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RECENT DECISIONS

Criminal Law — *Miranda v. Arizona* Applicable to Military Interrogation

Airman Third Class Michael Tempia, under investigation by the Air Force for allegedly taking indecent liberties with females under the age of sixteen,¹ was informed that he had the right to consult with an attorney. The same warning was administered at a later hearing before the Military Police. Moreover, the Military Police made an appointment for Tempia with the Base Staff Judge Advocate, and at this meeting he was informed that he had the right to employ outside counsel, but that military counsel would not be furnished because he was not as yet charged with any crime. Subsequently Tempia stated to interrogating officers, who had again informed him of his right to employ or consult counsel, that he "did not desire further counsel as . . . 'they didn't do me no good.'" Tempia thereupon confessed, and was later convicted as charged. He appealed to the United States Court of Military Appeals, alleging that the confession was coerced in violation of the conditions enunciated by the Supreme Court in *Miranda v. Arizona*.² Held, reversed: The standards of *Miranda v. Arizona* are applicable in military prosecutions, prohibiting the use of statements obtained during custodial interrogation unless the suspect was adequately warned of his freedom from self-incrimination and his rights were adequately safeguarded. *United States v. Tempia*, 16 U.S.C.M.A. 629 (1967).

The constitutional standards of *Miranda* derive their efficacy from the fifth amendment's prohibition against self-incrimination rather than from the sixth amendment's guarantee of counsel.³ Nevertheless, that decision has come to stand for the "right to counsel" of persons suspected of crime. In essence the Supreme Court required the presence of counsel to effectuate freedom from self-incrimination by ensuring that the individual does not unconsciously incriminate himself. Counsel's function in this situation, then, is not one of defense, but of advice as to the legal implications of the statements which the suspect is asked to make.

Viewed in this light, the result in *Tempia* is sound. To be sure, Tempia was warned repeatedly of his right to counsel, and was even given an opportunity to meet with the Base Staff Judge Advocate. But he was never advised by counsel.

¹ In violation of UNIFORM CODE OF MILITARY JUSTICE art. 134, 10 U.S.C. § 934 (1956).

² 384 U.S. 436 (1966); Comment, *Custodial Interrogation as a Tool of Law Enforcement: Miranda v. Arizona and the Texas Code of Criminal Procedure*, 21 Sw. L.J. 253 (1967). *Miranda* declares that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards" to ensure the protection of the individual's fifth amendment rights. 384 U.S. at 444.

³ See Note, *Constitutional Law—Pointer v. Texas—Guarantee of the Accused's Right to Confront the Witness Against Him in a State Proceeding According to Federal Standards*, 19 Sw. L.J. 632 (1965) for an excellent description of the various due process theories. *Palko v. Connecticut*, 302 U.S. 319 (1937); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Contra, Malloy v. Hogan*, 378 U.S. 1 (1964). For a discussion of the Supreme Court's development of the confession cases, see Comment, *supra* note 2, at 263 n.67.

The implications of *Tempia*, however, are far-reaching. Inextricably binding the right to counsel to the self-incrimination clause of the fifth amendment, this court examines and discards a fundamental aspect of *Miranda*. In *Miranda* Chief Justice Warren was careful to point out that the specific dictates of that decision or "other fully effective means" are essential under the fifth amendment.⁴ The dissent in the instant case finds that "esteem for the military practice was expressed in *Miranda*," and concludes that this was "only because the Supreme Court was satisfied it provided effective counterbalance to the inherent pressures of in-custody interrogation, and assured the individual complete freedom to decide whether to speak or to remain silent."⁵ Perhaps military regulations do not provide "other fully effective means," but this in itself does not mean that only the rigid rules of *Miranda*'s code will satisfy the requirement. It is time for the lower courts, military or civilian, state or federal, to determine exactly what constitutes such means and to implement them if their requirements are less exacting upon law enforcement officials.

W.R.J.

Due Process — Article 711 of the Texas Code of Criminal Procedure — Co-Principal's Incompetence To Testify

Bonner and his wife were indicted separately on charges of burglary. Prior to Bonner's trial his wife pleaded guilty and was placed on probation. When Bonner attempted to call her as a witness at his own trial the court refused to allow her to testify because of article 711 of the Texas Code of Criminal Procedure,¹ which declares co-principals incompetent to testify in the disposition of a case involving another co-principal. The Texas Court of Criminal Appeals upheld the application of the Texas statute in Bonner's trial and did not discuss the federal constitutional issues.² Bonner made application for a writ of habeas corpus to the United States district court, which was refused. He appealed, contending that the refusal to allow a co-principal to testify violated his rights of due process under the fourteenth amendment. *Held, reversed*: Article 711 of the Texas Code of Criminal Procedure, which declares co-principals incompetent to testify in the disposition of a case involving another co-principal, results in a deprivation of the accused's liberty without due process under the fourteenth amendment. *Bonner v. Beto*, 373 F.2d 301 (5th Cir. 1967).

The idea of the common law was that "such as are interested in the event of the cause"³ could not testify. Early in the nineteenth century

⁴ 384 U.S. at 444.

⁵ 16 U.S.C.M.A. at 643.

¹ TEX. CODE CRIM. PROC. ANN. art. 711 (1925).

² *Bonner v. State*, 375 S.W.2d 723 (Tex. Crim. App. 1964).

³ 3 BLACKSTONE, COMMENTARIES *369.

attacks were made on the disqualification for interest, and in 1889 Texas adopted a statute⁴ allowing an accused in a criminal prosecution to testify for himself. This statute removed the disqualification of the accused as a party. It would seem that since a co-defendant is disqualified solely because he is an interested party this disqualification should have been removed also. Nevertheless, it has survived successive revisions of the Texas Code.

Not until the recent cases of *Washington v. State*⁵ and *Brown v. State*⁶ has the constitutionality of article 711 of the Code of Criminal Procedure and article 82 of the Penal Code been attacked. The *Washington* court refused to hold the statute unconstitutional, finding that the statutes were procedural only and that the legislature could prescribe the competency of witnesses in all cases.⁷

In the instant case, the court concluded that the fourteenth amendment leaves Texas free to adopt whatever statute or decision desired concerning the competency of various classifications of witnesses to testify. But, the adoption of this rule cannot foreclose an inquiry as to whether in a given case the application of that rule works a deprivation of the prisoner's life or liberty without due process of law.

J.M.F.

Federal Civil Procedure — Enjoining the Taking of Depositions in a Civil Action When a Criminal Action Is Pending

Simon, Kaiser and Fishman were indicted in the Southern District of New York on charges of mail fraud, conspiracy to commit mail fraud, and willfully filing a false and misleading report with the Securities and Exchange Commission. In the Eastern District of New York, Wharton, trustee in bankruptcy of Continental Vending Machine Corporation, had filed a civil action involving in part the same facts as the criminal action. Wharton, diligently and in good faith preparing for trial in the civil action, wished to take the depositions of Simon, Kaiser and Fishman, but was enjoined from doing so by a district judge for the Southern District of New York.¹ *Held, reversed*: An injunction should not be granted by a court in which a criminal action is pending to prevent the taking of depositions in a related civil action in another court unless there is a show-

⁴ Tex. Laws 1889, ch. 43, sec. 1, at 37, 9 GAMMEL, LAWS OF TEXAS 1065 (1889).

⁵ 400 S.W.2d 756 (Tex. 1966).

⁶ 401 S.W.2d 251 (Tex. 1966).

⁷ The United States Supreme Court has granted certiorari in *Washington* and has defined the issue as whether or not petitioner's conviction and sentence are void due to a denial of sixth and fourteenth amendment rights. 35 U.S.L.W. 2124 (U.S. June 12, 1967) (No. 649).

¹ *United States v. Simon*, 262 F. Supp. 64 (S.D.N.Y. 1966), *reversed*, 373 F.2d 649 (2d Cir. 1967).

ing of interference with the criminal trial or with the preparation of a defense. *United States v. Simon*, 373 F.2d 64 (2d Cir. 1967).

The district judge based his authority to issue the injunction on the All Writs Act² and his supervisory power over the administration of federal criminal justice.³ The judge reasoned that unfairness would result in the criminal action since the prosecution might obtain testimony which it could not obtain under the Federal Rules of Criminal Procedure. Prior to *Simon* neither the All Writs Act nor the supervisory power has ever been used by a federal district court in a criminal proceeding to enjoin a party from taking depositions in a civil action in another jurisdiction. The act has been used by a higher court in enjoining a trial court where there was discovery without limit or control and an undue burden on a party.⁴ In such a case, an injunction is only issued under exceptional circumstances which amount to a clear abuse of discretion, an abdication of the judicial function, or an usurpation of judicial power.⁵

The circuit court assumed but did not decide that the lower court had the power to issue the injunction, but went on to hold that it should not have done so since there was no showing that the depositions would interfere with the criminal trial or the preparation of a defense. However, in the closing sentence of the opinion, the circuit court concluded that the district court had the power to take appropriate action if a finding is made that this interference would be present.

The circuit court relied heavily upon the fact that neither Simon, Kaiser nor Fishman invoked their privilege against self-incrimination under the fifth amendment.⁶ The individuals did not invoke the privilege because they felt that it would impair their professional standing. The court concluded that the individuals had a choice of either invoking the privilege or giving the testimony⁷ and that the rights of the accused to invoke the privilege would not be affected by their failure to invoke it in an independent proceeding.⁸

The circuit court also noted that the individuals could have moved in the civil action under Federal Rule of Civil Procedure 30(b) to delay or limit the depositions, and, therefore, the district court in which the criminal action was pending should only issue an injunction in exceptional circumstances.⁹ A group of cases involving situations where one party sought disclosure of the other party's evidence was distinguished from the case under discussion on the basis that in the present case there was an

² 28 U.S.C. § 1651 (1964).

³ See *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *Rea v. United States*, 350 U.S. 214 (1956); *McNabb v. United States*, 318 U.S. 332 (1943).

⁴ *Paramount Film Distrib. Corp. v. Civic Center Theatre*, 333 F.2d 358 (10th Cir. 1964).

⁵ *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Paramount Film Distrib. Corp. v. Civic Center Theatre*, 333 F.2d 358 (10th Cir. 1964); *Pet Milk Co. v. Ritter*, 323 F.2d 586 (10th Cir. 1963).

⁶ U.S. CONST. amend. V.

⁷ See 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. ed. 1961).

⁸ *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958); see 8 J. WIGMORE, EVIDENCE § 2276, at 470-72 (McNaughton rev. ed. 1961).

⁹ FED. R. CIV. PROC. 30(b).

independent action by a third party who had no connection with the other action.¹⁰

The circuit court weighed the public interest in the progress of the civil action and the interest of the accused in withholding their testimony until after the criminal trial and tipped the scale toward the former since the individuals had not invoked the fifth amendment and since they had not tried to avoid the depositions under Federal Rule of Civil Procedure 30(b). But, the court intimated that if a strong enough fact situation were presented the district judge would have the power to issue an injunction.

S.A.U.

Insurance — Flexible Fund Annuities — The Requirement of Registration Under Section 5 of the SEA

The Securities and Exchange Commission initiated suit to enjoin United Benefit Life Insurance Company from offering its "Flexible Fund Annuity" contract without meeting the registration requirements of section 5 of the Securities Act,¹ and to compel United to register the "flexible fund" itself as an investment company in accordance with section 8 of the Investment Company Act.² Under the terms of the flexible fund annuity the purchaser pays a fixed monthly premium up to a specified maturity date. United segregates these premiums from its other funds and invests the flexible fund principally in common stocks. Before maturity, the purchaser may withdraw all or part of his proportionate share of the entire fund, or he may withdraw an alternative cash value measured by a percentage of his net premiums. At maturity, the purchaser must elect either to receive the cash value of his policy, measured by the larger of his share of the fund or his net premium guarantee, or to convert such cash value into a life annuity. After the maturity date, the purchaser's interest in the fund ceases, since he has either received the cash value of his policy or converted it to a fixed-payment annuity, in which case the value of his interest would be transferred from the flexible fund to United's general reserves. The SEC contended that the pre-maturity portion of the flexible fund contract was separable and a "security," requiring registration under section 5 of the Securities Act. The district court held that the guarantee of a fixed-payment annuity portion gave the entire contract the character of insurance. The court of appeals affirmed.³ *Held, reversed*: For the pur-

¹⁰ *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963); *Perry v. McGuire*, 36 F.R.D. 272 (S.D.N.Y. 1964); *Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co.*, 14 F.R.D. 333 (E.D. Pa. 1953); *National Discount Corp. v. Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952).

¹ 15 U.S.C. § 77c (1964).

² 15 U.S.C. § 80a-8 (1964).

³ 359 F.2d 619 (D.C. Cir. 1966).

poses of the Securities Act flexible fund annuity contracts possess the characteristics of an investment, are nonexempt securities, and cannot be offered to the public without conforming to the registration requirements of section 5. *Securities & Exch. Comm'n v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967).

The general purpose of section 5 of the Securities Act is to afford the purchaser of a "security" the advantages of disclosure of relevant facts concerning his investment.⁴ The flexible fund annuity contract is a deferred or optional annuity plan somewhat similar to a variable annuity. Both variable annuities and the flexible fund are designed to meet inflation through a professionally managed investment program, while retaining the security of an insurance annuity. In *SEC v. Variable Annuity Life Insurance Co. (VALIC)*,⁵ the Supreme Court held that a variable annuity was not an insurance contract within the section 3(a) exemption of the Securities Act but instead was a "security."⁶ The benefits under the variable annuity plan fluctuated with the value of the fund after maturity, giving the plan the characteristics of an investment, not insurance. In *United* the court of appeals found *VALIC* controlling, but interpreted the case to mean only that the insurer must bear a substantial part of the investment risk in order for the contract to qualify as insurance. That court concluded that the net premium guarantee plus the conversion privilege met the *VALIC* test. However, the Supreme Court refused to construe *VALIC* as turning solely on the question of investment risk-taking.

Rejecting *United's* theory that the differences between the variable annuity and the flexible fund contract were sufficient to bring the latter within the optional annuity contract exemption of section 3(a) of the Securities Act, the court held that the pre-maturity portion of the contract was separable from the rest of the contract and constituted a "security" within section 2 of that Act.⁷ The pre-maturity portion of the flexible fund was intended to be an investment, not insurance. Furthermore, the insurer's assumption of an investment risk does not by itself create an insurance provision under federal law. The court remanded *United* for consideration of the question whether the flexible fund itself could be separated from *United's* other activities and treated as an investment company within section 8 of the Investment Company Act. Although the court gave no answer to this question, the fact that it was willing to separate the investment, pre-maturity portion of the contract from the fixed-payment annuity portion certainly is indicative that the flexible fund itself may be treated as an investment company.

W.T.C.

⁴ 15 U.S.C. § 77c (1964).

⁵ 359 U.S. 65 (1959).

⁶ 15 U.S.C. § 77c(a)(8) (1964).

⁷ 15 U.S.C. § 77b(1) (1964).

Labor Law — A Union's Right To Discipline Its Members

During economic strikes being conducted against Allis-Chalmers Manufacturing Company by two locals of the UAW, approximately seventy-five members of the union crossed the picket line and returned to work. This action was in violation of the constitution and by-laws of the union¹ and resulted in the filing of formal charges of conduct unbecoming a union member against each of the offending individuals. They were assessed fines from \$20 to \$100 at the union committee hearing. The union then brought an action to collect the fine against one union member in a Wisconsin state court which resulted in a judgment for the union. Allis-Chalmers filed charges with the National Labor Relations Board, claiming that this action of the union constituted interference with the member's right to refrain from engaging in concerted activities, in violation of section 8(b)(1)(A)² of the National Labor Relations Act. The Board ruled that this action by the union was not an unfair labor practice and Allis-Chalmers appealed to the Court of Appeals for the Seventh Circuit. The Board's ruling was affirmed at an original hearing before a three-judge panel, but on a rehearing en banc the court reversed the Board ruling and held that the union action amounted to coercion of employees in the exercise of their individual rights.³ On certiorari to the Supreme Court, *Held, reversed*: NLRA section 8(b)(1)(A), prohibiting union coercion of employees in the exercise of their rights to refrain from engaging in concerted activity, does not extend to union discipline by means of a fine for refusal to participate in an authorized strike action. *NLRB v. Allis-Chalmers Mfg. Co.*, 35 U.S.L.W. 4623 (U.S. June 12, 1967).

Section 8(b)(1)(A) of the NLRA provides that it is an unfair labor practice for a union "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 of this title; provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."⁴ Employees have the right under section 7⁵ to engage in self-organization and collective bargaining and the right to engage in or refrain from engaging in other concerted activities. Thus the issue before the court was which of these conflicting rights should prevail—the right of the union to discipline its members as expressed in the proviso, or the right of the employees to refrain from engaging in concerted activities.

In reaching its decision the Supreme Court looked to the legislative history of 8(b)(1)(A) and determined that "this history of congressional action does not support a conclusion that the Taft-Hartley prohibitions against restraint or coercion of an employee to refrain from concerted activities included a prohibition against the imposition of fines on mem-

¹ See 149 N.L.R.B. 67, 75 (1964).

² 29 U.S.C. § 158(b)(1)(A) (1964).

³ *Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656 (7th Cir. 1966), noted in 21 Sw. L.J. 358 (1967).

⁴ 29 U.S.C. § 158(b)(1)(A) (1964).

⁵ 29 U.S.C. § 157 (1964).

bers who decline to honor an authorized strike and attempts to collect such fines."⁶ The Court felt the true intent of Congress was not to impose any limitation with respect to the internal affairs of unions with the exception of barring enforcement of the internal regulations of a union to affect a member's employment status.⁷ The Court's decision gives effect to the proviso of 8(b)(1)(A), excluding a union's power to prescribe its own rules in respect to union membership from the broader prohibition of 8(b)(1)(A) against union coercion in respect to employees' concerted activity.⁸

G.E.S.

Mortgages — Deeds of Trust — The Optional Acceleration Clause and Notice

Covington sold several tracts of land to Burke for \$1,775. Burke executed a vendor's lien note secured by a deed of trust. The deed of trust permitted its holder to accelerate the entire debt, at his option, if the taxes on the property became delinquent. Burke at no time allowed the principal or interest to become delinquent but he did fail to pay \$27 in taxes due on February 1, 1964. Covington, without notice to Burke of his decision to accelerate the option, posted notices of sale on February 3, 1964, and purchased the land at the trustee's sale for \$1 per acre. Covington then passed title to the land to the Della Corporation and proceeded to notify Burke of the transactions. The trial court awarded damages to Burke in the amount of \$5,150, the fair market value of the property. *Held, affirmed*: An option under a deed of trust to accelerate the maturity of a note for failure to pay taxes may be exercised only when the mortgagee demands payment and gives notice of his decision to accelerate the entire balance. *Covington v. Burke*, 413 S.W.2d 158 (Tex. Civ. App. 1967).

There are two types of acceleration clauses: the self-executing and the optional clauses. Where the acceleration clause is self-executing no notice is necessary and upon default the trustee has a duty to foreclose and is under no obligation to give actual notice to the mortgagor.¹ But where the acceleration clause can be exercised only at the mortgagee's option, the courts have required that the mortgagor be given actual notice of demand for payment and of the exercise of the option to accelerate the entire balance of the debt.² Thus, the mortgagor will not lose his property at a trustee's sale of which he is unaware. The exercise of an option to accelerate the entire balance of a debt where either interest or principal payments

⁶ 35 U.S.L.W. 4623, 4629 (U.S. June 12, 1967).

⁷ *Id.* at 4626.

⁸ For a discussion of the policy arguments involved from the union's and employer's standpoint see Note, 21 Sw. L.J. 358 (1967).

¹ *Chandler v. Guaranty Mort. Co.*, 89 S.W.2d 250 (Tex. Civ. App. 1935).

² *Parker v. Mazur*, 13 S.W.2d 174 (Tex. Civ. App. 1928) *error dismissed*.

have become delinquent or where the mortgagor has failed to comply with one of the covenants, such as the promise to pay taxes or insurance, is a harsh remedy.³ The courts in Texas have looked with disfavor upon the exercise of this power since great inequity like that of the present case may result.⁴

The decision of the court in *Covington* is supported by the cases of *Jernigan v. O'Brian*⁵ and *Parker v. Mazur*,⁶ which refused to allow such an unconscionable remedy to be used. The policy the court seems to be stating is that unless the acceleration clause is expressly self-executing, notice will be an absolute prerequisite for a legal acceleration and sale.

L.J.B.

Torts — Liability of Accounting Firm Under Action of Deceit and Section 10(b) of the SEA for Failure To Disclose Errors Discovered in Audit

Peat, Marwick, Mitchell, & Co. (PMM), an accounting firm engaged in a special audit for Yale Express Co., discovered that it had earlier committed errors in certifying Yale's annual stockholders' report. PMM failed to disclose the error to Yale or to the investing public. Plaintiff stockholders asserted that PMM was liable in damages for its silence and inaction. PMM countered that there was no common law or statutory basis for imposing such a duty on a public accounting firm retained by the officers and directors of the company and moved to dismiss the complaint. *Held, motion denied*: An accounting firm which discovers errors in a stockholders' report it has prepared and certified and which fails to disclose these errors to the investing public may be held liable in a common law deceit action and under section 10(b) of the Securities Exchange Act and SEC rule 10b-5. *Fischer v. Kletz*, 266 F. Supp. 180 (S.D.N.Y. 1967).

The problem presented to the court arose from PMM's dual relationship to Yale, as an "independent public accountant"¹ while preparing the annual report and as a "dependent public accountant" while engaged in the special audit. In the latter capacity, PMM's primary obligations were to Yale and not to the public. Therefore, PMM contended that there was no duty of disclosure to the public when the errors were discovered.

Although the rule in the common law action of deceit is generally not to impose liability for tacit non-disclosure, the courts have developed the exception that one who makes a statement which is relied upon by an-

³ *Motor & Industrial Fin. Corp. v. Hughes*, 294 S.W.2d 182 (Tex. Civ. App. 1956).

⁴ *Jernigan v. O'Brian*, 303 S.W.2d 515 (Tex. Civ. App. 1957).

⁵ *Id.*

⁶ 13 S.W.2d 174 (Tex. Civ. App. 1928) *error dismissed*.

¹ Since Yale's securities were registered on the New York Stock Exchange, Yale was required to have its annual report certified by an "independent public accountant." Securities Exchange Act § 13(a), 15 U.S.C. § 78m(a)(2) (1934).

other *must* disclose any subsequently acquired information.² The court in *Fitzgerald v. McFadden*³ found no reason why the elements of "good faith and honesty" which govern the businessman should not apply to the statutory public accountant. The court in *Fischer* further held that the obligation to disclose was not contingent on PMM's opportunity for personal gain, but arose even when the plaintiff had no dealing with the defendant but had been induced by the latter's misrepresentation to deal with a third party.⁴

The court also held that a cause of action existed against PMM under section 10(b) of the Securities Exchange Act⁵ and SEC rule 10b-5, which provide a private remedy for defrauded investors. Although there were no cases directly on point, the court drew analogies to *Pettit v. New York Stock Exchange*.⁶ In *Pettit* defendants' motion to dismiss was denied although the defendants had no economic interest in the transaction and remained inactive in a claimed breach of duty. The court in *Pettit*, however, did not decide whether a section 10(b) action could be maintained in a situation like *Fischer* where the allegation of conspiracy and aiding and abetting was not present.⁷ The *Fischer* court felt this and other issues of potential significance would be better dealt with at trial.

The court's decision in *Fischer* to allow the plaintiffs to attempt to prove deceit and SEC violations represents an extension of liability to defendants (in this case public accounting firms) heretofore considered insulated. This decision could be considered a warning to any such firm or individual dealing, albeit indirectly, with corporate or shareholder rights.

P.T.M.

Venue — Plea of Privilege — Judicial Notice of Location of Event Within County of Suit

Clyde Barber filed suit in Ector County, Texas, for the death of his wife in a collision with defendant's truck. Defendant, Intercoast Jobbers, filed a plea of privilege to be sued in Dawson County, Texas, the location of its principal place of business. Plaintiff asserted by controverting affi-

² W. PROSSER, *TORTS* 534 (2d ed. 1955).

³ 88 F.2d 639 (2d Cir. 1939).

⁴ *Pasley v. Freeman*, 3 Term R. 51 (K.B. 1789).

⁵ 15 U.S.C. § 78j(b) (1934). The subsection provides in pertinent part:

It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality . . . or any facility of any national securities exchange—

. . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

⁶ 217 F. Supp. 21 (S.D.N.Y. 1963).

⁷ No express claim of "aiding and abetting" could be found in plaintiffs' complaint. Such a claim was, however, made in plaintiffs' memorandum submitted in answer to the motion to dismiss. 266 F. Supp. at 194.

davit that venue should be maintained in Ector County under section 9a of article 1995,¹ which allows venue to be placed in the county where the act or omission of negligence occurred. At the venue hearing Barber introduced evidence that the accident occurred at the intersection of 81st Street and Highway 385, four miles north of downtown Odessa, and the court, after judicially noting that the point of collision was within Ector County, overruled defendant's plea of privilege. The court of civil appeals reversed,² since plaintiff had not strictly complied with the statutory requirement of establishing by a preponderance of the evidence that defendant's act of negligence "occurred in the county where suit was filed."³ On plaintiff's appeal to the Texas Supreme Court, *Held, reversed*: The location of a collision is a fact which is "certain and indisputable" and may be judicially noticed with 'verifiable certainty.' *Barber v. Intercoast Jobbers & Brokers*, 10 Tex. Sup. Ct. J. 460 (June 17, 1967).

Texas courts have long given the venue exceptions a strict interpretation and refuse to fix venue by implication.⁴ In maintaining venue in a county other than that of defendant's residence a venue fact common to the exceptions is that the act or omission occurred within the county of suit. Normally the plaintiff will offer evidence at the venue trial showing both the specific situs and the county of the event in question. When the county has not been specifically plead and proven, judicial notice of the geographical make-up of the county may be sufficient to maintain venue if the plaintiff has alleged the specific situs in his controverting affidavit and has presented sufficient evidence to prove it by a preponderance of the evidence. In such cases the court will normally take notice of indisputable geographical facts of common knowledge⁵ once the situs is established as being within the county seat,⁶ within a given city,⁷ a specific distance from a given city,⁸ or precisely located in a similar manner.⁹ The danger in relying on judicial notice to establish this venue fact is that a city may lie on the border between two counties,¹⁰ or near the county line, or that the court may do as the court of civil appeals did in the instant case and fail to apply properly the judicial notice doctrine.

Since the judicial notice doctrine is easily susceptible to misinterpretations in venue cases, both by the parties and the court, a plaintiff should be careful to avoid these pitfalls by alleging both the specific situs and county of the event in suit.

M.L.T.

¹ TEX. REV. CIV. STAT. ANN. art. 1995(9a) (1955). See 1 R. McDONALD, TEXAS CIVIL PRACTICE § 4.17.2 (1965).

² *Intercoast Jobbers & Brokers v. Barber*, 410 S.W.2d 249 (Tex. Civ. App. 1966).

³ TEX. REV. CIV. STAT. ANN. art. 1995(9a) (1955).

⁴ See generally 1 R. McDONALD, TEXAS CIVIL PRACTICE §§ 4.11.5, 4.17.2, 4.43.1, 4.47, 4.49 (1965).

⁵ *Southwestern Inv. Co. v. Shipley*, 400 S.W.2d 304 (Tex. 1966), noted in VanDercreek, *Texas Civil Procedure, Annual Survey of Texas Law*, 21 Sw. L.J. 155, 160 (1967).

⁶ *Clement v. McNiel*, 328 S.W.2d 823 (Tex. Civ. App. 1959).

⁷ *Harper v. Killion*, 162 Tex. 481, 348 S.W.2d 521 (1961); *Dorner v. Singleton Farm & Ranch*, 351 S.W.2d 377 (Tex. Civ. App. 1961).

⁸ *Brown Express Co. v. Kieckman*, 344 S.W.2d 501 (Tex. Civ. App. 1961); *Smith v. Conner*, 211 S.W.2d 630 (Tex. Civ. App. 1948).

⁹ *Buckaloo Trucking Co. v. Johnson*, 409 S.W.2d 911 (Tex. Civ. App. 1966).

¹⁰ *Southwestern Inv. Co. v. Shipley*, 400 S.W.2d 304 (Tex. 1966).

Workmen's Compensation — Death Benefits — Adopted Children

Patton was killed in the course of his employment. His employer's insurer paid into the court the correct amount of workmen's compensation benefits, asking the court to determine whether Patton's non-dependent minor children or his dependent parents were entitled thereto. After Patton and his wife were divorced, the children were adopted by Shamburger, their stepfather. The trial court held that the children were entitled to the benefits. *Held, affirmed*: The natural children of a deceased employee are entitled to the death benefits recoverable under the Workmen's Compensation Act to the exclusion of the employee's surviving parents, regardless of the fact that the children are adopted prior to the employee's death. *Patton v. Shamburger*, 413 S.W.2d 155 (Tex. Civ. App. 1967) *error granted*.

The Texas Workmen's Compensation Act provides for a death benefit payable on the death of an employee killed in the course of his employment.¹ Although certain individuals must prove that they were dependent on the deceased employee before they may receive the death benefit,² neither minor children nor parents of the deceased employee are subject to this requirement.³ If there is no surviving wife, but both minor children and parents survive the deceased employee, the minor children receive the benefits to the exclusion of the parents. This result is in accordance with the Texas statute of descent and distribution, by which distributions are made under the Workmen's Compensation Act,⁴ which places the children ahead of parents.⁵ The question arises whether after adoption children are still entitled to receive the death benefits provided by the Workmen's Compensation Act. Clearly, children, after adoption, are entitled to inherit from their natural parents.⁶ Workmen's compensation death benefits are, however, not part of the deceased employee's estate.⁷ The question thus becomes whether adopted children are still the "children" of their natural parents under the article⁸ which governs the determination of the beneficiaries entitled to the death benefit.

The point under consideration had not been decided in Texas prior to *Patton v. Shamburger*;⁹ nor had there been much litigation in other jurisdictions. In Oklahoma,¹⁰ New York,¹¹ and Idaho,¹² it had been held that

¹ TEX. REV. CIV. STAT. ANN. art. 8306, § 8 (1967).

² TEX. REV. CIV. STAT. ANN. art. 8306, § 8a (1967). Those who must prove dependency are grandparents, adult children, and brothers and sisters.

³ *Id.*

⁴ *Id.*

⁵ TEX. PROB. CODE ANN. § 38 (1956).

⁶ TEX. REV. CIV. STAT. ANN. art. 46a, § 9 (1959).

⁷ TEX. REV. CIV. STAT. ANN. art. 8306, § 8a (1967).

⁸ *Id.*

⁹ 413 S.W.2d 155 (Tex. Civ. App. 1967) *error granted*.

¹⁰ *Stark v. Watson*, 359 P.2d 191 (Okla. 1961).

¹¹ *Shulman v. New York Bd. of Fire Underwriters*, 15 App. Div. 2d 700, 223 N.Y.S.2d 312 (1962).

¹² *Jones v. Holmes Constr. Co.*, 84 Idaho 327, 372 P.2d 406 (1962).

adoption does not bar the adopted child's right to inherit from his natural parents; but Georgia¹³ held that this right is barred by adoption. Since the adopted child's right to inherit from the natural parent varies from state to state, and since the workmen's compensation statutes vary from state to state, there is no true majority and minority rule. In *Patton v. Shamburger*¹⁴ the court followed the decisions of the states whose statutes most clearly paralleled the Texas statutes involved.¹⁵ The court relied heavily upon the New York case of *Shulman v. New York Board of Fire Underwriters*¹⁶ where the adopted children were allowed to recover the death benefit. The New York statutes allow an adopted child to inherit from its natural parent and the New York workmen's compensation provision closely approximates the Texas act.¹⁷

In the light of the strong public policy stated in article 46a, section 9¹⁸ of the Texas statutes and persuasiveness of the language in *Shulman*¹⁹ and in other cases²⁰ cited in the opinion it appears that this case was properly decided by the court. However, there is the nagging problem of why the children should receive the benefits when they were not truly dependent upon their natural father. Assume, for example, that an adopted child's natural father died one day and the following day the child's adoptive father should die: should the adopted child recover workmen's compensation benefits for the death of each?

T.N.C.

¹³ *New Amsterdam Cas. Co. v. Freeland*, 216 Ga. 491, 117 S.E.2d 538, reversing 101 Ga. App. 754, 115 S.E.2d 443 (1960). See also *United States Fid. & Guar. Co. v. Dunbar*, 112 Ga. App. 102, 143 S.E.2d 663 (1965) (holding that the adopted child can still receive the benefits when the natural father dies one day before the adoption becomes final); *Alexander v. Employers Mut. Liab. Co.*, 102 Ga. App. 789, 118 S.E.2d 215 (1960). The holding in these Georgia cases results from the definition of a dependent under the Georgia Workmen's Compensation Act, GA. CODE ANN. §§ 114-414 (1956), 114-413 (Supp. 1966), and the Georgia adoption statute which cuts off all connection between the adopted child and the natural parent, GA. CODE ANN. § 74-414 (Supp. 1966).

¹⁴ 413 S.W.2d 155 (Tex. Civ. App. 1967) error granted.

¹⁵ *Id.* at 156.

¹⁶ 15 App. Div. 2d 700, 223 N.Y.S.2d 312 (1962).

¹⁷ In *Shulman v. New York Bd. of Fire Underwriters, id.*, the court stated:

Had the purpose [of the word child as used in the Workmen's Compensation Law] been to destroy the consanguineous connection between a father and his natural child adopted by another as the basis for an award of death benefits, the statutory definition certainly would have been so precisely written as to leave no doubt that such was its intent. Moreover, the care with which the Legislature preserved in related statutes the right of such a child to inherit from its natural parents is a reliable guide to the object sought to be accomplished by subdivision 2 of section 16. Neither logic nor reason dictates any real distinction between the statutory devolution of property in the case of intestacy and the succession to a right conferred by the Workmen's Compensation Law.

Id. at 701, 223 N.Y.S.2d at 313.

¹⁸ TEX. REV. CIV. STAT. ANN. art. 46a, § 9 (1959).

¹⁹ *Shulman v. New York Bd. of Fire Underwriters*, 15 App. Div. 2d 700, 223 N.Y.S.2d 312 (1962).

²⁰ *Jones v. Holmes Constr. Co.*, 84 Idaho 327, 372 P.2d 406 (1962); *Shulman v. New York Bd. of Fire Underwriters*, 15 App. Div. 2d 700, 223 N.Y.S.2d 312 (1962); *Stark v. Watson*, 359 P.2d 191 (Okla. 1961).