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Recent Decisions

RECENT DECISIONS

Administrative Law — Texas Savings and Loan Act — Provision Granting Judiciary Power To Determine if Proposed Association is Needed Violates Separation of Powers Provision of the Texas Constitution

Gerst, the Savings and Loan Commissioner of Texas, refused Nixon's application for a proposed savings and loan association charter. Gerst's refusal was based on his finding that there was no public need for the proposed association and that the new body would unduly harm an existing association. On appeal, the district court concluded that Gerst's findings were incorrect and were not supported by substantial evidence. The court of civil appeals affirmed.[1] In the Texas Supreme Court an intervening savings and loan association contended that the savings and loan act was unconstitutional insofar as it required the district judge to determine material facts on the preponderance of the evidence. *Held, affirmed:* The provision of the Texas Savings and Loan Act which vests in the court the power to redetermine whether a proposed association is needed, or will unduly harm an existing association, is unconstitutional because it violates the separation of powers provision of the Texas Constitution. However, the provision of the act making the record of the Commissioner's hearing the basis for determining if his action is supported by substantial evidence is valid. *Gerst v. Nixon,* 411 S.W.2d 350 (Tex. 1966).

Section 2.08 of the Texas Savings and Loan Act[2] provides that the Savings and Loan Commissioner shall not approve any charter application by a proposed savings and loan association unless he affirmatively finds that there is a public need and that the association would not unduly harm the operation of an existing savings and loan association. Section 11.12(5)(b) provides that on appeal the trial judge shall redetermine these fact issues by a preponderance of the evidence, but that no evidence shall be admissible which was not adduced at the hearing before the Commissioner. On the other hand, the Texas Constitution expressly provides for separation of powers among the legislative, executive and judicial branches of the government.[3]

The supreme court found that to permit the judicial branch to redetermine the facts found by the Commissioner, a member of the executive branch, allowed the judicial branch to assume powers of the latter and therefore violated the express constitutional requirement of separation of powers.

After excising the objectionable clause under the severability provision of the act,[4] the court sought to determine whether the remainder of sec-

[1] Gerst v. Nixon, 399 S.W.2d 845 (Tex. Civ. App. 1966).
[2] TEX. REV. CIV. STAT. ANN. art. 852a (1963).
[3] TEX. CONST. art. II, § 1.
[4] Acts of 1963, 58th Leg., ch. 113, § 3.

tion 11.12(5)(b) validly limited the trial court to the record of the Commissioner's hearing in determining if the order was supported by substantial evidence. Under the Texas substantial evidence rule, the trial court usually makes such a determination on evidence produced in open court under the rules of evidence.[5] The intervening petitioner contended that all of section 11.12(5)(b) was invalid and that, therefore, this usual method should apply. The result of this argument would be to keep the record of the Commissioner's hearing out of evidence since it contained inadmissible testimony, and thereby put an impossible burden on Nixon to prove that the Commissioner's order was not supported by substantial evidence. The supreme court upheld this portion of the statute because the legislature has the power to establish the method for determining if substantial evidence supported the order.

The decision is in line with previous Texas cases.[6] In proceedings which are legislative in nature, the courts have been denied the power to redetermine facts found by an administrative agency. However, the decision seems to give the legislature new power over the judiciary, by allowing the denial of a method evolved in the judicial system—a separate trial de novo to determine if there is substantial evidence. Thus, it would seem that the court, though keeping separate this function of the executive branch, has allowed the legislature to encroach on the power of the judiciary.

M.N.M.

Constitutional Law — Right to a Fair Trial — Reduction of Prejudicial Publicity by Standing Federal Court Order

Seymour, a television news photographer, took photographs of a defendant and his attorney in the hallway outside a courtroom. The defendant was being led from the courtroom at the termination of his arraignment proceedings. Seymour's conduct was in violation of a standing order of the federal district court, Northern District of Texas, prohibiting the taking of photographs in connection with any judicial proceedings on or from the same floor of the building on which the courtrooms are located.[1] After being cited for criminal contempt for the violation, Seymour contended that enforcement of the order as promulgated represented

[5] See Larson, *The Substantial Evidence Rule: Texas Version*, 5 Sw. L.J. 152 (1951).

[6] Chemical Bank & Trust Co. v. Falkner, 369 S.W.2d 427 (Tex. 1963); Key W. Life Ins. Co. v. State Bd. of Ins., 350 S.W.2d 839 (Tex. 1961). *Cf.*, Scott v. State Bd. of Medical Examiners, 348 S.W.2d 686 (Tex. 1964).

[1] Misc. Order No. 381 (December 17, 1965) subscribed by each judge of the Northern District of Texas provides: "It is ordered that the taking of photographs or broadcasting or televising in connection with any judicial proceeding on or from the same floor of the building on which courtrooms are located is forbidden." Seymour v. United States, 373 F.2d 629, 630 n.1 (5th Cir. 1967).

an unconstitutional prior restraint upon the freedom of the press. The trial court found Seymour guilty of criminal contempt and fined him $25. *Held, affirmed:* In the interest of maintaining judicial decorum and the preservation of an atmosphere essential to a fair trial, federal courts have the power to issue standing orders which reasonably prohibit the taking of photographs in connection with any judicial proceeding. *Seymour v. United States,* 373 F.2d 629 (5th Cir. 1967).

Due process requires that the criminally accused be tried in an atmosphere which is conducive to a fair trial and free from prejudicial outside influences.[2] Insuring that the accused does receive a fair trial has become more difficult because modern mass communication devices have a profound and pervasive effect upon the general public and upon potential jurors. Thus "courts must take such steps by rule and regulation that will protect their processes from prejudicial outside influences."[3] In considering the effect of extensive publicity upon the rights of the accused, the earlier approach of the United States Supreme Court was to make a careful examination of the facts of each case to determine if prejudice has actually resulted.[4] In *Rideau v. Louisiana*[5] the Court departed from its earlier approach, however, and established the current principle that where the procedure used involves the *probability* that the accused will be prejudiced, due process is lacking, regardless of whether actual prejudice could be shown.

Prior to the instant case, the taking of photographs in the courtroom during the *process* of judicial proceedings was not permitted in federal courts.[6] The court in the instant case, however, recognized that modern mass communication devices necessitated that trial courts be given broad latitude to insure that the accused receives a trial free from threat of prejudicial publicity. In upholding the constitutionality of the standing order, the court construed the order as prohibiting the taking of photographs during the *existence* of a judicial proceeding, whether in process, recessed, or terminated. Thus the power of the court is not restricted to the time when a proceeding is in process or court is in session, but now extends even after the specific judicial proceeding in question has been recessed or terminated.

The decision broadens the federal district court's power to remedy at its inception potentially prejudicial publicity in an effort to preserve for the accused "the most fundamental of all freedoms,"[7] a fair trial. The court followed the principle that freedom of the press should not be construed to give the press "a constitutionally protected right of access to sources of information not available to others."[8] The right of the accused

[2] Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).
[3] *Ibid.*
[4] Irvin v. Dowd, 366 U.S. 717 (1961); Stroble v. California, 343 U.S. 181 (1952).
[5] 373 U.S. 723 (1963). *Accord,* Sheppard v. Maxwell, 384 U.S. 333 (1966); Turner v. Louisiana, 379 U.S. 466 (1965).
[6] FED. R. CRIM. P. 53.
[7] Estes v. State of Texas, 381 U.S. 532, 540 (1965).
[8] United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.2d 777, 778 (1954).

to a fair trial free from prejudicial outside influences must remain paramount to another's ability to gather information solely for the purpose of informing the public.

F.W.M.

Corporations — Ultra Vires — Shareholder Intervention

Moody sought to recover on a promissory note executed in the name of Inter-Continental Corp. by its president and attested by its secretary. The corporation pled, among other defenses, that the officers and directors of the corporation were without authority to execute the note and it was thus ultra vires and unenforceable. Richardson, an Inter-Continental shareholder, sought to intervene in the suit under article 2.04B(1) of the Texas Business Corporation Act[1] to enjoin the payment of the note, on the ground that it was an ultra vires transaction given in satisfaction of a personal obligation of the Inter-Continental president. On Moody's motion the trial court struck the intervention and granted a motion for summary judgment against Inter-Continental. The trial court found that the intervenor was not acting in his own behalf, but was sought out by Inter-Continental to make the plea and the latter arranged to employ intervenor's attorney. *Held, reversed and remanded:* Where a shareholder seeks to enjoin an act of his corporation that is ultra vires and asserts this statutory right by intervention in a suit pending between the parties who must be joined if the shareholder initiates the action, his intervention should not be stricken. There should be a hearing on the merits, under appropriate pleadings, in order to determine if the intervenor is acting in collusion with the corporation. *Inter-Continental Corp. v. Moody*, 411 S.W.2d 578 (Tex. Civ. App. 1967) *error ref. n.r.e.*

The court held that article 2.04 TBCA abrogated the doctrine of inherent incapacity in Texas and that ultra vires is only available as provided in article 2.04 TBCA.[2] Therefore, the defense of ultra vires is unavailable to a corporation, but may be pled by a shareholder if all parties to the transaction are parties to the suit and the court deems the proceeding equitable. The case was remanded for a determination of the intervenor's rights. It was an error to strike intervention, but relief should be denied the intervenor if, on remand, the trier of facts finds that he is but an agent of Inter-Continental.[3]

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[1] TEX. BUS. CORP. ACT ANN. art. 2.04B(1) (1956). "[B]ut that such act, conveyance, or transfer [of a corporation] was, or is beyond the scope of the purpose of the corporation as expressed in the articles of incorporation or inconsistent with any such expressed limitations of authority may be asserted: (1) In a proceeding by a shareholder against the corporation to enjoin the doing of any act." The Texas Business Corporation Act is hereinafter referred to as the TBCA.

[2] TEX. BUS. CORP. ACT ANN. art. 2.04B (1956); Inter-Continental Corp. v. Moody, 411 S.W.2d 578, 586 (Tex. Civ. App. 1967) *error ref. n.r.e.* See also Bar Committee Comment following article 2.04, 3A VERNON'S ANN. CIV. STAT. 40 (1966); Brimble, *Ultra Vires Under the Texas Business Corporation Act*, 40 TEXAS L. REV. 677 (1961); Note, 20 SW. L.J. 861 (1966).

[3] TEX. R. CIV. P. 60; TEX. BUS. CORP. ACT ANN. art. 2.04B (1956); 411 S.W.2d at 589-91.

Inter-Continental is the third Texas case discussing ultra vires since the adoption of the TBCA.[4] Though the supreme court has not construed article 2.04, the holdings of the three civil appeals cases which have construed the statute are consistent and should be followed by the higher court.[5] Otherwise the inequity of the doctrine of general capacity would be perpetuated and the legislative intent would be frustrated.[6]

As a matter of policy, intervention should be liberally granted in cases such as *Inter-Continental.*[7] A multiplicity of suits will be avoided and any damage to the third party dealing with the corporation will be minimized while adequate protection will be afforded to shareholders.[8] However, if corporations are allowed to circumvent article 2.04's proscription with the simple artifice of collusive intervention by a "friendly" shareholder, the statute will become meaningless. Thus intervenors should only be granted relief if it is clearly demonstrated that they are acting in their own behalf.

S.C.S.

Criminal Law — Texas Uniform Criminal Extradition Act — Right of Indigent Defendant to Court-Appointed Counsel in Habeas Corpus Proceeding

In 1962 Turner was sentenced to the Ohio State Reformatory for the crime of burglary. He was paroled in 1965, declared a parole violator several months later, and confined in the Texas Department of Corrections in 1966. Extradition papers were prepared and an executive warrant was issued. In the ensuing habeas corpus proceeding under section 10 of the Texas Uniform Criminal Extradition Act[1] Turner's requests for court-appointed counsel were denied, although the record clearly indicated that he was indigent. Turner was remanded to custody for extradition to the state of Ohio. *Held, reversed and remanded:* An indigent person is entitled to representation by court-appointed counsel in a habeas corpus proceeding under the Texas Uniform Criminal Extradition Act. *In re Turner,* 410 S.W.2d 639 (Tex. Crim. App. 1967).

Section 10 of the Texas Uniform Criminal Extradition Act requires that the person arrested under an executive warrant be brought before a judge who "shall inform him of the demand for his surrender and of

[4] Republic Nat'l Bank v. Whitten, 383 S.W.2d 207 (Tex. Civ. App. 1964), *aff'd,* 397 S.W.2d 415 (Tex. 1965); Empire Steel Corp. v. Omni Steel Corp., 378 S.W.2d 905 (Tex. Civ. App. 1964) *error ref. n.r.e.* See also Spool Stockyards Co. v. Chicago, R.I. & Pac. R.R., 353 F.2d 263 (5th Cir. 1965).

[5] The issue was clearly presented in *Whitten,* note 4 *supra,* but the court affirmed on the grounds of estoppel. 397 S.W.2d at 415-16; Note, 20 Sw. L.J. 861 (1966).

[6] See authorities cited *supra* note 2.

[7] See authorities cited *supra* notes 2, 3.

[8] *Ibid.*

[1] TEX. CODE CRIM. PROC. ANN. art. 51.13 (1965).

the crime with which he is charged, and that he has the right to demand and procure legal counsel."[2] Although no express provision is made in the statute for the appointment of counsel to represent indigent persons, the court concluded that the legislature did not intend that the right to counsel be limited to those individuals who are financially able. The court drew support for its conclusion from a decision of the Illinois Supreme Court,[3] which interpreted section 10 of the Illinois Uniform Criminal Extradition Act.[4] The Illinois court required that counsel be appointed to represent indigent persons who do not have the means to procure this assistance. That court felt that counsel is necessary in a habeas corpus proceeding, to consider such questions as "whether the various extradition papers are in proper form, whether the arrested person is in fact a fugitive from justice subject to extradition, and whether he is in fact a person charged with a crime in the demanding State."[5] The Texas Court of Criminal Appeals agreed.

G.P.A.

Evidence — Deceased Witness — Admissibility in Civil Trial of Testimony Given in Prior Criminal Trial

After Bryant was acquitted in a criminal arson trial, he brought suit against a group of insurance companies who refused indemnity for his fire losses because they believed he had intentionally caused the fire. At the civil trial, the companies offered the transcribed testimony of a witness at the previous arson trial who was now dead. Bryan objected to the admission of such prior testimony, contending that it was hearsay. The trial court admitted the prior testimony and Bryan appealed. *Held, affirmed*: Testimony given in a prior criminal trial is admissible in a subsequent civil action where the witness who gave the evidence at the criminal proceeding is dead, provided that the issue was substantially the same in both proceedings and that the party against whom the evidence is presently offered was a party to both suits and had an opportunity to cross-examine the witness. *Bryant v. Trinity Universal Ins. Co.*, 411 S.W.2d 945 (Tex. Civ. App. 1967).

A well established exception to the hearsay rule is that relevant statements made in a previous trial may be admitted in a later proceeding as evidence of the truth of such statements when the witness is dead or

[2] TEX. CODE CRIM. PROC. ANN. art. 51.13, § 10 (1961).

[3] People *ex rel.* Harris v. Ogilvie, 221 N.E.2d 265 (Ill. 1966).

[4] Section 10 of the Illinois Uniform Criminal Extradition Act is similar in language to § 10 of the Texas Uniform Extradition Act.

[5] 221 N.E.2d at 267.

unavailable.[1] The safeguards imposed upon this exception are that the litigant who is adverse to the witness must have been a party to both proceedings and must have had ample opportunity to cross-examine the witness in the first proceeding.[2] For cross-examination to be meaningful, the issues in both cases must be substantially the same.

The present case is the first Texas decision on the question of whether, under this hearsay exception, testimony given in a prior *criminal* case is admissible in a subsequent *civil* case.[3] Bryant argued that the testimony was not admissible since the issues in the two trials were different; the issue in the criminal case concerned Bryant's "guilt" while that in the civil action concerned "property" rights.[4] The court felt, however, that to define the issues as guilt and property would be to determine the ultimate issue or result sought to be obtained by the litigation. The real issue in both actions was recognized to be whether Bryant had set fire to or had procured the burning of the building; Bryant, therefore, had had ample opportunity to cross-examine the witness as to this issue.[5]

G.W.O.

Taxation — Definition of "Eighty Per Cent in Value" Under Section 1239

Parker sold certain depreciable personal property to a corporation of which he owned 800 shares. Parker reported the gain on the sale of the property to the corporation as a capital gain under section 1231 of the Internal Revenue Code of 1954. The Commissioner denied capital gain treatment under section 1239[1] since Parker owned more than eighty per

[1] See, *e.g.*, Houston Fire & Cas. Ins. Co. v. Brittian, 402 S.W.2d 509 (Tex. 1966); Lone Star Gas Co. v. State, 137 Tex. 279, 153 S.W.2d 681 (1941); Newton v. State, 202 S.W.2d 921 (Tex. Crim. App. 1947); Abston v. State, 141 S.W.2d 337 (Tex. Crim. App. 1940); Mitchell v. State, 222 S.W. 983 (Tex. Crim. App. 1920); Bergin v. State, 79 Tex. Crim. 617, 188 S.W. 423 (1916); Porch v. State, 51 Tex. Crim. 7, 99 S.W. 1122 (1907); Maryland Cas. Co. v. Lee, 165 S.W.2d 135 (Tex. Civ. App. 1942); Security Realty & Dev. Co. v. Bunch, 143 S.W.2d 687 (Tex. Civ. App. 1940); Campbell v. Hicks, 83 S.W.2d 1013 (Tex. Civ. App. 1935) *error dismissed.* See also McCORMICK, EVIDENCE 480-501 (1954); 1 McCORMICK & RAY, TEXAS LAW OF EVIDENCE 719-42 (2d ed. 1956).

[2] *Ibid.* An additional safeguard, however dubious, is that the former testimony was given under oath. McCORMICK, *op. cit. supra* note 1.

[3] Bryant v. Trinity Universal Ins. Co., 411 S.W.2d 945, 949 (Tex. Civ. App. 1967).

[4] *Ibid.*

[5] An analogous situation was presented in Maryland Cas. Co. v. Lee, 165 S.W.2d 135 (Tex. Civ. App. 1942) *error ref.*, a workman's compensation case. In the first trial, the issue had concerned the extent of injuries; in the latter one, the issue was whether the injuries were so extensive as to cause death. Testimony from the first proceeding was permitted because the issues in both were substantially the same—they concerned the severity of the injuries.

[1] INT. REV. CODE OF 1954, § 1239.

(a) Treatment of Gain as Ordinary Income—In the case of exchange, directly or indirectly, of property described in subsection (b)—
  (1) between a husband and wife; or
  (2) between an individual and a corporation more than 80 percent in value of the outstanding stock of which is owned by such individual, his spouse, and his minor children and minor grandchildren;

any gain recognized to the transferor from the sale or exchange of such property

cent "in value" of all the outstanding stock of the corporation at the time of sale. The other 200 authorized shares were subscribed to by Eaves. But some of the share certificates had not been issued since Eaves had paid only a portion of the subscription price. Before any of the shares could be sold, they had to be offered first to the corporation as required by the articles of incorporation. In addition, the shares issued to Eaves carried a notice on their face that they were subject to a buy-sell agreement between Parker and Eaves. This agreement provided that upon Eaves' death or termination of employment his shares would be purchased by Parker. The district court found that, as a matter of law, Parker did not own more than eighty per cent "in value" of the outstanding shares. *Held, reversed and rendered:* Under section 1239 of the Internal Revenue Code eighty per cent in value is determined by looking at the actual fair market value of the shares of the corporation and not merely at the number of shares outstanding. Therefore, restrictions of a buy-sell agreement and minority qualities may combine to have a depressing effect on the value of minority shares. *United States v. Parker,* 376 F.2d 402 (5th Cir. 1967).

Section 1239 was adopted to prevent a taxpayer from selling depreciated property to his controlled corporation and taking capital gains treatment on the sale. In such transactions the property would be depreciated by the corporation, using the sales price as a basis. Thus, under section 1239 any such sale would be treated as ordinary gain if between a taxpayer and a corporation in which eighty per cent in value of the outstanding stock is owned by the individual, his spouse, his minor children and minor grandchildren.[2] Both sales by the stockholder to the corporation and by the corporation to the stockholder are taxed by section 1239,[3] but only if the property in the hands of the transferee is depreciable under section 167.[4]

The requirement of eighty per cent ownership *in value* of the outstanding stock is unique among the various sections of the 1954 Code dealing with controlled corporations.[5] In *Trotz v. Commissioner*[6] it was held that the phrase "in value" must have some intended meaning. Thus, if the eighty per cent determination is to be on the basis of the number of shares outstanding, no reason exists for the use of the words "in

shall be considered as gain from the sale or exchange of property which is neither a capital asset nor property described in section 1231.

(b) Section Applicable Only to Sales or Exchanges of Depreciable Property—This section shall apply only in the case of a sale or exchange by a transferor of property which in the hands of the transferee is property of a character which is subject to the allowance for depreciation provided in section 167.

[2] See note 1 *supra.*

[3] 3B MERTEN, FEDERAL INCOME TAXATION § 22.25 (1966).

[4] See note 1 *supra.*

[5] INT. REV. CODE OF 1954, § 368(c), dealing with reorganizations, defines control as the ownership of stock possessing at least eighty per cent of the total combined voting power of all classes of stock entitled to vote and at least eighty per cent of the total number of shares of all other classes of stock of the corporation. See also INT. REV. CODE OF 1954, § 707(b)(2) where a partnership is considered "controlled" if a partner owns more than eighty per cent of the capital interest, or profits interest, in such partnership.

[6] 361 F.2d 927 (10th Cir. 1966).

value." Such rationale led the court in *Trotz* to remand to the tax court for a factual determination to ascertain if the stockholder owning seventy-nine per cent of the total shares actually owned more than eighty per cent "in value" of the shares.[7]

Parker is a logical application of the doctrine of the *Trotz* case: that the actual value of the stock involved must be determined in order to properly apply the eighty per cent test. In *Trotz* as well as in *Parker* the minority shares were the subject of a buy-sell agreement.[8] This factor as well as the inherent deflation in value of minority as opposed to control stock[9] prompted the court in *Parker* to hold that since Parker owned eighty per cent numerically of the stock, he must own more than eighty per cent in value of the stock.

The significance of the *Parker* case is slightly diminished by the application of section 1245[10] to sales of depreciable personal property made after 1962. Gain on the sale of such property would be treated as ordinary income to the extent of any depreciation taken in periods after 1961. Thus it appears that the significance of section 1239 will be limited primarily to transfers of real estate.[11]

However, as to transfers of real estate the *Parker* case will have real significance. It would appear that any majority shareholder runs the risk of section 1239 in any transaction with his company if he is found to own more than eighty per cent of the fair market value of all the stock of the corporation.

J.J.K.

Torts — Carpool Agreements Under the Texas Guest Statute

Pursuant to a carpool agreement, Autry, Spiering and two other men alternated driving their respective automobiles to their mutual place of work. An accident occurred while Spiering was driving home from work, and Autry was injured. The trial court ruled that as a matter of law Autry was a guest under the Texas Guest Statute,[1] and therefore granted Spiering summary judgment because Autry had alleged only ordinary negligence. *Held, reversed and remanded:* Under the parties' contractual arrangement for reciprocal rides, Autry gave consideration to Spiering

[7] On the remand the tax court determined that on the basis of expert testimony the shares of this particular construction company had no going concern value and would be worth only their proportionate share of the assets or 79%. Harry Trotz, ¶ 67,139 P-H Tax Ct. Mem. (1967).

[8] Such a contract necessarily has a depressing effect upon the value of the stock in the market. Spitzer v. Commissioner, 153 F.2d 967 (8th Cir. 1946); Worchester County Transp. Co. v. Commissioner, 134 F.2d 578 (1st Cir. 1943).

[9] Minority stock interests in a "closed" corporation are usually worth much less than the proportionate share of the assets to which they attach. Cravens v. Welch, 10 F. Supp. 94 (S.D. Cal. 1935).

[10] INT. REV. CODE OF 1954, § 1245.

[11] TAX MANAGEMENT No. 54, 2d A-58 (1963).

[1] TEX. REV. CIV. STAT. ANN. art. 6701b (1960).

and was not a guest as a matter of law within the meaning of the Texas Guest Statute. *Autry v. Spiering*, 407 S.W.2d 826 (Tex. Civ. App. 1966) *error ref. n.r.e.*

The Texas Guest Statute precludes recovery against the owner or operator of a motor vehicle by his "guest without payment"[2] unless such owner or operator caused the accident intentionally or was guilty of gross negligence. To recover for injuries due to the operator's ordinary negligence, the rider must be considered a non-guest or passenger. He must therefore prove that he has "paid" for his transportation, although the requisite payment need not be monetary.[3] The Texas courts early adopted two mutually dependant tests for determining payment.[4] First, there must be a definite relationship between the rider and operator. Second, from this relationship a definite, tangible benefit must flow to the operator and the benefit must have motivated the operator to furnish the transportation.[5]

Since carpool agreements involve both business and social elements[6] the question is whether there has been sufficient payment by the rider to consider him a non-guest or passenger. Most courts which have decided the question hold that the rider in a carpool of employees is not a guest.[7] *Autry v. Spiering*[8] is the first Texas case clearly dealing with a carpool agreement among fellow employees. In an earlier Texas case which dealt with a related problem, there was a fact question as to whether the employees had had any agreement regarding automobile rides.[9] In another Texas case, the plaintiff frequently rode to work with a fellow employee and unsolicitedly and sporadically paid the driver for gas and other expenses. Such payments were insufficient to prevent the plaintiff from being held a guest.[10] The court was careful to note, however, that "there was no regular carpool and appellant did not believe appellee was running a taxi service."[11] The decision was in accord with the established line of cases that mere sharing of expenses does not alter the rider's status as a

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[2] *Ibid.*

[3] Schafer v. Stevens, 352 S.W.2d 471 (Tex. Civ. App. 1961); Henry v. Henson, 174 S.W.2d 270 (Tex. Civ. App. 1943); Johnson v. Smither, 116 S.W.2d 812 (Tex. Civ. App. 1938); 33 TEXAS L. REV. 961 (1955).

[4] Since the Texas statute was copied from the Connecticut statute, the Texan courts turned to Connecticut decisions for interpretation purposes and adopted the tests from the Connecticut cases. See, *e.g.*, Henry v. Henson, 174 S.W.2d 270 (Tex. Civ. App. 1943); Franzen v. Jason, 166 S.W.2d 727 (Tex. Civ. App. 1942); Linn v. Nored, 133 S.W.2d 234 (Tex. Civ. App. 1939); Pfeiffer v. Green, 102 S.W.2d 1077 (Tex. Civ. App. 1937).

[5] See, *e.g.*, Cedziwooda v. Crane-Longely Funeral Chapel, 283 S.W.2d 217 (Tex. 1955); Burt v. Lochausen, 249 S.W.2d 194 (Tex. 1952); Dietrich v. Young Co., 400 S.W.2d 572 (Tex. Civ. App. 1966) *error ref. n.r.e.*; Wills v. Buchanan, 358 S.W.2d 727 (Tex. Civ. App. 1962); Gregory v. Otts, 329 S.W.2d 904 (Tex. Civ. App. 1959); Burnett v. Howell, 294 S.W.2d 410 (Tex. Civ. App. 1956) *error ref. n.r.e.*; Henry v. Henson, 174 S.W.2d 270 (Tex. Civ. App. 1943); Franzen v. Jason, 166 S.W.2d 727 (Tex. Civ. App. 1942); Raub v. Rowe, 119 S.W.2d 190 (Tex. Civ. App. 1938) *error ref.*; Johnson v. Smither, 116 S.W.2d 812 (Tex. Civ. App. 1938) *error dismissed*; Elkins v. Foster, 101 S.W.2d 294 (Tex. Civ. App. 1937).

[6] 55 MICH. L. REV. 459 (1957).

[7] See Annot., 161 A.L.R. 917 (1946); 146 A.L.R. 640 (1943); 55 MICH. L. REV. 459 (1957).

[8] 407 S.W.2d 826 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[9] Webb v. Huffman, 320 S.W.2d 893 (Tex. Civ. App. 1959).

[10] McClain v. Carter, 278 S.W.2d 877 (Tex. Civ. App. 1955) *error ref. n.r.e.*

[11] *Id.* at 878.

guest.[12] Yet, where a driver had agreed to take the plaintiff to and from work for two dollars a week, summary judgment in favor of the automobile owner was reversed.[13]

Autry v. Spiering[14] seems to be a logical culmination to these prior, more indefinite cases. There still remains, however, the problem of carpool agreements among other classes of operators and riders. The case of a carpool among parents in transporting children to and from school, for example, has never been decided by any appellate court in Texas.[15] *Autry* should serve as an analogy here and these arrangements should be considered to provide the payment required by the Guest Statute. It is not necessary that such payment be furnished directly by the rider.[16] Similarly, arrangements between students who alternate driving each other to and from school should result in the same conclusion.

P.R.K.

[12] Bonney v. San Antonio Transit Co., 325 S.W.2d 117 (Tex. 1959); Easter v. Wallace, 318 S.W.2d 916 (Tex. Civ. App. 1958) *error ref. n.r.e.;* Burnett v. Howell, 294 S.W.2d 410 (Tex. Civ. App. 1956) *error ref. n.r.e.;* Young v. Bynum, 260 S.W.2d 696 (Tex. Civ. App. 1953); McCarty v. Moss, 225 S.W.2d 883 (Tex. Civ. App. 1950); Raub v. Rowe, 119 S.W.2d 190 (Tex. Civ. App. 1938) *error ref.;* see also, Annot., 10 A.L.R.2d 1351 (1950); 14 Sw. L.J. 72, 77 (1960); 33 TEXAS L. REV. 961 (1955).

[13] Wills v. Buchanan, 358 S.W.2d 727 (Tex. Civ. App. 1962).

[14] 407 S.W.2d 826 (Tex. Civ. App. 1966) *error ref. n.r.e.*

[15] The only case found involving school children concerned the adult chaperone on a school bus which had been chartered for a special trip. The court reasoned that the plaintiff-chaperone was not a guest but was aboard in order to provide a service necessary to the trip itself. Freeman v. Ham, 283 S.W.2d 438 (Tex. Civ. App. 1955) *error ref. n.r.e.*

[16] Houston Belt & Terminal Ry. v. Burmester, 309 S.W.2d 271 (Tex. Civ. App. 1957) *error ref. n.r.e.;* Freeman v. Ham, 283 S.W.2d 438 (Tex. Civ. App. 1955) *error ref. n.r.e.;* 9 BAYLOR L. REV. 238 (1957).