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RECENT DECISIONS

Criminal Law — Insanity — Question of Commitment Separate From Question of Insanity

In 1961 Morgan was indicted for rape. At a jury trial on the issue of insanity the jury found him presently insane although sane at the time the offense was alleged to have been committed. No medical or psychiatric testimony regarding Morgan's insanity was offered. The trial judge entered judgment disregarding the jury's finding of present insanity and adjudged him sane, apparently believing that a jury finding of present insanity must be founded on the requirements of article 932b, Code of Criminal Procedure.[1] This article authorized commitment of a defendant by court order to a state mental hospital only when the order was supported by competent medical or psychiatric testimony of the defendant's insanity. Shortly after the court's ruling, Morgan was tried on his plea of nolo contendere and convicted of rape, punishment being assessed at life in prison. Morgan brought an original habeas corpus proceeding attacking his conviction as void. *Held, reversed and remanded:* Article 34 of the Penal Code provides that "no person who becomes insane after he committed an offense shall be tried for the same while in such condition."[2] The fact that there is no medical or psychiatric testimony as required by article 932b, Code of Criminal Procedure, to commit a defendant to a state mental hospital has no bearing on, and is not necessary for, the jury's finding of present insanity under article 34 of the Penal Code. *Ex parte Morgan,* 403 S.W.2d 803 (Tex. Crim. App. 1966).

The court concluded that, for a finding of present insanity, the Code of Criminal Procedure requires only "competent testimony," not "competent medical or psychiatric testimony" as is required for commitment.[3] The question of commitment of the defendant is separate from the question whether his trial is barred by the jury's finding that he is presently insane.

It is clear from the *Morgan* holding that a defendant cannot be placed on trial after a jury finding of present insanity regardless of

[1] *Compare* TEX. CODE CRIM. PROC. ANN. art. 46.02 (1966) *with* former art. 932b, Tex. Code Crim. Proc. Ann. (1958). The present article at § 2(b)(1) states: "The issue of present insanity shall be submitted to the jury only if supported by *competent testimony.*" Section 9 of the present article states: "No person shall be committed to a mental hospital . . . except on *competent medical or psychiatric testimony.*" (Emphasis added.) The provisions of former art. 932b §§ 1, 8 are substantially identical to the present provisions above.

[2] TEX. PEN. CODE ANN. art. 34 (Supp. 1966).

[3] Note 1 *supra.*

whether the evidence is sufficient to meet the statutory requirements of commitment in a state hospital. But the dilemma of the physical disposition of a defendant found insane without medical or psychiatric testimony remains unsolved.[4]

S.P.B.

Damages — Pain and Suffering — Use of the Unit of Time Argument

In a personal injury suit the trial court allowed counsel for the subrogated insurer to employ the unit of time formula, accompanied by illustrative charts, in arguing damages for pain and suffering. The trial court instructed the jury that the argument was merely counsel's method of presenting his contention, that the argument was not evidence, and that the jury should not be prejudiced by anything transpiring outside the actual evidence in the case. From a judgment for Transport Insurance Company, Baron Tube Company appealed to the Fifth Circuit, contending that that court's recent decision of *Johnson v. Colglazier*[1] requires summary reversal whenever the unit of time argument is used. *Held, affirmed:* A trial court may, in its discretion, allow the unit of time argument, provided its use is accompanied by an instruction that the argument is merely counsel's way of presenting his contentions and cannot be considered as evidence in the case. *Baron Tube Co. v. Transport Ins. Co.,* 365 F.2d 858 (5th Cir. 1966).

The unit of time formula is based upon the suggestion of a specific sum of money per day or other unit of time during which pain has been or will be suffered. In *Johnson v. Colglazier*[2] the Fifth Circuit, over a strong dissent by Judge Brown, appeared to hold that the unit of time argument was inherently prejudicial and that its use constituted reversible error. The *Johnson* court relied on *Botta v. Brunner*,[3] generally recognized as the leading case against use of the argument and adopted the following reasons set forth therein: the argument is not supported by the evidence; the argument creates an illusion of certainty which cannot exist; the argument places a monetary value on something inherently immeasurable; and the argument encourages the jury to put themselves in the plaintiff's shoes. In *Country Mut. Ins. Co.*

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[4] For a discussion of the physical disposition of a defendant in sanity cases, see Woodley, *Insanity as a Bar to Criminal Prosecution,* 3 So. TEX. L.J. 204 (1958).

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[1] 348 F.2d 420 (5th Cir. 1965); Note, *The Unit of Time Argument—Inherently Prejudicial?,* 20 Sw. L.J. 208 (1966).

[2] *Ibid.*

[3] 26 N.J. 82, 138 A.2d 713 (1958).

v. Eastman[4] the question of the propriety of the unit of time argument again was presented to the Fifth Circuit, and a new panel of judges refused to reverse summarily the plaintiff's verdict. The court ruled that since there was no objection to the argument and since a substantial remittitur was ordered, there was no reversible error.

In order to resolve the apparent conflict between the strong language of *Johnson* and the holding of *Country Mutual,* the Fifth Circuit heard *Baron Tube* sitting en banc. Recognizing that the *Johnson* decision had been criticized[5] and that the unit of time argument was permitted in the courts of each state within the circuit, the court ruled that, with proper safeguards, the argument could be used. *Johnson* was overruled to the extent it indicated the contrary. Expressing the view that the reasons for disallowing the argument must be weighed against the "desirability of allowing at least a modicum of advocacy," and that the scales were tipped on the side of advocacy, the court adopted Judge Brown's dissent in *Johnson.* Whether to allow the argument was placed within the discretion of the trial court, but the opinion stated that only an unusual case would require complete denial. If the trial court allows the argument, an instruction such as the one employed by the trial court in *Baron Tube* is mandatory. Additional safeguards which a trial court may employ were listed as follows: requiring notification in advance that the argument will be used, carefully scrutinizing charts to avoid false factual impressions, using special interrogatories to determine if the specific element of damages is measurably infected by the argument, and ordering remittitur in the event of an excessive verdict.

R.B.D.

Judges — Specially Appointed County Judge — Residence Requirements

Judge Lytton of the county court of Kenedy County, having an interest in a pending will contest, certified his disqualification in the cause to the Governor of Texas. Acting under the provisions of article 1932 of the Texas Civil Statutes,[1] the Governor named Edwards, a resident of Nueces County, as a special judge in the probate proceeding. The Texas Attorney General, contending that the Texas Constitution requires a specially appointed judge to be a resident of the

[4] 356 F.2d 880 (5th Cir. 1966); Recent Decision, 20 Sw. L.J. 685 (1966).
[5] See 20 Sw. L.J. 208 (1966); 44 TEXAS L. REV. 195 (1965).

[1] TEX. REV. CIV. STAT. ANN. art. 1932 (1964).

county in which the cause is pending, brought a quo warranto action to have Edwards removed. The district court ordered Edwards replaced, and he appealed. *Held, reversed and remanded*: A special judge appointed under article 1932 is not a "county officer" within the purview of article XVI, section 14 of the Texas Constitution and need not be a resident of the county where the suit is pending. *Edwards v. State*, 406 S.W.2d 537 (Tex. Civ. App. 1966) *error ref.*

Article 1932 provides that when a county judge is disqualified from acting in a probate matter, he shall certify his disqualification to the Governor, who shall appoint "some person" to act as special judge in the case.[2] Although this statute makes no reference to the residence requirements of a special judge, article XVI, section 14 of the Texas Constitution states, "[A]ll district or *county officers* [shall reside] within their districts or counties, . . . and failure to comply with this condition shall vacate the office so held."[3]

Whether a special judge appointed under article 1932 is a "county officer" within the purview of the constitutional residence requirement is a question of first impression in Texas.[4] The majority reasoned that Edwards, the special judge, was not elected or appointed to a regular office. Instead, he was temporarily appointed to hear one probate contest, and his duties and authority were limited to the problems arising from that one case. Judge Lytton continued to be the regular judge with all of the rights and duties of the office. The majority concluded therefore that a special judge is not a "county officer" within the meaning of the constitutional residence provision since that section applies to the regular county officers.

A vigorous dissent drew no distinction between a regular county judge with a specified term of office and a specially appointed county judge.[5] The dissenter reasoned that since a special judge holds an office which vests in him a portion of the sovereign powers of the state, he is a county officer and therefore must meet all the requirements of the Texas Constitution.

J.J.M.

[2] *Ibid.*

[3] TEX. CONST. art. XVI, § 14.

[4] The court distinguished three prior cases which dealt with the residential requirements of specially elected district judges and an appellate judge. In none of the cases was a direct attack made on the special judges' residential qualifications in a quo warranto proceeding. See Honse v. Ford, 258 S.W. 527 (Tex. Civ. App. 1924); Campbell v. McFadden, 31 S.W. 436 (Tex. Civ. App. 1895); Hagler v. State, 116 Tex. Crim. 552, 31 S.W.2d 653 (1930).

[5] Great reliance was placed by the dissent on the case of Jordan v. Crudgington, 149 Tex. 237, 231 S.W.2d 641 (1950). The legislature had passed a statute which set up a new court with a new judge but the law did not provide for the judge's residential requirements. After deciding the new judge was a county judge, the *Jordan* court stated that the lack of a residence requirement was "an immaterial omission, for the matter is regulated by both our Constitution and our statutes."

Labor Law — Violation of Union's Duty of Fair Representation Constitutes Unfair Labor Practice

The management at an Alabama plant constantly engaged in job and seniority discrimination on the basis of race. The local union refused to process grievances complaining of these practices. As a result, several Negro employees filed complaints with the National Labor Relations Board. The Board found that the failure to process these grievances violated the union's duty to represent fairly all workers within a bargaining unit and constituted an unfair labor practice.[1] The union appealed to the Fifth Circuit. *Held, enforced:* The right of workers within a collective bargaining unit to be represented fairly by the union is protected by section 7 of the National Labor Relations Act and is enforcible through section 8(b)(1)(A). *Local 12, United Rubber Workers v. NLRB,* 367 F.2d 12 (5th Cir. 1966).

In 1944 the Supreme Court expressly recognized the union's duty to "represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith."[2] Although this duty clearly exists under section 9(a) of the NLRA,[3] the question of enforceability through the unfair labor practice sections of the act has not been clearly answered. The Board has adopted the position that the duty is implicit in and may be enforced through such sections. On the other hand, in *NLRB v. Miranda Fuel Oil Co.,*[4] the only previous court of appeals decision where this question was at issue, the Second Circuit disagreed. Although the three-man panel filed three separate opinions, Judge Medina's opinion of the court flatly rejected the theory that arbitrary or discriminatory union action constitutes an unfair labor practice. He reasoned that Congress intended to limit the application of section 8(b)(1)(A) of the act to conduct affecting union membership.

In the instant case, the Fifth Circuit stated that the duty of fair representation "comprises an indispensible element of the right of employees to bargain collectively through representatives of their own choosing as guaranteed in section 7."[5] The union thus violated section 8(b)(1)(A) by depriving employees of their section 7 rights.[6] The

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[1] Rubber Workers Union, 150 N.L.R.B. 312 (1964).

[2] Steele v. Louisville & N.R.R., 323 U.S. 192, 204 (1944).

[3] See Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

[4] 326 F.2d 172 (2d Cir. 1963).

[5] Local 12, United Rubber Workers v. NLRB, 367 F.2d 12 (5th Cir. 1966).

[6] Section 8(b)(1)(A), 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b) provides that, "It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7. . . ."

Section 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 provides that:

> Employees shall have the right to self-organization, to form, join, or assist

court concluded that Judge Medina's narrow interpretation would render section 7 rights virtually meaningless in the area of union administration of the collective bargaining contract. The decision is of substantial significance beyond mere academic interest. If the duty to represent fairly can be imposed through the unfair labor practice sections,[7] then the injured worker may seek his remedy through Board procedures.[8] This expansion of Board powers relieves an employee from bearing the substantial expense of prosecuting his claim in the courts. Moreover, it vests the power to determine questions of this nature in a body equipped with sufficient expertise and experience to fashion a just and appropriate remedy.

J.B.E.

Navigable Waters — Private Impounding of Water — Title to Beds of Navigable Water Under the Small Bill

Article 7500a, section 1, of the Texas Revised Civil Statutes[1] authorizes any property owner to construct a dam on his own property and to impound a maximum of two hundred feet of water for domestic and livestock purposes without securing a permit. Pursuant to this provision, Garrison had built a dam on the west prong of the Medina River, a navigable stream as defined by article 5302.[2] His subsequent application to the Texas Water Commission for a permit to divert some of the impounded water for purposes of irrigation[3] was granted. The Bexar-Medina-Atascosa Counties Water Improvement District No. 1 brought suit against the Texas Water Commission and Garrison to cancel this permit. The trial court cancelled the permit,

labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

[7] See NLRB v. Local 1367, International Longshoremen's Ass'n, 367 F.2d 12 (5th Cir. 1966) where the Fifth Circuit based a per curiam decision on *Rubber Workers*. However, in a unique concurring opinion, Judge Choate expressed concern over the Board's "treading perilous waters by taking over the duties of unions" and viewed the reasoning in *Rubber Workers* as setting a dangerous precedent.

[8] When the worker's claim is based solely on an alleged violation of the fair representation duty, the preemption doctrine dictates that the Board possesses exclusive jurisdiction. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). When the union violates the terms of the collective bargaining agreement as well as its duty of fair representation, the courts and the Board have concurrent jurisdiction. Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

[1] TEX. REV. CIV. STAT. ANN. art. 7500a, § 1 (Supp. 1966).

[2] TEX. REV. CIV. STAT. ANN. art. 5302 (1962).

[3] TEX. REV. CIV. STAT. ANN. art. 7500a, § 2 (Supp. 1966).

and Garrison appealed. *Held, affirmed:* The Small Bill,[4] which validates "patents on lands lying across or partly across water courses or navigable streams,"[5] did not vest title to the beds of navigable waters in the patentees, awardees and their assignees, but left it in the state. Therefore, a property owner may not construct a dam on navigable waters pursuant to section 1 of article 7500a since such dam is not being erected "on his own property" as that statute authorizes. *Garrison v. Bexar-Medina-Atascosa Counties Water Improvement Dist.*, 404 S.W.2d 376 (Tex. Civ. App. 1966) *error ref. n.r.e.*

The Small Bill states, "[N]othing in this Act . . . shall impair the rights of the general public and the State in the waters of streams or the rights of riparian and appropriation owners in the waters of such streams, and . . . with respect to lands sold by the State of Texas expressly reserving title to minerals in the State, such reservation shall not be affected by this act. . . ."[6] The *Garrison* court determined that this language indicated a legislative intent not to grant full title to land under navigable waters to patentees or awardees and their assignees. This construction was deemed to be in accord with a 1932 Texas Supreme Court case[7] which held that the Small Bill is to be construed strictly in favor of the state and against a grant of title to private owners. Such construction is also consistent with the Conservation Amendment of the Texas Constitution[8] which specifies the conservation and development of certain natural resources, including waters, as public rights and duties.

As a result of the instant decision, all dams located on navigable waters in Texas must be removed. An amicus curiae brief filed on behalf of the Southwestern Cattle Raisers' Association, excoriated the ruling of the trial court and decried the "far-reaching consequences adverse to hundreds of Texas landowners with interests similar to appellant."[9] The Association specifically delineated the difficulty which owners must face in determining whether or not their dams and reservoirs are on navigable waters within the meaning of article 5302. Under article 5302, "all streams so far as they retain an average width of thirty feet from the mouth up shall be considered navigable streams."[10] Thus, as Mr. Wells A. Hutchins has stated, "[A] stream,

[4] TEX. REV. CIV. STAT. ANN. art. 5414a (1962).
[5] *Ibid.*
[6] *Ibid.*
[7] State v. Bradford, 121 Tex. 515, 50 S.W.2d 1065 (1932).
[8] TEX. CONST. art. XVI, § 59(a).
[9] Garrison v. Bexar-Medina-Atascosa Counties Water Improvement Dist., 404 S.W.2d 376, 381 (Tex. Civ. App. 1966).
[10] TEX. REV. CIV. STAT. ANN. art. 5302 (1962).

even though not navigable in fact, may be navigable in law because of the statute."[11]

Apart from its obvious inequities and a perhaps strained interpretation of the Small Bill, this decision has thrust the burden of ascertaining navigability onto landowners, under a statutory definition that seems quite unworkable. Furthermore, the court did not attempt to resolve any of the problems raised but declared them to be legislatively created and thus legislatively rather than judicially curable.

P.R.K.

Oil and Gas — Gas Royalties — Formula for Determining Market Price

Vela executed an oil and gas lease in 1933, and the lessees agreed to pay, as royalty for gas sold or used off the premises, "one-eighth of the market price at the wells of the amount so sold or used." In 1935 Vela's lessees entered into a gas purchase contract with the only pipeline purchasing in the field. The contract was for the life of the lease at a price of 2.3 cents per m.c.f., and Vela was paid royalties based on this contract. In 1960 and 1962 two other purchasers constructed lines into the field and entered into gas purchase contracts with other producers at prices ranging from 13 cents to 17.24 cents per m.c.f. Vela sued Texas Oil and Gas Corporation, assignee of the original lessees, to recover deficiencies in royalty payments as a result of the increase in the market price of the gas. The trial court found that the market value of the gas was 16.047 cents per m.c.f. and awarded Vela the difference between that price (less a 3 cent compression charge) and 2.3 cents per m.c.f., plus interest for the applicable four-year limitation period. *Held, affirmed:* In determining the market price of gas three factors must be considered: (1) the price paid under a gas purchase contract between the lessee and a third party; (2) the circumstances underlying that contract; and (3) evidence of sales comparable in time, quantity, quality and availability of marketing outlets. *Texas Oil & Gas Corp. v. Vela*, 405 S.W.2d 68 (Tex. Civ. App. 1966).

The practicalities of the gas industry[1] necessitate that gas be sold

[11] HUTCHINS, TEXAS WATER RIGHTS 54 (1961).

[1] Gas, unlike oil, is incapable of being stored in large quantities, and production in excess of what can be utilized will result in wastage. Expensive gathering and transporting facilities are necessary to bring gas to places where it can be utilized; consequently, the free exchange of the commodity is limited. Comment, *Value of Lessor's Share of Production Where Gas Only is Produced*, 25 TEXAS L. REV. 641 (1947).

under long-term contracts, and rules concerning daily sales and quotations are irrelevant in determining the royalty to be paid for gas.[2] In the recent case of *Foster v. Atlantic Ref. Co.,*[3] the Fifth Circuit was presented with the question of whether these considerations precluded the lessor from claiming royalties in excess of those paid under a long-term gas purchase contract between the lessee and the purchaser after subsequent purchasers began paying higher prices for gas from the field. The court ruled that the lessor, not having been a party to the gas purchase contract, was not bound by its terms; therefore, the lessee was obligated to pay the lessor the "market price" in accordance with the terms of the lease.

In *Vela,* a case of first impression in Texas, the court approved *Foster*[4] and established a formula to be used in determining market price. Under the formula, a court should give equal consideration to the price paid under the gas purchase contract, the circumstances underlying that contract, and evidence of comparable sales. However, there appears little doubt that in this case the third element, evidence of comparable sales, was allowed the greatest weight in the ultimate determination of the market price of the gas in the field. The lessor's expert witness testified that he calculated the market price by averaging the price paid for gas in each substantially similar sale in the field, excluding sales from the Vela wells which were considered too far out of line. Even though the method used by the expert was criticized,[5] the court held that the trial court did not abuse its discretion by accepting the resulting market price.

It can be strongly argued that due to the lessee's implied covenant to market and the necessity of long-term gas purchase contracts, the lessor should be bound by the terms of a contract which was reasonable when made.[6] At a minimum, the court's formula should be followed faithfully, and the terms and circumstances of the contract should be

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[2] Foster v. Atlantic Ref. Co., 329 F.2d 485 (5th Cir. 1964); Gex v. Texas Co., 337 S.W.2d 820 (Tex. Civ. App. 1960).

[3] 329 F.2d 485 (5th Cir. 1964).

[4] The Court emphasized that there was no evidence that Vela had signed a division order authorizing payment in accordance with the terms of the contract, and thereby implied that a division order would absolve the lessee from liability for royalty deficiencies. However, a division order is ambulatory, and the lessor could revoke it whenever other pipelines connect with the field and purchase gas at higher rates than those paid under the original contract. Phillips Petroleum Co. v. Williams, 158 F.2d 723 (5th Cir. 1946). See also Siefkin, *Right of Lessor and Lessee With Respect to Sale of Gas and as to Gas Royalty Provisions,* 4th INST. O. & G. 181, 189 n.21 (1953); *cf.,* Smith v. Liddell, 367 S.W.2d 662 (Tex. 1963).

[5] The court took the position that the average price formula was not conclusive because if it were used exclusively, no one would be receiving the market price of gas in the field; and further, if the price paid to the lessor pursuant to the original contract were disregarded, each lessor in the field would be receiving a different "market price." 405 S.W.2d at 75.

[6] Siefkin, *supra* note 4.

given greater weight than was afforded by both the trial and appellate courts in *Vela.*

R.B.D.

Procedure — Extraterritorial Service of Process Under Texas Article 2031b

Suit was brought against Société Metallurgique de Normandie, a French corporation, by AMCO Transworld, Inc., owners of cargo purchased from Société and damaged in transit. Extraterritorial service of process on the corporation was had through the procedure provided in Texas article 2031b.[1] Under this article when a foreign corporation has neither maintained a resident agent within the state nor appointed an agent to receive service, service may be had upon the Texas Secretary of State who then forwards notice by registered mail to the served corporation.[2] To be subject to the article, a foreign corporation must be "doing business" within the state.[3] The acts constituting "doing business" must involve sufficient minimum contacts with the state so as to be consistent with due process of law.[4]

AMCO alleged that Société had maintained the required minimum contacts by its conduct within the state and by its method of financing transactions. Société's Commercial Director had made two one-day trips to Texas in order to solicit business, but no contracts were entered into within the confines of the state. All further solicitation took place by mail, and the corporation accepted in France purchase orders sent to it by mail from AMCO. The corporation received payment by means of a letter of credit arrangement between AMCO and a Texas bank. Société issued drafts drawn upon the bank; the bank honored and paid the drafts and was later paid by AMCO. Upon delivery, it was discovered that the goods were damaged, and AMCO brought suit. Société moved to dismiss for want of jurisdiction. *Held,*

[1] TEX. REV. CIV. STAT. ANN. art. 2031b (1964).

[2] TEX. REV. CIV. STAT. ANN. art. 2031b, § 5 (1964).

[3] TEX. REV. CIV. STAT. ANN. art. 2031b, § 4 (1964).

> For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing business in this State by entering into any contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State.

Though the statutory language is ambiguous, it has been held that the purpose of the statute was "to exploit to the maximum the fullest permissible reach under federal constitutional restraints." Lone Star Motor Import, Inc. v. Citroen Cars Corp., 288 F.2d 69, 73 (5th Cir. 1961).

[4] See, *e.g.*, International Shoe Co. v. Washington, 326 U.S. 310 (1945).

dismissed: Neither mere solicitation of business within the state nor payment by means of a letter of credit arrangement involving a Texas party establish the "minimum contacts" necessary for extraterritorial service and jurisdiction under Texas article 2031b. *AMCO Transworld, Inc. v. M/V Bambi,* 257 F. Supp. 215 (S.D. Tex. 1966).

The court held that since the letter of credit arrangement was between the bank and AMCO and was merely an accommodation to the purchaser, it did not constitute sufficient contact to subject Société to jurisdiction under article 2031b. Furthermore, solicitation of business by Société in Texas did not in itself constitute the requisite minimum contact, as no business contracts were consummated within the state. The court followed other decisions among the circuits on this issue.[5]

In determining when a foreign corporation is amenable to suit in a diversity action, the law of the forum state controls, with federal law entering only to preserve the constitutional criterion of due process.[6] This balancing of constitutional requirements and state interest should involve a consideration of both the *nature* and *number* of the contacts established by the corporation with the forum state.[7] The court in the *AMCO* decision engages in such analysis. However, perhaps the court gives too little weight to the corporation's active seeking out of business within the state, a factor which can at least tip the balance toward sustaining jurisdiction.[8]

T.M.J.

Procedure — Indispensable Parties Under Texas Rule 39

Petroleum Anchor Equipment, Inc. sought to cancel a bill of sale and assignment of an invention, and an application for letters patent to that invention, executed by the corporation to Fite. The cancellation was sought against Fite's assignees, Tyra and his wife, on the

[5] MacInnes v. Fontainbleau Hotel Corp., 257 F.2d 832 (2d Cir. 1958); Kelly v. Three Bays Corp., 173 F. Supp. 835 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 958 (2d Cir. 1960); Greek Tourist Agency, Inc. v. Hellenic Mediterranean Lines, 199 F. Supp. 6 (S.D.N.Y. 1961).

[6] See Arrowsmith v. United Press Int'l, 320 F.2d 219, 223 (2d Cir. 1963).

[7] See Hearne v. Dow-Badische Chem. Co., 224 F. Supp. 90 (S.D. Tex. 1963), in which Judge Noel discusses the relative importance of the five following factors: (1) the nature and character of the business transaction giving rise to the contact; (2) the number and type of activities carried on within the state; (3) whether the activities establishing the contact gave rise to the cause of action; (4) whether the forum has a special policy interest in providing relief; and (5) the relative convenience of the parties to the action.

[8] This purposeful seeking out of business within Texas was considered important in Hearne v. Dow-Badische Chem. Co., *supra* note 7, although it was not separately set out as a factor by Judge Noel.

grounds that the sale and assignment by the corporation to Fite resulted from a fraudulent conspiracy between the company's president and Fite and that the instrument was void as ultra vires. Neither party in the trial court argued that Fite, a Mississippi resident, was an unjoined indispensable party; and judgment was entered for the Tyras. The court of appeals, however, noted Fite's absence as a party and held that he was an indispensable party without whom the trial court had no jurisdiction to proceed.[1] *Held, reversed:* Under rule 39 of the Texas Rules of Civil Procedure[2] only a person with a joint interest is an indispensable party. Those who "ought to be parties if complete relief is to be accorded between those already parties" are merely necessary parties, and the trial court has discretion to proceed without their joinder if they are beyond the court's jurisdiction. *Petroleum Anchor Equip. Inc. v. Tyra,* 406 S.W.2d 891 (Tex. 1966).

Rule 39(a)[3] renders it mandatory for persons with a joint interest to be made parties to the suit; these parties the instant court labels "indispensable." Under rule 39(b),[4] however, joinder of persons who should be made parties for purposes of granting complete relief is discretionary with the court if they are beyond the court's jurisdiction; such parties are considered "insistible"[5] or "conditionally necessary."

The immediate decision is predicated on this statutory distinction. Since Fite lacked joint ownership with the Tyras in the invention and application for letters patent, he was found not to have joint interest under rule 39(a). The possibility of a subsequent suit by the Tyras against Fite might be reason to hold him an "insistible" or conditionally necessary party, but not an indispensable one. The Tyras' claim that they could not be accorded complete relief in the present proceeding due to Fite's absence should have been raised by a plea in abatement to the trial court. Under rule 39(b) the trial court would then have had discretion to proceed with or dismiss the action since Fite was beyond its jurisdiction.

Since the enactment of the Texas Rules of Civil Procedure, indispensable parties have been strictly limited by Texas decisions to instances of actual joint ownership.[6] The court in the immediate decision followed this line of cases, but dicta may signal a possible broad-

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[1] Petroleum Anchor Equip., Inc. v. Tyra, 392 S.W.2d 873 (Tex. Civ. App. 1965).

[2] TEX. R. CIV. P. 39.

[3] TEX. R. CIV. P. 39(a).

[4] TEX. R. CIV. P. 39(b).

[5] The court cites from a lecture by Robert W. Stayton entitled *Important Developments Since 1940 in the Texas Law Relating to Parties and Actions*, Univ. of Texas Law Refresher folder, wherein Professor Stayton invents the term "insistible" parties to cover those parties provided for in rule 39(b).

[6] See Petroleum Anchor Equip., Inc. v. Tyra, 10 Tex. Sup. Ct. J. 11, 13 (1966).

ening of the rule. The court was careful to note not only that Fite lacked a joint interest but also that no injunctive relief or damages were sought against him.[7] Furthermore, the court found that Fite's interest was not directly enough involved in the instant action to render him an indispensable party on the basis of some factual prejudice that might result in a later proceeding.[8] Thus, the court seemingly did not preclude a party's being considered indispensable if injunctive relief or damages are sought against him or if his interests are so directly involved that there may be serious factual prejudice against him in a later suit.

P.R.K.

Products Liability — Strict Liability — Non-Food Products

While removing a pie from her oven, Mrs. Crusan was severely burned when the aluminum foil pie pan collapsed. The evidence showed that the Aluminum Company of America was legally responsible for the manufacture and sale of the pan, that the pan was defectively made, and that Mrs. Crusan was not negligent in handling it. The manufacturer contended that privity of contract between the parties was necessary in order for the injured party to recover. *Held:* A manufacturer of a defective pie pan which is unreasonably dangerous is liable for injuries suffered by a user even though privity of contract does not exist between the manufacturer and the user. *Crusan v. Aluminum Co. of America,* 250 F. Supp. 863 (E.D. Tex. 1965).

The Texas Supreme Court case of *Decker & Sons, Inc. v. Capps*[1] established the proposition, based on public policy, that privity of contract between the parties and negligence on the part of the manufacturer are unnecessary in adulterated food consumption cases. This doctrine of strict liability as to food has been followed in subsequent decisions rendered by Texas courts of civil appeal.[2] In the 1964 case

[7] The court cites Bacus Portable Steam Heater Co. v. Simonds, 2 App. D.C. 290 (D.C. Cir. 1894) which held that parties not joined in the particular suit were indispensable; the decision, however, was based on the ground that injunctive relief was sought against one of the absent parties.

[8] A judgment adverse to the Tyras would not result in "legal" prejudice in a subsequent suit between the Tyras and Fite since this judgment is not res judicata to the absent Fite.

[1] 139 Tex. 609, 164 S.W.2d 828 (1942).

[2] Sweeney v. Cain, 243 S.W.2d 874 (Tex. Civ. App. 1951); Coca-Cola Bottling Co. v. Loudder, 207 S.W.2d 632 (Tex. Civ. App. 1947); Coca-Cola Bottling Co. v. Burgess, 195 S.W.2d 379 (Tex. Civ. App. 1946).

of *Putman v. Erie City Mfg. Co.*[3] the Fifth Circuit, "making an Erie educated guess"[4] as to what Texas state courts would hold, extended strict liability to the manufacturer of a wheelchair, holding it strictly liable for resulting injuries to a user because the wheelchair was defective and unreasonably dangerous.[5]

The instant case was decided upon the *Putman* rationale. The court concluded that the defective pie pan was an unreasonably dangerous product, and therefore the manufacturer was strictly liable for Mrs. Crusan's injuries. However, Judge Fisher in rendering the opinion added the following dictum:

> Further, even if it can be said that the pie pan in question *was not defective and was not unreasonably dangerous in its use,* this Court is of the opinion that strict liability on the basis of public policy should be applied and privity not required because to so hold is a reasonable, logical and natural development of the doctrine courageously adopted by the Supreme Court and Appellate Courts of Texas in the *Decker* and other food consumption cases.[6]

By approving the extension of strict liability to a non-food product which is not defective and not unreasonably dangerous, the above language provides a novel and questionable interpretation of Texas law. All Texas cases cited as support involved adulterated food products.[7] Moreover, Texas state courts have had little opportunity to comment on the propriety of the *Putman* case which extended strict liability to cover a defective, unreasonably dangerous non-food product.[8] If the above dictum is followed literally, a manufacturer of a perfectly constructed and totally innocuous product might be held strictly liable to a user who is injured by the product.

G.W.O.

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[3] 338 F.2d 911 (5th Cir. 1964); Recent Decision, 19 Sw. L.J. 198 (1965). See generally Wade, *Strict Tort Liability of Manufacturers,* 19 Sw. L.J. 5 (1965).

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

[5] In *Putman* no food product was involved, there was no proof of negligence, and there was no privity between the user and the manufacturer or assembler.

[6] 250 F. Supp. 863, 864 (E.D. Tex. 1965). (Emphasis added.)

[7] *Id.* at 864 n.2.

[8] Prior to the instant case, the only Texas state court case to cite *Putman,* apparently with approval, is Ford Motor Co. v. Puskar, 394 S.W.2d 1 (Tex. Civ. App. 1965). That case, however, involved an express misrepresentation as to the safety of a non-food product and was therefore not a strict liability case. Subsequent to the instant case, Shamrock Fuel & Oil Sales Co. v. Tunks, 406 S.W.2d 483 (Tex. Civ. App. 1966) was rendered, citing *Putman* with approval. There the manufacturer, distributor, and retailer of highly volatile kerosene were held strictly liable for resulting injuries. As in *Decker,* this was based on breach of a warranty implied as a matter of law because of underlying public policy.

Taxation — Estate Tax — Transfer of Residence to Spouse

Mr. and Mrs. Ladd purchased a lot in 1950 and subsequently constructed a residence thereon. Title was vested in the husband and wife as tenants by the entirety. In 1958 Mr. Ladd conveyed his interest to Mrs. Ladd by warranty deed, vesting in her the fee simple title. The husband and wife continued to reside together in the home with Mr. Ladd paying the bills and his wife managing the house as before the transfer. Mr. Ladd died suddenly in 1959, and his executor did not include the value of the residence in the estate tax return. A deficiency was assessed under section 2036 of the Internal Revenue Code, which requires inclusion in the estate of "the value of all property . . . to the extent of any interest therein of which the decedent has at any time made a transfer . . . , under which he has retained . . . possession or enjoyment."[1] The district court[2] granted a refund to the executor, and the Government appealed to the Sixth Circuit. *Held, affirmed:* Where the joint residence of a married couple has been irrevocably transferred to the wife, its value is not included in the estate of the deceased husband even though the husband continued to reside there until his death. *Union Planters Nat'l Bank v. United States*, 361 F.2d 662 (6th Cir. 1966).

Section 2036 was adopted in 1931 to restrict the use of inter vivos transfers with a retained life estate as a method of estate tax avoidance. In *Estate of Church*,[3] the Supreme Court set out the standard for application of section 2036. To avoid imposition of the estate tax, the "transfer must be immediate and out and out, and must be unaffected by whether the grantor lives or dies."[4] Applying this test to a situation arising in Texas where the husband transferred his community property interest in his residence to his wife although continuing to live there, the Tax Court[5] found that the decedent retained no legal rights or interest and therefore section 2036 did not apply. The Internal Revenue Service in 1952 announced its acquiescence[6] but in 1966 withdrew it,[7] thus giving rise to several recent cases.[8]

In the instant case the Commissioner contended that since the

[1] INT. REV. CODE OF 1954, § 2036.
[2] 238 F. Supp. 883 (W.D. Tenn. 1964).
[3] 335 U.S. 632 (1949).
[4] *Id.* at 646.
[5] Estate of Wier, 17 T.C. 409 (1951).
[6] 1952-1 CUM. BULL. 4 (1952).
[7] 1966 INT. REV. BULL. No. 25, at 6.
[8] Brinkley v. United States, 358 F.2d 639 (3d Cir. 1966); Stephenson v. United States, 238 F. Supp. 660 (W.D. Va. 1965). Both cases reached the same result on much the same reasoning as *Union Planters*.

transferor continued to enjoy the benefits of the property through his relationship with the transferee, section 2036 should apply. The court found, however, that the husband had divested himself completely of all title, right, and interest in the home. Therefore, he retained no legal right to the possession or enjoyment of the home within the meaning of section 2036. Nor could an agreement for continued possession and enjoyment be inferred from the fact that the husband continued to live there. Mr. Ladd continued to occupy the residence only with his wife's permission, and this privilege could have been withdrawn by her at any time.

The result in *Union Planters* should be considered by estate planners, with one practical caveat. Before making any conveyance whatsoever, the transferring spouse should be certain that his present marital bliss is sufficiently lasting and stable to warrant relinquishing his entire interest in the property.

J.B.E.