Home v. Tut-hill*, 113 N.J. Eq. 460, 167 Atl. 9 (1933); RESTATEMENT, PROPERTY § 343 (1936). It is reasoned that a power is not property and does not enlarge the donee's estate, so that the residuary clause does not refer to the property subject to the power. SIMES, LAW OF FUTURE INTERESTS § 270 (1936); 5 AMERICAN LAW OF PROPERTY § 23.40 (Casner ed. 1952).

The Massachusetts courts, however, assume that a layman will regard the appointive property as his own, SIMES, LAW OF FUTURE INTERESTS § 270 (1936), and thus they presume that a residuary clause is an exercise of the power unless a contrary intention appears in the will. *Armory v. Meredith*, 89 Mass. (7 Allen) 397 (1863). But cf. *Boston Safe Deposit & Trust Co. v. Prindle*, 290 Mass. 577, 195 N.E. 793 (1935). Several states, not including Texas, have statutes establishing a similar presumption. 5 AMERICAN LAW OF PROPERTY § 23.40 (Casner ed. 1952).

An often-quoted opinion by Justice Story declares that the intent to exercise a power is sufficiently manifested when the instrument in question (1) refers to the power, (2) refers to the property to be appointed, or (3) would be inoperative except as an execution of the power. *Blagge v. Miles*, 3 Fed. Cas. 559, No. 1479 (C.C.D. Mass. 1841). Although many cases approve these criteria, Justice Story's opinion makes it clear that they were not meant to be exclusive, and numerous courts have found the required intention manifested by other circumstances. 5 AMERICAN LAW OF PROPERTY § 23.40 (Casner ed. 1952); *Wilmington Trust Co. v. Grier*, 19 Del. Ch. 34, 161 Atl. 921 (1932); *White v. Graves*, 104 Atl. 205 (N.J. Eq. 1918); *Cooper v. Haines*, 70 Md. 282, 17 Atl. 79 (1889). Contra, *Thompson v. Ehrlich*, 148 S.C. 330, 146 S.E. 149 (1928). The prevailing view is that a residuary clause is persuasive evidence of the donee's intent to exercise the power if the donee's own property is small in relation to the amount of appointive property. 5 AMERICAN LAW OF PROPERTY § 23.40 (Casner ed. 1952). Contra, *Equitable Trust Co. v. Causey*, 24 Del. Ch. 259, 9 A.2d 714 (1939).

In *Weir v. Smith*, 62 Tex. 1 (1884), the donee made specific bequests of part of the property subject to the power and then devised "all the real estate belonging to me and not heretofore devised" to certain named children. The court held that she had appointed only the property specifically referred to. Even in Massachusetts a residuary clause is inoperative as an appointment if a will shows that the testator was aware of the distinction between his own property and that subject to appointment. *Boston Safe Deposit & Trust Co. v. Prindle*, *supra*. Similarly, if the power concerns only an interest in property in which the donee owns a separate interest, it is reasonable to conclude that if the will does not otherwise refer to the power, a general devise or bequest, or a residuary clause, is merely a disposition of the donee's interest, not an appointment. *Weir v. Smith*, *supra*; *Arnold v. Southern Pine Lumber Co.*, *supra*.

In the instant case the court relied on the extrinsic facts that: (1) the donee had knowledge of the provisions of his father's will when his own will was executed, and (2) the donee's own property at that time was "comparatively slight." But the court added that, if this reasoning "be in any respect erroneous," the same result would be reached because the donee left no property of his own at death, and his will would have been totally ineffective except as an appointment. This reasoning is questionable. Reliance on the donee's lack of property when he died seems inconsistent with the accepted view that the only circumstances which may properly be considered in determining intent are those surrounding the execution of the will. 3 PAGE, WILLS § 1331 (3d ed. 1941).

Ramon A. von Drehle