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Recent Decisions

RECENT DECISIONS

Adoption — Dependent or Neglected Children — "Abandonment" — "Proper Parental Care"

Betty Hendricks, an unwed mother, gave her written consent to the adoption of her infant daughter. On the same day, the child was placed in the care and custody of the Currys for the purpose of adoption. After the Currys filed adoption proceedings, Betty Hendricks withdrew her consent to adoption and sought to regain custody of the child. The Currys, in an effort to prevent the natural mother from regaining possession of the infant, filed suit to have the child adjudged dependent or neglected. They relied on article 2337[1] which provides that parents shall not have custody of a child adjudged to be dependent or neglected as defined by article 2330.[2] The trial court entered judgment in favor of the Currys; the court of civil appeals affirmed.[3] *Held, reversed*: The acts of an unwed mother in executing her written consent to the adoption of her infant and delivering possession of the child to the proposed adoptive parents do not render a child "abandoned" nor deny it "proper parental care" within the meaning of article 2330 relating to dependent or neglected children. *Hendricks v. Curry*, 401 S.W.2d 796 (Tex. 1966).

Under article 2330,[4] a child will be declared dependent or neglected if the court finds he is "abandoned" or is not receiving "proper parental care." The Texas Supreme Court in the instant case found that the word "abandoned" as used in the statute is equivalent to "deserted" and indicates a "conscious disregard or indifference" to the child.[5] The mother's acts in giving up possession of the child and

[1] TEX. REV. CIV. STAT. ANN. art. 2337 (1964).

[2] TEX. REV. CIV. STAT. ANN. art. 2330 (1964).

[3] Hendricks v. Curry, 389 S.W.2d 181 (Tex. Civ. App. 1965).

[4] TEX. REV. CIV. STAT. ANN. art. 2330 (1964) provides:

> The term "dependent child" or "neglected child" includes any child under sixteen years of age who is dependent upon the public for support or who is destitute, homeless or *abandoned;* or who has not *proper parental care* or guardianship, or who habitually begs or receives alms, or who is found living in any house of ill fame or with any vicious or disreputable person, or whose home, by reason of neglect, cruelty or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such child; or any such child whose parents or guardian permit it to use intoxicating liquor except for medicinal purposes or to become addicted to the use of such liquors, or permits it in or about any place where intoxicating liquors are sold. [Emphasis added.]

[5] This definition was set out in Strode v. Silverman, 209 S.W.2d 415 (Tex. Civ. App. 1948), in which the word "abandon" as used in article 46a was construed. The court in the instant case felt the definition to be a sound one and determined that it should be followed in construing the word abandon as used in article 2330.

in giving her written consent to its adoption were held not to be acts which would imply a conscious disregard or indifference to the child; rather, they were acts done to provide better for the child's welfare.

The court also considered the meaning of "parental care" as used in article 2330 and found it to be a purely descriptive term, referring only to the kind and quality of care a child should receive. Parental care need not be provided by the child's parents but may be furnished by persons occupying a parental position in the child's life, either permanently or temporarily. If parental care could be supplied only by the child's parents, it would be the duty of a court to declare a child dependent once the child was delivered to persons for the purpose of adoption. The court concluded that proper parental care was being provided by the Currys; hence, the child was not dependent or neglected.

M.N.M.

Damages — Mathematical Formula for Pain and Suffering*

Eastman brought a civil diversity action in a federal district court against Country Mutual Insurance Company seeking damages for injuries sustained when his pickup truck was struck from behind by a truck being driven by Mutual's insured. Eastman's counsel, in both his opening statement and his rebuttal, suggested that the jury consider a mathematical formula ($70 per week for the rest of Eastman's life) in determining the award for pain and suffering. Each time no specific objection was raised. The jury returned an award of $73,926, but the court required Eastman to enter a remittitur reducing the judgment to $45,000. On appeal, the insurance company for the first time urged error in the use of a mathematical formula to compute damages for pain and suffering. *Held, affirmed*: Remittitur cures the error of using a mathematical formula or, at least, removes the case from the category of extreme cases where justice would require correction of the error by the appellate court even though no timely objection was made in the trial court. *Country Mut. Ins. Co. v. Eastman*, 356 F.2d 880 (5th Cir. 1966).

* EDITOR'S NOTE: As this issue was being printed, the Fifth Circuit, sitting *en banc*, handed down another opinion which permits use of the mathematical formula upon proper instruction by the trial judge. Baron Tube Co. v. Transport Ins. Co., No. 22680, 5th Cir., Aug. 3, 1966. The *Baron Tube* case will be discussed in the next issue of the *Journal*.

The federal courts have been in disagreement over the propriety of allowing a plaintiff's request for an award to compensate pain and suffering which is based on a per-diem or waking-hours-for-life mathematical formula.[1] The question was thought to have been settled in the Fifth Circuit with the 1965 decision of *Johnson v. Colglazier*.[2] In that case the trial court's allowance of a mathematical formula was held reversible error in spite of a determination that the particular award was not excessive per se. The court stated, "the plaintiffs' argument as a whole transgressed permissible bounds" and that "the [trial] court's silence and non-action in not preventing and rebuking the argument was reversible error."[3]

Through the instant case, the Fifth Circuit has modified its former stand by indicating that automatic reversal will not follow the oral suggestion of a mathematical formula.[4] The court indicates that in the absence of objection to the argument remittitur alone is sufficient to cure the error of using a formula. Such a holding seems logically inconsistent with *Johnson,* where the verdict was not excessive and, consequently, was not subject to remittitur.

M.L.T.

Evidence — Article 3737e — Admissibility of Hospital Records Containing Medical Opinion Entries

Lula Andrews sued Loper for damages for personal injuries suffered by Charles Andrews, a minor, in an automobile collision. A controlling question was whether the boy suffered a skull fracture. Dr. Swetland, the treating physician, testified that in his opinion the boy had sustained such a fracture. Offered in evidence under article 3737e[1] were hospital records signed by Dr. Swetland which included the following entry: "I have referred him to Dr. Hutchings for examination and again he finds a papilledema of the left optic disc of about two diopters. This, he believes, is definitely the result of a fracture of the base of the skull. . . ." A third doctor reached a conclusion different from that of Drs. Swetland and Hutchings. Counsel

[1] See Note, *The Unit-of-Time Argument—Inherently Prejudicial?*, 20 Sw. L.J. 208 (1966).

[2] 348 F.2d 420 (5th Cir. 1965), Note, 20 Sw. L.J. 208 (1966).

[3] 348 F.2d at 425.

[4] Note that Judge Brown was replaced by Senior Judge Whitaker of the U.S. Court of Claims, sitting by designation.

[1] TEX. REV. CIV. STAT. ANN. art. 3737e (Supp. 1966).

for Loper objected to the admission of that portion of the hospital record containing Dr. Hutching's medical opinion. *Held*: A diagnostic entry in a hospital record is admissible in evidence under article 3737e only when the diagnosis records a condition resting in reasonable medical certainty.[2] *Loper v. Andrews*, 404 S.W.2d 300 (Tex. 1966).

Article 3737e creates an exception to the hearsay rule and provides that a record of an act or condition shall be competent evidence of the occurrence of the act or existence of the condition when certain statutory conditions to admissibility are present.[3] The court in the instant case listed two situations where recorded entry of a medical diagnosis clearly qualifies as a record of a condition and is competent evidence of the existence of the condition. First, the medical condition may be apparent and observable by all (*i.e.*, an open wound). Second, the medical condition may be well recognized and reasonably certain but requiring an expert interpretation (*i.e.*, a diagnosis of leukemia). Often, however, the patient's condition may be such that the resulting medical entry rests primarily in conjecture and speculation. The court construed article 3737e as rendering hospital entries admissible only in those instances where the diagnosis records a condition with reasonable medical certainty. Since a difference of opinion existed among the three physicians as to the existence of the skull fracture, the medical entry was held to be a conjecture of Dr. Hutchings and was inadmissible.

The instant case rectifies a misinterpretation of article 3737e which existed since the 1959 case of *Travis Life Ins. Co. v. Rodriquez*.[4] There a court of appeals construed article 3737e as authorizing the admission in evidence of hospital records containing a diagnosis of leukemia. The opinion pointed out that such a diagnosis is not one about which physicians ordinarily differ.[5] The per curiam refusal

[2] The court of appeals [Loper v. Andrews, 395 S.W.2d 873 (Tex. Civ. App. 1965)] held the objection was insufficient to preserve the point for review. The Texas Supreme Court, however, regarded the objection as sufficient although open to some doubt.

[3] TEX. REV. CIV. STAT. ANN. art. 3737e (Supp. 1966) provides in relevant part:

> Section 1. A memorandum or record of an act, event or condition shall, insofar as relevant, be competent evidence of the occurrence of the act or event or the existence of the condition if the judge finds that:
>
> (a) It was made in the regular course of business;
>
> (b) It was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event or condition to make such memorandum or record or to transmit information thereof to be included in such memorandum or record;
>
> (c) It was made at or near the time of the act, event or condition or reasonably soon thereafter.

[4] 326 S.W.2d 256 (Tex. Civ. App. 1959).

[5] *Id.* at 262.

of error by the Texas Supreme Court[6] was construed in many recent cases as holding that hospital records containing even disputable or conjectural opinion entries are admissible under article 3737e.[7] The instant decision makes it clear that such entries are not admissible. What is not clear are the criteria to be used to determine when a medical opinion is "conjecture."

J.J.M.

Federal Courts — Uniform Commercial Code as Source of Federal Law

In competing with four other electronics manufacturers invited to submit proposals for the sale or lease of a new computer system to the Federal Reserve Board, Wegematic Corporation submitted a detailed proposal which offered delivery within nine months from the date the contract or purchase order was signed.[1] In September, 1956, the Board accepted Wegematic's proposal, the order specifying delivery on June 30, 1957, with liquidated damages of one hundred dollars a day for delay. After several delays, Wegematic announced in October, 1957, that it was impractical to deliver the computer system and requested cancellation of the contract without damages. The Board procured the equipment from another company and brought suit for damages in a federal district court. The court awarded the United States $235,806 in damages. Wegematic appealed, claiming that delivery was made impossible by basic engineering difficulties and that under federal law, which both parties conceded to govern, this "practical impossibility" of completing the contract excused its default in performance. *Held, affirmed*: The Uniform Commercial Code should be used as a source in determining the federal law of sales, and under section 2-615 of the code, a liquidated-damages clause in a contract prevents the promisor from asserting the defense of "practical impossibility." *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. 1966).

In response to a suggestion by Wegematic the court looked to the

[6] Rodriquez v. Travis Life Ins. Co., 160 Tex. 182, 328 S.W.2d 434 (1959).

[7] See State Auto. & Cas. Underwriters v. Reagan, 337 S.W.2d 522 (Tex. Civ. App. 1960); Missouri-Pacific R.R. v. Watson, 346 S.W.2d 640 (Tex. Civ. App. 1961) *error ref. n.r.e.*; White v. McElroy, 350 S.W.2d 249 (Tex. Civ. App. 1961) *error ref. n.r.e.*

[1] In the invitations to the five firms, the Federal Reserve Board had stressed the importance of early delivery as a consideration in determining its choice.

Uniform Commercial Code to determine the issue of impossibility. In doing so, it construed section 2-615 of the code—"Excuse by failure of presupposed conditions"[2]—as making the test of impossibility a question of how much risk the promisor assumes. The court held that Wegematic's agreement to liquidated damages defeated its proposition of excuse through "practical impossibility." Had Wegematic wished to be relieved of the risk involved in the new computer system, the appropriate exculpatory language could have been used. Instead, it assumed the risk by binding itself to a specific delivery date with a penalty for late or non-performance.

Normally, in cases involving federal questions, the sources of federal law are the decisions of federal courts.[3] However, a uniform law has sometimes been applied by the various circuits. In a 1950 case the Second Circuit used the Negotiable Instruments Law as a source of federal law.[4] Judge Hand, in speaking of the NIL, said it is "more complete and more certain, than any other which can conceivably be drawn from those sources of 'general law' to which we were accustomed to resort in the days of *Swift v. Tyson*."[5] On the other hand, the Second Circuit refused to recognize the Uniform Warehouse Receipts Act as a source of federal law since the various states were sharply divided over its interpretation.[6] The instant case marks the first time that a court of appeals has used the Uniform Commercial Code as a source of federal law in commercial transactions involving a federal question. The court noted that the code was adopted by Congress for the District of Columbia and has been enacted by over forty states. If the other courts of appeal and/or the Supreme Court follow suit, the United States will have "a truly national law of commerce."[7]

J.M.M.

[2] UNIFORM COMMERCIAL CODE § 2-615 provides: "Except so far as a seller may have assumed a greater obligation . . . delay in delivery or non-delivery . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. . . ."

[3] Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943).

[4] New York, N.H. & H.R.R. v. Reconstruction Fin. Corp., 180 F.2d 241 (2d Cir. 1950).

[5] *Id.* at 244.

[6] Cargill, Inc. v. Commodity Credit Corp., 275 F.2d 745 (2d Cir. 1960).

[7] United States v. Wegematic Corp., 360 F.2d 674, 676 (2d Cir. 1966).

Oil and Gas — Make-up of Overproduction Per Order of Railroad Commission

Nine dummy wells on Sample's leasehold, classified as high marginal wells, were incapable of producing their scheduled allowables. In violation of statewide rule 52,[1] the capable wells on the same lease produced their own allowables plus those assigned to the dummy wells. The Railroad Commission determined that 58,061 barrels of oil had thus been overproduced and ordered that Sample make up this amount from future allowables. The district court rendered summary judgment for Sample, declaring the Commission's order to be void. The Commission appealed directly to the Texas Supreme Court.[2] *Held, reversed and remanded*: The Railroad Commission has the power to require the operator of a lease to make up overproduction from future allowables. *Railroad Comm'n v. Sample*, 405 S.W.2d 338 (Tex. 1966).

In 1939, the Texas Attorney General expressed the opinion that the Commission lacks the power to require a make-up of overproduction. This opinion has been disregarded during the past fifteen years, and many operators have been required to make up overproduction from future allowables. Furthermore, the present attorney general has expressly renounced the earlier view. In the instant case, the Commission's power over overproduction was determined to derive from section 7 of article 6049c,[3] which authorizes the Commission to apportion production among various producers on a reasonable basis. The court stated, "This broad grant of authority includes the power to make reasonable adjustments in the allowable of a well or lease to compensate for prior overproduction therefrom."[4]

Sample, contending that the Commission's order was an imposition of an extra-legislative penalty, relied on *Harrington v. Railroad Comm'n*,[5] which held that the legislative penalties and sanctions for violations of the conservation laws were exclusive and could not be varied or altered by the Commission. *Harrington* did not, however, decide the issue of the Commission's requiring an operator to make up past overproduction. In the instant case, the Texas Supreme Court determined that the Commission's order was not a penalty but a restric-

[1] Statewide Rule 52, set out in TEX. R.R. COMM'N RULES & REGS., as prepared by R. W. Bynam & Co. (1958), provides that a well is entitled to produce its daily allowable only to the extent of its actual production ability.

[2] A direct appeal to the Texas Supreme Court is authorized by TEX. REV. CIV. STAT. ANN. art. 1738a (1962).

[3] TEX. REV. CIV. STAT. ANN. art. 6049c, § 7 (1962).

[4] Railroad Comm'n v. Sample, 405 S.W.2d 338 (Tex. 1966).

[5] 375 S.W.2d 892 (Tex. 1964).

tion of actual production to the authorized amount and a protection of other producers' correlative rights.

Justice Smith dissented on the grounds that the Commission's order was a penalty for Sample's filing of incorrect testing procedures; that no overproduction had actually been proved; that Sample had been denied procedural due process; and that the Commission has no statutory authority to require a make-up of overproduction of oil. Despite the vigorous dissent, it would appear that the majority opinion, through a reasonable statutory interpretation, has enabled the Commission to deal efficiently and effectively with the overproduction problem and to avoid the more complicated aspects and criminal implications of a penalty proceeding.[6]

P.R.K.

Reapportionment — County Commissioners' Precincts — Equal Population

Article V, section 18, of the Texas Constitution requires a division of the counties of Texas "from time to time, for the convenience of the people . . . into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner."[1] The Midland County Commissioners' Court, acting under this provision, redrew the Midland County commissioners' precinct lines in 1963. Precinct No. 1, which included the city of Midland, contained ninety-five per cent of the county population and ninety-seven per cent of the eligible voters; while the remaining five per cent of the county population was divided among the other three districts. Avery, mayor of Midland, brought suit alleging that the population disparity violated the Constitution of Texas and the United States Constitution. The district court found that the districting plan was unconstitutional and ordered the commissioners' court to redistrict so that each precinct would have *substantially the same number of people.* The court of civil appeals reversed, stating, "neither the Constitution of the United States nor the Constitution of Texas . . . contains any requirement that county commissioners precincts be *equal to each other in population.*"[2] Avery brought error.

[6] TEX. REV. CIV. STAT. ANN. art. 6036 (1962) provides for such a penalty proceeding.

[1] TEX. CONST. art. 5, § 18.

[2] Midland County v. Avery, 397 S.W.2d 919, 921 (Tex. Civ. App. 1965) (Emphasis added.)

Held: A rational variance from equality in population in commissioners' precincts is constitutional if based upon additional relevant factors such as number of qualified voters, land areas, geography, miles of county roads, and taxable values.[3] *Avery v. Midland County*, 9 Tex. Sup. Ct. J. 579 (1966).

The court recognized that the United States Constitution requires counties to provide representational plans with fundamental equality in voting rights. However, while agreeing with the district court that the Midland County districts must be redrawn, the court held that neither the Texas Constitution nor the Constitution of the United States makes population the sole criterion for division of Texas counties into commissioners' precincts. The court reasoned that the strict population equality ordered in the legislative and congressional reapportionment suits[4] did not apply to commissioners' courts whose precincts were drawn "for the convenience of the people" as required by the Texas Constitution. It added that with strict population equality the urban areas would in most cases control the commissioners' court, although developments in the last few years have narrowed the scope of the functions of the commissioners' court, limiting its major responsibilities to the nonurban areas of the county.

If the court's distinction between the commissioners' courts and legislative bodies is valid, then the instant case may well answer the reapportionment problems of local government units. However, it is highly unlikely that such a distinction is valid as long as tax monies, county roads, welfare funds, and a myriad of other functions directly affecting the city dweller are administered by the county commissioners' court.[5] In any event, there is a substantial federal question involved, and it is questionable whether the United States Supreme Court will accept the reasoning of the Texas Supreme Court.

C.M.D.

Securities — Securities Exchange Act — Section 14(a) Proxy Rules Extended

Gittlin, holding 5,000 shares of Studebaker stock and acting under written authorization from holders of more than 145,000 shares, in-

[3] Since the additional relevant factors were not considered by the commissioners' court, a new redistricting was ordered, but at a time that would not interfere with the 1966 elections.

[4] Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964).

[5] See TEX. REV. CIV. STAT. ANN. arts. 2351-72 (1964) for the powers and duties of the commissioners' courts.

stituted a proceeding in the Supreme Court of New York to inspect the company's shareholder list. The move was part of a plan by Gittlin and his associates to force changes in the corporation's board of directors and was a preparatory tactic to proxy solicitation for the annual shareholder meeting. Upon the motion of Studebaker Corporation, the United States District Court for the Southern District of New York enjoined the use of the shareholders' authorizations because of noncompliance with the proxy rules of the Securities and Exchange Commission issued under section 14(a) of the Securities Exchange Act.[1] Two rules were involved: 14a-3, prohibiting solicitation in the absence of a proxy statement containing specified information; and 14a-6, stating that preliminary copies of any proxy material must be filed with the SEC at least ten days prior to solicitation of shareholders. Gittlin appealed the order to the Second Circuit, contending that the proxy rules do not cover authorizations for the sole purpose of exercising a right of inspection granted by state law; that the corporation had no standing to seek an injunction; and that the district court's order violated the federal anti-injunction statute.[2] *Held, affirmed*: The proxy rules issued by the SEC under Exchange Act Section 14(a) cover the giving of any authorization which is part of a continuous plan intended to culminate in proxy solicitation; a corporation has standing to enjoin proxy rule violations by a shareholder in an independent action; and the policy underlying the federal anti-injunction provision may be superseded by the necessity of effective federal securities regulation. *Studebaker Corp. v. Gittlin,* 360 F.2d 692 (2d Cir. 1966).

By holding that the proxy provisions may cover authorizations to enforce the New York right of shareholder inspection, the court relied upon the 1943 case of *SEC v. Okin.*[3] There the Second Circuit ruled that a request to shareholders, which did not go so far as to request an authorization, nevertheless was subject to the proxy rules if the request were part of a continuous plan of solicitation.

Before the instant case, some doubt may have existed as to whether the Exchange Act Proxy Rules gave a corporation standing to protect itself against unlawful solicitation of its shareholders. This attitude was given force by an earlier decision of the Second Circuit, *Howard v. Furst,*[4] holding that the act gave no remedy to a corpora-

[1] Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1965).

[2] 62 Stat. 968 (1948), 28 U.S.C. § 2283 (1965). This statute prohibits a federal court from issuing "an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

[3] 132 F.2d 784 (2d Cir. 1943).

[4] 238 F.2d 790 (2d Cir. 1956), *cert. denied,* 353 U.S. 937 (1957).

tion in such a situation. *Howard* was partially invalidated by the Supreme Court in *J. I. Case Co. v. Borak*,[5] which involved a derivative action brought by a shareholder to assert a claim of harm to the corporation caused by unlawful solicitation. The *Borak* Court held that the derivative cause of action could be asserted and thus opened the door to allowing a direct action by the corporation. The court in *Gittlin* affirmatively stated that a corporation may protect itself from Exchange Act solicitation violations in an independent action. By recognizing that the proxy rules cover authorizations to enforce a state-granted right of inspection and that a corporation may enjoin a violation in an independent action, the court founded its decision upon the realities of corporate control battles.

In answer to Gittlin's defense based on the anti-injunction statute, the court found an exception to that statute to exist where national interest in securities regulation is present. The congressional purpose of providing effective securities regulation[6] and the national interest in protecting *both* the corporation and the shareholder in proxy battles seem to justify the *Gittlin* court in extending the scope of section 14(a) rules.

T.M.J.

Statutes — Disposition of Property Not Needed for Highway Purposes — Repeal of Article 6674q-9

In 1938 the Texas Highway Commission relocated a state highway. Additional land was needed for the new right-of-way, and the state of Texas purchased a thirty-acre tract. The highway constructed on this land was subsequently abandoned, and a contest arose over title to two acres within the originally purchased thirty-acre tract. Easley claimed title to the two acres under article 6674q-9,[1] and the state of Texas, who had brought this suit in the nature of a trespass to try title action, relied on article 6673a, section 1.[2] The trial court found for Easley, and the court of civil appeals affirmed.[3] *Held, reversed*: Article 6674q-9, which provides that land no longer needed for highway purposes shall vest in the previous owner, is effectively repealed, and such abandoned land now remains under the control of the State

[5] 377 U.S. 426 (1964).
[6] See S. REP. No. 1455, 73d Cong., 2d Sess. 77 (1934).
[1] TEX. REV. CIV. STAT. ANN. art. 6674q-9 (1960).
[2] TEX. REV. CIV. STAT. ANN. art. 6673a, § 1 (1960).
[3] State v. Easley, 390 S.W.2d 24 (Tex. Civ. App. 1965).

Highway Commission as provided in article 6673a, section 1. *State v. Easley*, 404 S.W. 2d 296 (Tex. 1966).

Article 6674q-9 provides that when donated right-of-way land has been abandoned, the title shall vest in the donative owner, his heirs or assigns.[4] Article 6673a, section 1, on the other hand, states that when a highway right-of-way is no longer needed, the State Highway Commission may make recommendations to the Governor regarding disposition of the land.[5] In the instant case, the Texas Supreme Court held that these two statutes were in direct and irreconcilable conflict. Therefore, the last expression of the legislature on the subject is the controlling provision. Being the latest enactment, article 6673a was held to be the controlling law; and article 6674q-9 was repealed. Certainly a better working system will result with abandoned highway land remaining under the auspices of the State Highway Commission, the agency responsible for maintaining an adequate highway system.

B.A.E.

Taxation — Franchise Tax — Business Receipts Within Texas

Yoakum Industries, Inc., a Texas corporation, brought suit against the state comptroller to recover a portion of franchise taxes paid under protest. The disputed portion of the tax was based on interest and dividends from intangibles (stocks and bonds) received in Texas by Yoakum from corporations chartered in states other than Texas. The Texas franchise tax law prior to its amendment in 1959 had provided for a tax on gross receipts of a corporation "from its business done in Texas."[1] The Comptroller had interpreted this statute to include only business income received from corporations chartered in Texas; consequently, if dividends and interest were paid by a corporation chartered in a state other than Texas, such receipts were not in-

[4] Article 6674q-9 provides in relevant part: "[W]hen the right-of-way, or any part thereof, pertaining either to a State Highway or a lateral road, has been abandoned . . . for all public purposes, and such right-of-way . . . was donated by the owner of the land for right-of-way purposes, then . . . the title to said right-of-way shall vest in said owner, his heirs or assigns. . . ."

[5] Article 6673a, § 1 provides in relevant part: "Whenever the State Highway Commission determines that any real property . . . acquired by the State for highway purposes, is no longer needed for such purposes, . . . the State Highway Commission may recommend to the Governor that such land . . . be sold, and the Governor may execute a proper deed conveying all the State's rights, title and interest in such land."

[1] Former art. 7084, Tex. Rev. Civ. Stat. (1951).

cluded in the franchise tax base of the corporate receiver. In 1959, the state legislature had amended the franchise tax statute to read that the term 'gross receipts from its business done in Texas' shall include, *inter alia*, "all other business receipts within Texas."[2] Yoakum argued that by the amendment the Legislature had merely sanctioned former administrative interpretation, *i.e.*, that dividends received by a Texas corporation from foreign corporations were not subject to the franchise tax. The district court granted summary judgment for Yoakum. *Held, reversed and rendered*: Interest and dividends from intangibles received within Texas from sources without the state constitute "gross business receipts" within the Texas franchise tax law. *Calvert v. Yoakum Indus., Inc.*, 403 S.W.2d 475 (Tex. Civ. App. 1966).

The court presumed that the state legislature enacted the 1959 amendment as a change in existing law and to increase the revenue of the state. The court decided, therefore, to follow the construction of the franchise tax provision presently urged by the Comptroller and tax a Texas corporation receiving business income from out-of-state corporations. In fact, on the same day the principal case was decided, the court in *Humble Oil & Ref. Co. v. Calvert*[3] extended its interpretation of the amended franchise tax provision to include dividends and interest received by a *foreign* corporation which has its corporate headquarters or "commercial domicile" in Texas.[4]

All provisions of the amendment defining gross receipts from business done in Texas, for franchise tax purposes, stress the inclusion of receipts only from sources within Texas.[5] That the last phrase—"All other business receipts within Texas"—was intended to switch taxation emphasis from place of payor to place of receipt and to reverse established administrative interpretation of the franchise law's application, seems rather unlikely. If a switch in emphasis was intended, the Legislature could have easily so expressed its intent.

S.P.B.

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[2] The amended statute, TEX. TAX—GEN. ANN. art. 12.02 (1960), provides that the term "gross receipts from its business done in Texas" shall include:

(a) Sales of tangible personal property located within Texas at the time of the receipt of or appropriation of the orders where shipment is made to points within the State,

(b) Services performed within Texas,

(c) Rentals from property situated, and royalties from the use of patents or copyrights, within Texas, and

(d) *All other business receipts within Texas.* [Emphasis added.]

[3] 404 S.W.2d 147 (Tex. Civ. App. 1966).

[4] In support of the theory of commercial domicile the court cited City of Amarillo v. Carter Trucking, 380 S.W.2d 177 (Tex. Civ. App. 1964); and Wirt Franklin Petroleum Corp. v. Gruen, 139 F.2d 659 (5th Cir. 1944).

[5] See note 2 *supra*.

Taxation — Texas Election Code — Deductibility of Primary Election Assessment

Judge Davenport was a candidate for re-election to the office of district judge. The Texas Election Code requires that an assessment, amounting to his proportionate share of the election costs, be levied against each candidate in a primary election.[1] Davenport sought a tax deduction for his $1,958.40 assessment and, upon being denied the deduction, filed suit for refund. He asserted that the assessment was deductible either as an ordinary and necessary business expense under section 162 of the Internal Revenue Code, as an ordinary and necessary expense incurred for the production of income (section 212), or as a deductible state tax (section 164).[2] The deduction was disallowed by the Commissioner. The district court reversed, granting the deduction "since the payment was a necessary and proper expenditure not only for the carrying on of the business but for the production of the business."[3] *Held*:[4] An assessment required by the Texas Election Code of all candidates in a primary election is not deductible for tax purposes under sections 162 and 212 of the Internal Revenue Code. *Campbell v. Davenport*, 362 F.2d 624 (5th Cir. 1966).

In determining that the assessment was not deductible under section 162 as a business expense or under section 212 as an expense incurred for the production of income, the court applied the rationale of *McDonald v. Commissioner*.[5] There Judge McDonald, who had been appointed to fill a vacancy and who was seeking his first elected term in office, sought to deduct his campaign expenses as well as an "assessment" paid to his party organization to obtain its support. The Supreme Court stated that the performance of the functions of ju-

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[1] TEX. ELECTION CODE ANN. art. 1307a (Supp. 1966) quoted in pertinent part:

> Every candidate subject to assessment by the county executive committee under Section 186 or Section 186a of this Code for a portion of the expenses of holding the primary elections . . . shall pay . . . at the time of filing his application for a place on the ballot, a deposit of fifty dollars. . . . . After the county executive committee makes the assessments, it shall refund to each candidate within thirty days thereafter the amount of the payment in excess of the assessment against the candidate, if the deposit exceeds the assessment. If the deposit does not exceed the assessment, the balance due on the assessment shall be paid [by the taxpayer] as provided in Section 186.

TEX. ELECTION CODE ANN. art. 1308 (Supp. 1966) quoted in pertinent part: "[T]he county committee . . . shall apportion such cost in such manner as in their judgment is just and equitable among the various candidates for . . . [the various] offices."

[2] INT. REV. CODE OF 1954, §§ 162, 164, 212.

[3] Davenport v. Campbell, 238 F. Supp. 568, 572 (N.D. Tex. 1964).

[4] The court held that the assessment constituted a tax and was deductible under § 164 of the code. This result is of little importance to post-1964 taxpayers, as such assessments are no longer deductible under the 1964 amendments to the code. Revenue Act of 1964, 78 Stat. 19, § 207a, amending INT. REV. CODE OF 1954, § 164a.

[5] 323 U.S. 57 (1944).

dicial office constituted carrying on a trade or business under the terms of the code and that all ordinary and necessary expenses incurred in carrying on that trade or business were deductible. A distinction was drawn, however, between expenditures made with a view toward "securing" election and expenses incurred in "performing" the functions of public office. The Court refused to allow a deduction for Judge McDonald's campaign expenses or party assessment since such expenses were incurred in securing his public office.

In the instant case the Fifth Circuit ignores any distinction that might exist between expenses incurred by a judge seeking election for the first time (*McDonald*) and one seeking re-election (*Davenport*). Moreover, the court has extended the Supreme Court's reasoning in *McDonald* to include "involuntary" expenses required by law. The expenses incurred by Judge McDonald were voluntary campaign expenses such as advertising, printing, travelling, and an assessment for party support. The assessment levied against Judge Davenport, however, was required by the Texas Election Code as a prerequisite to placing his name on the ballot.

J.M.K.