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Recent Case Notes

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RECENT CASE NOTES

Community Property — Liability of Shareholders of Joint-Stock Association — Defense of Coverture

In 1950 *D* inherited stock from her husband in an unincorporated joint-stock association organized to carry on a banking business. Four months later she remarried. In 1957 the company was declared insolvent and the receiver sought a personal judgment against *D* (relying on a statute declaring such stockholders to be personally liable to the creditors of a joint-stock association). *Held*: A joint-stock association is to be treated as a partnership and, accordingly, the defense of coverture relieves a married-woman stockholder of personal liability for the debts of a joint-stock company despite a statute authorizing judgment against the individual property of its stockholders. *Flint v. Culbertson*, —Tex.—, 319 S.W.2d 690 (1958).

Prior to 1913 a married woman's powers of contract were limited to contracts for necessaries and those which "benefit her separate estate." Comment, 13 Sw. L.J. 84 (1959). In 1913 she was given sole management and control of her separate property. TEX. GEN. LAWS 1913, c. 32, p. 61, 16 Gammel, Laws of Texas 61 (1913). Although express power to contract was omitted from the 1913 statute, subsequent case law read into this provision the power to make enforceable contracts in connection with the management of her separate property. *Levin v. Jeffers*, 122 Tex. 83, 52 S.W.2d 81 (1932); *Cauble v. Beaver-Electra Ref. Co.*, 115 Tex. 1, 274 S.W. 120 (1925); *Whitney Hardware Co. v. McMahan*, 111 Tex. 242, 231 S.W. 694 (1921). However, *previous* to this clarification of her contractual powers a separate line of cases began to develop holding that a married woman's contract made in connection with a *business* (whether separate property or not) was voidable by her. *Hirshfield & Co. v. Evans*, 127 Tex. 254, 93 S.W.2d 148 (1936); *Wyner v. Express Publishing Co.*, 288 S.W.2d 583 (Tex. Civ. App. 1956) *error ref. n.r.e.*; *Dickinson v. Griffith Lumber Co.*, 213 S.W. 341 (Tex. Civ. App. 1919). This inconsistency can be traced to an erroneous conclusion in *Dickinson v. Griffith Lumber Co., supra*, (decided two years before *Whitney Hardware Co. v. McMahan, supra*) that the omission from the 1913 acts of any *express* power to contract left article 4626 (the statute passed in 1911 providing for removal of disabilities for mercantile purposes) as the exclusive source for the wife to obtain powers of contract if she engaged in business. Comment, 13 Sw. L.J. 84, 104 (1959). The *Dickinson* case has frequently been followed with seldom an attempt to distinguish the *McMahan* line of cases. See, *e.g.*, *Wyner v. Express Publishing Co., supra*; *Jesse H. Jones Co. v. Black*, 42 S.W.2d 151 (Tex. Civ. App. 1931).

As there is no statute declaring that a married woman cannot execute a binding partnership contract, logically such a contract could have been fitted within the power to manage her separate property, but it is now settled that such a contract will not bind her. *King v. Matney*, 259 S.W.2d 606 (Tex. Civ. App. 1953) *error ref. n.r.e.*; *Jung v. Dallas Tailor & Laundry Supply Co.*, 256 S.W.2d 703 (Tex. Civ. App. 1953). Further, the courts emphatically state that the marriage of a *feme sole* dissolves an existing partnership even though the parties purport to continue the partnership relation. *Dillard v. Smith*, 146 Tex. 227, 205 S.W.2d 366 (1947); *King v. Matney, supra; Jung v. Dallas Tailor & Laundry Supply Co., supra.* The decisions prohibiting such contracts probably are traceable to either of two erroneous premises. In the first reported statement that a married woman could not become a partner it was said by way of dictum that ". . . there is no statute or authority in the decisions of this court which recognizes the right of a married woman to make a valid contract of partnership of this kind. . . ." *Bradford v. Johnson*, 44 Tex. 381 (1876). Since the husband was by statute the manager of the wife's separate property before 1913 she had, as a practical matter, no power to contract and bind herself in *any* type contractual association. TEX. REV. CIV. STAT. ANN. art. 4621 (1911). Despite the intervention of the statutory revision of 1913, the *Bradford* case and similar cases of the same era continue to be cited and were relied upon as authority by the principal case. The other source of the conclusion that the wife cannot become a partner is the line of cases originating with *Dickinson v. Griffith Lumber Co., supra*, and repeated in *Hirshfield v. Evans, supra*, which are based on the theory (possibly erroneous) that the wife is in substantially the same position as before 1913 and can make no binding business contracts unless she complies with article 4626. Accepting this broad premise the courts easily and frequently state that a married woman cannot become (or remain) a partner in a mercantile and trading business unless her disabilities of coverture have been removed. *King v. Matney, supra*; *Jung v. Dallas Tailor & Laundry Supply Co., supra*, citing *Hirshfield v. Evans, supra.*

Apparently in conflict with these two propositions, viz., (1) a married woman cannot become a partner and (2) marriage of a *feme sole* dissolves an existing partnership, is article 6137 which provides that "*any and all* of the stockholders or members" of an unincorporated joint-stock company are subject to individual liability for the debts of the association. (Emphasis added). The liability created by this statute is contractual in nature and is similar to the liability of a general partner for the debts of the partnership. SPEER, LAW OF MARITAL RIGHTS IN TEXAS § 292 (3rd ed. 1929); *Allison v. Campbell,* 117 Tex. 277, 1 S.W.2d 866 (1928). The question becomes, therefore, whether article 6137 prevents a married woman from interposing the defense of coverture to a suit against her individual property for the debts of a joint-stock company of which she is otherwise a member. The court in the principal case reasoned that the legislature intended to include under article 6137 only those persons who would in the normal course of business dealings be liable, and that the legislature did not intend to create new obligations or additional classes of obligees. Accordingly, the phrase "any and all of the stockholders and members" must not be construed to include married women. The court further stated that a joint-stock company, although distinguishable in many respects from the ordinary commercial partnership, is to be treated as a partnership and dealt with under the law governing partnerships. A plea of coverture, therefore, will prevail against a suit brought under article 6137. The dissent, however, citing similar statutes in other jurisdictions, took the position that liability was predicated upon the contracts of the bank, and not that of the shareholder. Consequently, liability would be an incident of stock ownership, regardless of the status of the shareholder.

Application of the rule in the instant case affords little or no protection to a creditor of a joint-stock association that has as its principal shareholder a married woman because the creditor is forced to seek relief against the minority shareholders whose assets may be insufficient to meet his claims. Further, the theory of the principal case would deny debt-paying shareholders (who are liable "as partners" for the full amount of the debts of the association) the right of contribution against married-women stockholders. Some protection to both creditors and other shareholders could possibly be achieved by requiring married-women shareholders to comply with article 4626 (or possibly TEX. REV. CIV. STAT. ANN. art. 4614 (Supp. 1958); see Comment, 13 Sw. L.J. 84, 103 (1959)).

In an association consisting of a limited number of individuals it may not be unreasonable to expect the other members to require her compliance with the statute, but in a large stock association there would normally be no evidence of which members were single or married women and certainly few means of determining when a *feme sole* married. Since the instant case involves a post-nuptial debt, it would at best be speculative whether subsequent compliance with article 4626 would inure to the benefit of post-nuptial creditors existing *prior* to such compliance (or subject the married-woman shareholder to contribution if such debts are paid by other shareholders); but it would seem that an intention to recognize these prior contracts could be found from such action. Also, whether a female shareholder is liable for debts incurred by the association before her marriage (on the possible theory of ante-nuptial debt) is left unanswered by the principal case.

Malcolm L. Shaw

Community Property — U.S. Bonds — Co-Ownership

A husband used community funds to purchase United States savings bonds payable to himself or his wife (commonly referred to as "or" bonds). He predeceased his wife without having cashed the bonds, and after his wife's death a controversy as to the ownership of the bonds arose between the heirs of the wife and the beneficiaries of the husband's will. Although Treasury regulations provide that the surviving co-owner is "recognized" as the sole owner of the bonds, 31 C.F.R. 315.61 (1958) (Treasury Circular No. 530), the husband's legatees contended that, since the bonds were purchased with community funds, they were community property and, accordingly, a one-half interest in the bonds passed to them under the husband's will. They argued that the Treasury regulation was merely a method of payment for the convenience of the government and did not affect the property rights of the parties. *Held*: A purchase with community funds of savings bonds in the name of husband or wife creates a valid contract between the purchaser and the government and vests the sole property right in the bonds in the surviving co-owner. *Ricks v. Smith*, —Tex.—, 318 S.W.2d 439 (1958).

A co-owner, by the majority view, obtains sole ownership of jointly-owned United States savings bonds. *Hill v. Havens*, 242 Iowa 920, 48 N.W.2d 870 (1951); *Edds v. Mitchell*, 143 Tex. 307, 184 S.W.2d 823 (1945); Annot., 37 A.L.R.2d 1221, 1223 (1954). Although the primary theory behind this rule is that a valid contract is created between the federal government and the bond purchaser which may be enforced according to its terms by a third-party beneficiary named in the bond, *Conrad v. Conrad*, 66 Cal. App. 2d 280, 152 P.2d 221 (1944); *Edds v. Mitchell*, *supra*; *cf. Franklin Washington Trust Co. v. Beltram*, 133 N.J. Eq. 11, 29 A.2d 854 (1943), another theory occasionally advanced is that the Treasury regulation regarding the payment of securities is federal law and supercedes state law of property devolution, *Stephens v. First Nat'l Bank*, 65 Nev. 352, 196 P.2d 756 (1948); *Ervin v. Connecticut*, 225 N.C. 267, 34 S.E.2d 402 (1945); *cf. Franklin Washington Trust Co. v. Beltram*, *supra*. All courts adhering to the majority view agree, however, that a theory of gift inter vivos or causa mortis is inapplicable. *E.g.*, *Lee v. Anderson*, 70 Ariz. 208, 218 P.2d 732 (1950); Annot., 37 A.L.R.2d 1221, 1226 (1954). Exceptions which deprive the survivor of full interest in co-ownership bonds have been recognized under the majority rule in situations involving extenuating circumstances; *e.g.*, in the case of fraud or other inequitable conduct on the part of the surviving co-owner or purchaser, *Henderson's Adm'r v. Bewley*, —Ky.—, 264 S.W.2d 680 (1953), when joint or mutual wills of co-owners dispose of the securities, *Chase v. Leiter*, 96 Cal. App.2d 439, 215 P.2d 756 (1950), or if there is an agreement between the co-owners to dispose of the bonds, *In re Hendrickson*, 156 Neb. 463, 56 N.W.2d 711 (1953). On the other hand, the minority view allows the court to look to the *source* of the purchasing funds in determining ownership under state property devolution law; accordingly, the Treasury regulation is merely a convenient method for the government to discharge its obligations. *Slater v. Culpepper*, 222 La. 962, 64 So. 2d 234 (1953); *cf. District of Columbia v. Wilson*, 216 F.2d 630 (D.C. Cir. 1954); *Bell v. Killiam*, 266 Ala. 12, 93 So. 2d 769 (1957).

Texas has followed the general rule of sole ownership in the surviving co-owner of jointly-owned government bonds in three cases, *Edds v. Mitchell*, *supra*; *Chamberlain v. Robinson*, 305 S.W.2d 817 (Tex. Civ. App. 1957) *error ref.*; *McFarland v. Phillips*, 253 S.W.2d 953 (Tex. Civ. App. 1952) *error ref. n.r.e.*, but in these cases separate rather than community property was involved, see *Chamberlain v. Robinson*, *supra*; *McFarland v. Phillips*, *supra*, or the community property factor was not directly considered, see *Edds v. Mitchell*, *supra*. However, in an analogous situation it has been held that where the requirements of statutory partition were not met, a purchase with community funds of postal savings certificates (to be held by husband and wife in joint tenancy) could not effect a partition of the community estate so as to vest full ownership in the survivor. *Reed v. Reed,* 283 S.W.2d 311 (Tex. Civ. App. 1955).

The court in the instant case seems to have misconstrued the Treasury regulation which provided that "the survivor will be *recognized* as the sole and absolute owner" of jointly-owned United States savings bonds. In interpreting statutes, it is an established principle that the court looks to the purpose of the legislation and the intention of the enacting body. *United States v. American Trucking Ass'ns,* 310 U.S. 534 (1940). The intention of the Treasury Department and the purpose of the regulation is seemingly to effectuate a method of payment so that the government may be relieved of suits or claims, rather than to establish a *law* regarding the ownership of bonds. Thus, a postal regulation similar to the Treasury securities-payment regulation was held to be merely a declaration to facilitate payment by the postal department, and not a controlling contractual provision. *Reed v. Reed, supra* at 315. Moreover, the holding in the principal case based upon the contract theory seems to contravene established Texas law in that it violates the six exclusive methods in Texas by which community property may be converted into separate property, viz., (1) statutory partition of the community estate, (2) division of property on divorce, (3) property settlement on permanent separation, (4) testamentary disposition, (5) descent, or (6) gift. See TEX. CONST. ANN. art. 16, § 15 (1955); TEX. REV. CIV. STAT. ANN. arts. 4624a, 4638 (1955); *Bearden v. Knight,* 149 Tex. 108, 228 S.W.2d 837 (1950); *Frame v. Frame,* 120 Tex. 61, 36 S.W.2d 152 (1931); *Arnold v. Leonard,* 114 Tex. 535, 273 S.W. 799 (1925); *Corrigan v. Goss,* 160 S.W. 652 (Tex. Civ. App. 1913) *error ref.* The result of the instant case also abridges the Probate Code's requirements for creating survivorship rights, since there was no written agreement by the joint owners providing for survivorship. TEX. PROB. CODE ANN. § 46 (1956). (The Code provides that, without a specific agreement, survivorship will not be inferred from the fact that property is held in joint ownership.) Aside from the legal inadequacies of the decision, there are some inequitable practical aspects. The only notice a purchaser of government saving bonds has of the Treasury regulation providing that the surviving co-owner will be recognized as the sole owner of the bonds is the specification on the bond certificate that the security is "issued pursuant to Treasury Department Circular No. 653, Revised. . . ." (The actual notice comes from a footnote citation in Circular No. 653 to Circular No. 530, which is the co-owners' payment provision.) The buyer of the bonds probably places the bonds in co-ownership for convenience so that either co-owner may be able to submit the security for payment, and he is unaware that a survivorship agreement is created.

Even though the decision in the principal case apparently expands the methods by which one spouse may acquire the community interest of the other, it will not necessarily result in injustice if limited to its facts. The disposition to the wife may be rationalized on the basis that the husband voluntarily entered into a transaction presumably aware of its legal consequences. However, if the doctrine of the principal case is extended, injustice to the wife may result; *e.g.*, if the wife is the first to die, the husband (or his heirs) would acquire the full interest in the bonds, thereby permitting a disposition of the wife's community interest in a transaction that possibly occurred without her consent or knowledge. Further, if the husband acquires co-ownership bonds with community funds, naming himself and a third person as co-owners, the disposition of the wife's interest is not even dependent upon survivorship. The wife may be protected from these results by the rule that the husband, as manager of the community, may only dispose of community property if the disposition is not fraudulent upon the rights of the wife. Thus a husband-third-party co-ownership situation, or even a husband-wife co-ownership situation where the wife is the first to die, may be sufficient to constitute fraud (either actual or constructive), and the wife (or her heirs) might be able to set the transaction aside. The potency of the problems presented when the doctrine of the principal case is extended lends support to the view that the court in the principal case did not consider the incongruity between the Treasury payment rule and community property theory. It would seem, therefore, that the minority rule, permitting a tracing of purchase funds to determine to whom the proceeds of uncashed co-owner bonds should go, is more consistent with community property theory, and should have been adopted by the court.

Lawrence E. Steinberg

Fire Insurance — Community Property — "Sole Ownership" Clauses

P and her husband purchased a tract of land with community funds and took title in the husband's name. A house was then constructed with community funds and the property was used as a homestead. After the husband died intestate, *P* and her children continued to occupy the homestead and *P* procured a fire policy on the house from *D*, a County Mutual insurance company. The policy provided that *D* would not be liable for loss to any property not owned in its entirety by the insured, or to a building situated on land not owned by the insured in fee simple. The house was destroyed by fire, and *P* brought suit on the policy. *Held:* If a community survivor who retains control of property by virtue of a homestead right insures the property in his own name against loss by fire, he is not barred from recovery by the "owned in its entirety" and the "fee simple" clauses in the policy. *State & County Mut. Fire Ins. Co. v. Kinner*, —Tex.—, 319 S.W.2d 297 (1958).

There are two basic types of "sole ownership" clauses in fire insurance policies: the type which requires that the insured property be in the "sole and complete ownership" of the insured (hereinafter referred to as the "clause I" type) and the type which requires that the insured property be situated on "ground owned in fee simple" by the insured (hereinafter referred to as the "clause II" type). See VANCE, INSURANCE 824-30 (3d ed. 1951). Although a Texas Standard Fire Policy no longer contains these warranties of sole and unconditional ownership, *Dean v. Pioneer Co-Operative Fire Ins. Co.*, 231 F.2d 18 (5th Cir. 1956), County Mutual insurance companies need not adopt the provisions of the Standard Policy until required to do so by the state regulatory body. TEX. INS. CODE ANN. art. 17.25, § 5 (1951). To date such limitation has not been imposed.

Texas courts have taken two divergent views as to the enforceability of these clauses. One view treats them as significant parts of the insurance contract which are to be strictly enforced when violated by the insured. Courts adhering to this view have held that the insurer is not liable when the insured does not comply with a clause I. *Winfrey v. Girard Fire & Marine Ins. Co.*, 120 Tex. 436, 38 S.W.2d 1099 (1931); *Fireman's Fund Ins. Co. v. Wilson*, 284 S.W. 920 (Tex. Comm. App. 1926); *Providence Washington Ins. Co. v. Whitley*, 71 S.W.2d 359 (Tex. Civ. App. 1934) *error dism.; Fraser v. Rogers*, 56 S.W.2d 911 (Tex. Civ. App. 1933); *Eureka*

Sec. Fire & Marine Ins. Co. v. DeRoss, 40 S.W.2d 924 (Tex. Civ. App. 1931) *error ref.* Similarly, violations of clause II provisos have been held to preclude recovery against the insurer. *Franklin Fire Ins. Co. v. Lindley*, 80 S.W.2d 798 (Tex. Civ. App. 1935); *U.S. Fire Ins. Co. v. Farris*, 297 S.W. 575 (Tex. Civ. App. 1925); *Merchants' & Bankers' Fire Underwriters v. Williams*, 181 S.W. 859 (Tex. Civ. App. 1915). Although there is a statutory requirement that a misrepresentation in a policy be material before the policy can be avoided by the insurer, TEX. INS. CODE ANN. art. 21.16 (1951), those courts which insist on strict compliance have held that *any* misrepresentation relating to ownership is material, and thus, in effect, have refused to apply article 21.16, or its predecessor, to sole ownership clauses. See *St. Paul Fire & Marine Ins. Co. v. Culwell*, 62 S.W.2d 100 (Tex. Comm. App. 1933); *Fraser v. Rogers, supra; Eureka Sec. Fire & Marine Ins. Co. v. DeRoss, supra.* This is true despite the rule that such policy provisions should be strictly construed *against* the insurer. *London & Lancashire Ins. Co. v. Higgins*, 68 S.W.2d 1056 (Tex. Civ. App. 1934) *error dism.* The other and more liberal view treats these clauses merely as an assurance to the insurer that the insured has an "insurable interest" and that the insured will be the sole bearer of the loss. *East Texas Fire Ins. Co. v. Crawford*, 16 S.W. 1068 (1891); *accord, Hoyle v. Republic Ins. Co.*, 14 S.W.2d 816 (Tex. Comm. App. 1929); *British Gen. Ins. Co. v. Stamps*, 57 S.W.2d 638 (Tex. Civ. App. 1933). Accordingly, it has been held that a husband's homestead right in a community-owned building situated on land owned solely by the wife, *Warren v. Springfield Fire & Marine Ins. Co.*, 35 S.W. 810 (Tex. Civ. App. 1896), and a wife's interest in community property, *Mercury Fire Ins. Co. v. Dunaway*, 74 S.W.2d 418 (Tex. Civ. App. 1934) *error ref.*, are sufficiently substantial interests to meet the dual test of the *Crawford* case, viz., that the insured have an insurable interest and that he will bear the whole loss, and thus are sufficient to satisfy a clause I.

In the instant case, the court of civil appeals relied on the *Dunaway* case for its decision, *State & County Mut. Fire Ins. Co. v. Kinner*, 314 S.W.2d 871, 874 (Tex. Civ. App. 1958), and the supreme court granted writ of error because of the apparent conflict between the *Dunaway* case and the *Franklin* and *Winfrey* decisions. 319 S.W.2d at 298. The supreme court approved the proposition that, due to the unique nature of community property, Texas courts do not read the rigid rules of property title law into insurance policies. *Dean v. Pioneer Co-Operative Fire Ins. Co., supra* (and cases cited therein). In that event, the essential question is what sort of interest or title constitutes both an "insurable interest" and an interest wherein the insured is the sole bearer of the loss in order to satisfy clauses I and II? The court's answer to this question apparently is that a homestead right held by a community survivor in a building purchased with community funds situated on land formerly community property is sufficient to satisfy both clauses I and II. The court pointed out that its holding is not in conflict with the *Franklin* and *Winfrey* decisions. The *Winfrey* case can clearly be distinguished because the insured had only an undivided one-half interest in furniture, which violated the test in the *Crawford* case requiring the insured to have control over the property and to be the sole bearer of the loss, and it would seem that the *Franklin* case could be distinguished on the basis that there the homestead interest was *not* situated on community property. However, even if both the *Franklin* and *Winfrey* decisions can be reconciled with the present case, the court ignored several cases which *are* in conflict with the instant holding, cases which regarded property interests similar to that in the instant case as insufficient to satisfy the sole ownership clauses. See, *e.g.*, *Providence Washington Ins. Co. v. Whitley, supra,* (homestead interest in community property was held to violate a clause I); *Eureka Sec. Fire & Marine Ins. Co. v. DeRoss, supra* (insured daughter having a community homestead interest was held to have violated a clause I).

Many of the decisions in this area cannot rationally be reconciled, and it would seem that the court in the present case considered the problem of determining a clear policy for the courts to follow in interpreting the sole ownership clauses more important than attempting to render a decision consistent with prior conflicting decisions. The conclusion is inescapable that the old view requiring a strict compliance with the clauses has been overruled in favor of the more liberal view requiring only that the insured have an insurable interest and that all of the loss will be borne by that insured. It should also be noted that in the *Crawford* and *DeRoss* cases there is, as in the instant case, the hint that the insured must *continue* to occupy the property as homestead in order to support a recovery under the policy. The insurer is entitled to require these conditions of the insured, but deviation from the perfect and complete title will be permitted so long as the deviation is not unreasonable in relation to the risk involved.

Ray Besing

Investment Company Act—Sale of Control of Investment Advisor—Gross Mismanagement and Gross Abuse of Trust

Insurance Securities was organized to serve in a managerial capacity to Trust Fund, an unincorporated open-end investment company which had no officers or directors of its own. The primary responsibilities of Insurance Securities were those of investment advisor and principal underwriter. The contract between the two parties provided, as required by the Investment Company Act, that *assignment* of the contract to serve as investment advisor or principal underwriter would cause automatic termination of the contract. (The act defines "assignment" to include any transfer of a controlling block of the advisor's or underwriter's outstanding voting securities. 54 Stat. 789 (1940), 15 U.S.C.A. § 80a-2(a)(4) (1952) (hereinafter cited as *Investment Company Act.*) Nonetheless, the defendants, director-officers of Insurance Securities, sold their controlling interest in that company (Insurance Securities) for an amount greatly exceeding the book value of the stock. Thereafter, through the voting of proxies held by the defendants (solicited in their managerial capacity) the terminated contract was reinstated at the annual meeting of the investors of Trust Fund, no mention being made of the price received for the stock sold. The Securities and Exchange Commission brought this action to enjoin Insurance Securities and its continuing director-officers (the defendants) from acting as advisors and underwriters for Trust Fund and for an accounting of profits realized as a consequence of the sale of the controlling stock interest, claiming that the defendants were guilty of "gross mismanagement" and "gross abuse of trust" within the meaning of section 36 of the Investment Company Act. *Held*: The Investment Company Act's only protection to investors is automatic termination of the contract to act as advisor or underwriter in the event of its assignment, and the sale of a controlling interest at a price in excess of asset value does not constitute a "gross abuse of trust" within the meaning of section 36. *SEC v. Insurance Sec., Inc.*, 254 F.2d 642 (9th Cir.), *cert. denied*, 358 U.S. 823 (1958).

The Investment Company Act of 1940 attempts to protect investors from injury which might result from unscrupulous management of a trust. Thomas, *Investment Company Act of 1940*, 9 GEO. WASH. L. REV. 918, 929 (1941). Section 1(b)(6) states that the public interest and the interest of investors are adversely affected when the control or management of investment companies is transferred without the consent of the security holders. *Investment Company Act* § 1(b)(6). As a remedy, section 15(a)(4) provides that any assignment of the contract to act as advisor or underwriter will automatically terminate it; section 2(a)(4) defines assignment to include a transfer of a controlling interest of the advisor's or underwriter's outstanding stock. *Investment Company Act* §§ 2(a)(4), 15(a)(4). The SEC is also authorized to bring suit to enjoin any person from serving as an officer, director, investment advisor, or principal underwriter of an investment company if he is found guilty of "gross mismanagement" or "gross abuse of trust." *Investment Company Act* § 36.

The difficulty in applying section 36 is determining the standard of conduct that would afford investors injunctive relief under the terms "gross mismanagement" and "gross abuse of trust." At the common law a personal trustee, corporate officer or director, or other person standing in a fiduciary relationship with another may not sell or transfer such an office for personal gain. *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955); *Insuranshares Corp. v. Northern Fiscal Corp.*, 35 F. Supp. 22 (E.D. Pa. 1940); *Porter v. Healy*, 244 Pa. 427, 91 Atl. 428 (1914). By removing all temptation of profits flowing from a sale of office, the common-law rule seeks to prevent a conflict of interests between the fiduciary and his beneficiary, *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 5 A.2d 503 (1939); *Durfee v. Durfee & Canning, Inc.*, 323 Mass. 752, 80 N.E.2d 522 (1948); *Milam v. Cooper Co.*, 258 S.W.2d 953 (Tex. Civ. App. 1953) *error ref. n.r.e.*; RESTATEMENT, RESTITUTION § 197 (a), (c) (1937), which conflict might cause the fiduciary-seller to overlook the prospective purchaser's lack of managerial skill or his intent to loot the assets of the fund, Leech, *Transactions in Corporate Control*, 104 U. PA. L. REV. 725, 779-96 (1956). The only previous case tried under section 36 held that this section codifies the common-law fiduciary obligation placed upon officers and directors of investment companies and invokes the equity power of the court to enable it to do justice and grant full relief. *Aldred Inv. Trust v. SEC*, 151 F.2d 254 (1st Cir.), *cert. denied*, 326 U.S. 795 (1946). The district court in the *Aldred* case was more explicit in saying that the interpretation of "gross abuse of trust" as used in section 36 will depend not only upon relevant common-law principles but also upon the findings and declarations of *policy* as set forth in section 1 of the act. *SEC v. Aldred Inv. Trust,* 58 F. Supp. 724, 730 (D. Mass. 1945). Thus, it seems clear that the common law must be looked to for the meaning and scope of "gross mismanagement" and "gross abuse of trust" as they are not defined in the act, and, as suggested in the district court of the *Aldred* case, the terms should be expanded with regard to the purposes of the act.

The SEC in bringing suit in the instant case was attempting to prevent injury to Trust Fund through possible unscrupulous management by the new controlling parties who, having paid an excess value for control, might pursue hazardous and doubtful policies in an effort to recoup their investment. 254 F.2d at 647 n.8. Thus, the specific issue in the principal case is whether the sale of a controlling interest for an amount in excess of net asset value constitutes a "gross abuse of trust." The court in the principal decision refused to adopt the approach of the *Aldred* case and held that section 15(a)(4) is the only remedy available for the protection of investors in the case of an assignment of a management contract, and that section 36 is inapplicable. 254 F.2d at 651. The court found that by virtue of the service contract a fiduciary relationship existed between Insurance Securities and Trust Fund, but it concluded that the shift in control of Insurance Securities did not, and could not, effect a transfer or sale of the contract to act as advisor and underwriter. To the contrary, by operation of section 15(a)(4) the contract had terminated. Thus, the price received for the stock of Insurance Securities which was over and above book value cannot be said to represent compensation for the sale or transfer of a fiduciary office of Trust Fund. 254 F.2d at 650. Yet the court admits that the excess price paid was based largely upon the expectation that the service contract would be renewed and that profits would continue. 254 F.2d at 651. Thus, under this decision, the director-officers of Insurance Securities were able to sell their office as managers of Trust Fund for a substantial personal profit, and reinstate the service contract with the aid of the proxy machinery, thereby effectively skirting the clear intent and purpose of the Investment Company Act. See S. REP. No. 3580, 76th Cong., 3d Sess. 305 (1940); S. REP. No. 1775, 76th Cong., 3d Sess. 4 (1940).

The court's interpretation of the act has seriously hampered its effect in the area of a sale of control. For the average investor, with little financial experience and a predictable practice of following management recommendations, the termination provision of section 15 (a) (4) is an illusory protection. At the common law an investor, when the sale of a fiduciary office was at issue, might have been afforded an action for an accounting; the mere termination of the contract would have ended neither the fiduciary's duty nor his liability to his beneficiary for a breach of trust or confidence. However, under the present court's interpretation, the termination of the contract terminates the fiduciary's duty and the Investment Company Act offers no relief at all if the investors are duped into reinstatement of the managerial contract. In order to remedy this deficiency the principal case should be overruled or the act amended to be more specific regarding the scope of section 36.

J. Allen Dougherty

Labor Law—Unfair Labor Practice—Hot Cargo Clause as Defense to Charge of Secondary Boycott

X company sold non-union doors, manufactured by *Y* lumber company (primary employers), to be used by general contractors (secondary employers) in a construction project. A union local and the general contractors were parties to a master labor agreement containing the following "hot cargo" clause: "workmen shall not be required to handle non-union material." The general contractors' foreman, upon notification by a union agent that the doors were non-union and should not be hung, ordered the employees to cease handling the doors; however, the general contractors never voluntarily agreed to participate in the boycott. No agreement could be reached by the officers of *X* and the union; consequently *X* filed a complaint with the National Labor Relations Board, charging the union with an unfair labor practice in violation of the Taft-Hartley Act. Specifically, the union was charged with a concerted refusal to handle *Y's* doors in order to force the general contractors and *X* to cease doing business with *Y*. The union's defense was based upon the "hot cargo" clause. *Held*: A "hot cargo" clause in a collective bargaining agreement is not a defense available to a union against a charge of the unfair labor practice of employing a secondary boycott, when in the absence of such a provision the union's conduct would unquestionably be a violation of the secondary boycott provision in the Taft-Hartley Act. *Local 1976, United Bhd. of Carpenters v. NLRB,* 357 U.S. 93 (1958).

Inducing the employees of one employer to engage in a strike or a concerted refusal to handle the products of any other employer is an unfair labor practice, when the object is to compel the first employer or any other person to cease doing business with the second employer. Labor Management Relations Act (Taft-Hartley Act) § 8(b)(4)(A), 61 Stat. 136, 141 (1947), 29 U.S.C. § 158 (b)(4)(A) (1952). There are three elements essential to a violation of section 8(b)(4)(A) (referred to as the "secondary boycott provision"): (1) employee inducement, (2) inducement to engage in a strike or concerted refusal, and (3) an unlawful objective, viz., forcing or requiring an employer to participate in the strike or concerted refusal by ceasing his dealings with another employer. *NLRB v. Local 11, United Bhd. of Carpenters,* 39 L.R.R.M. 2731 (1957). Thus, if an employer, at the request of a union which refrains from using threats or direct appeals to his employees, *voluntarily* agrees to boycott the goods of another employer at the time the dispute arises, there is no violation of the secondary boycott provision. *International Bhd. of Teamsters & Rabouin, d/b/a Conway's Express,* 87 N.L.R.B. 972 (1949), *aff'd sub nom., Rabouin, d/b/a Conway's Express v. NLRB,* 195 F.2d 906 (2d Cir. 1952). In an attempt to insulate themselves against the effects of committing a secondary boycott, labor unions have recently begun to negotiate for the inclusion of a "hot cargo" clause in collective bargaining agreements. See, *e.g., Penello v. Milk Drivers, Local 246, Int'l Bhd. of Teamsters,* 156 F. Supp. 366 (D. Md. 1957). In such a clause, an employer contracts that his employees will not be required to perform services or handle goods deemed unfair or objectionable as designated by the union. *Cf. International Bhd. of Teamsters, Locals 554, 608 & McAllister Transfer, Inc.,* 110 N.L.R.B. 1769, 1777 (1954).

Whether a hot cargo clause may be interposed as a defense to a charge of committing a "secondary boycott" has received conflicting treatment by the National Labor Relations Board. See *Milk Drivers, Local 338, Int'l Bhd. of Teamsters & Crowley's Milk Co.,* 116 N.L.R.B. 1408 (1956). An early case, in discussing the conflict between the hot cargo clause and the prohibition of secondary boycotts, held the former to be a defense to a charge of violation of section 8(b)(4)(A) because the presence of the clause amounted to consent in advance, thus licensing the union to engage in the concerted refusal. *International Bhd. of Teamsters & Rabouin, d/b/a*

Conway's Express, supra. See also *Madden v. Local 442, Int'l Bhd. of Teamsters,* 114 F. Supp. 932 (W.D. Wis. 1953); *Local 135, Int'l Bhd. of Teamsters v. NLRB,* 105 N.L.R.B. 740 (1953). However, the Board later decided that Congress had manifested an intent to eliminate secondary boycotts, and that section 8(b)(4)(A), having been enacted as much for the protection of the secondary employer and the public as well as the primary employer, could not be waived by a contract that would frustrate congressional policy. *International Bhd. of Teamsters, Locals 554, 608 & McAllister Transfer, Inc., supra*; see *Reilly, d/b/a Reilly Cartage Co. & Local 200, Int'l Bhd. of Teamsters,* 110 N.L.R.B. 1742 (1954). The lower court in the present case followed the theory of the *McAllister* and *Reilly* cases in finding a violation of the secondary boycott provision regardless of *prior* acquiescence by the immediate employer. *Local 1976, United Bhd. of Carpenters & Sand Door & Plywood Co.,* 113 N.L.R.B. 1210 (1955); *accord, Truck Drivers, Local 728, Int'l Bhd. of Teamsters & Genuine Parts Co.,* 119 N.L.R.B. 399 (1957) (holding a hot cargo clause invalid where the secondary employer was a common carrier subject to the Interstate Commerce Act).

Conceding that the purpose of the statute is to protect neutrals from being *involuntarily* involved in labor disputes, the union contended in the instant case that the protection of the statute should not extend to one who has *voluntarily* agreed to the strike, at least when the employer does nothing *at the time* of the boycott to repudiate the collective bargaining contract. While the Court agreed that there is no "sweeping" prohibition of secondary boycotts in section 8(b)(4)(A), *cf. International Bhd. of Teamsters, Locals 554, 608 & McAllister Transfer, Inc., supra,* the interpretation of the Court was that compliance or non-compliance with the hot cargo clause was something for the employer to choose *at the time* the question (whether to boycott or not) arises and that he could not bind himself to boycott *in advance.* This choice, free of the pressures prohibited by the section, must be available to the contracting employer (X in the principal case) as a matter of federal policy, notwithstanding a formal agreement between the parties. 357 U.S. at 105. It may then be argued that the *Conway* doctrine is modified to the extent that reaffirmance is required at the time of the dispute and that hot cargo clauses are not outlawed per se.

Following the Court's theory that the employer is free to reject the hot cargo clause at the time of the dispute, it may be argued that if he does choose to be bound at that point, his choice is irrevocable.

Logically, however, may it not be argued that since a binding contract has once been overridden by federal policy, the employer may *again* claim this protection because of subsequent economic factors, notwithstanding any claims of his being bound by ratification, affirmance, or estoppel? This question of whether the employer will be irrevocably bound once he has given his consent has been left open by the Court. When this problem does appear before the Court, the answer will probably be resolved according to the degree of importance the Court places upon federal policy as opposed to contractual principles.

Malcolm L. Shaw

Oil and Gas — Habendum Clause — Cessation of Production After the Primary Term

An oil and gas lease was executed for a term of one year and as long thereafter as oil or gas was "produced." After the primary term expired dissention among the cotenants owning the lease resulted in a cessation of production for approximately six months. *P* then purchased the working interest in the lease and brought suit against the lessor to quiet his title. *Held*: An oil and gas lease does not terminate under a "thereafter" clause although there is a cessation of production if the period of cessation, viewed in light of all the circumstances, is not unreasonable. *Cotner v. Warren*,—Okla.—, 330 P.2d 217 (1958).

The ultimate duration of an oil and gas lease is usually fixed by a habendum clause. 2 SUMMERS, OIL AND GAS § 281 (perm. ed. 1938). The earlier clauses were typified by a provision for a long term lease of definite duration. Comment, *The Habendum Clause as a Special Limitation on Oil and Gas Leases in Texas*, 11 Sw. L.J. 340 (1957). However, as a result of experience with the definite term lease, it became apparent to both lessors and lessees that the continuance of a lease of land for oil and gas purposes should be restricted to the productive life of the leased premises. 2 SUMMERS, *op cit. supra* § 287. This restriction was accomplished by a reduction of the definite (or "primary") term to a peroid of approximately ten years, see Case Note, 12 Sw. L.J. 525 (1958), and the addition of a provision to the effect that the lease would continue thereafter as long as oil or gas was produced, Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 8 TEXAS L. REV. 483, 493 (1930); see

Case Note, 13 Sw. L.J. 134 (1959). The latter provision, commonly referred to as the "thereafter" clause, was destined to become the dominant part of the modern habendum clause. 2 SUMMERS, *op. cit. supra* § 287.

A few cases have liberally construed the "thereafter" clause, apparently upon the theory that it is a forfeiture provision and therefore subject to construction and enforcement in accordance with the equitable principles generally applied to such provisions. See *Lamb v. Vansyckle*, 205 Ky. 597, 266 S.W. 253 (1924); *Strange v. Hicks*, 78 Okla. 1, 188 Pac. 347 (1920). However, the modern view is that the "thereafter" clause is a special limitation which marks the duration of the estate granted and is not, properly speaking, a forfeiture provision. Walker, *supra* at 515. Accordingly, the vast majority of American courts have refused to apply the equitable principles applicable to forfeiture to the termination of the lessee's estate by the operation of this clause. *Woodruff v. Brady*, 181 Okla. 105, 72 P.2d 709 (1937); *Anthis v. Sullivan Oil & Gas Co.*, 83 Okla. 86, 203 Pac. 187 (1921); *Watson v. Rochmill*, 137 Tex. 565, 155 S.W.2d 783 (1941). The majority view is one of literal construction, and thus the fact that a cessation is caused by unavoidable delay, an act of God, or financial difficulty of the lessee will not prevent the cessation from causing the lease to terminate, unless there is an express stipulation to the contrary. *McLean v. Kishi*, 173 S.W. 502 (Tex. Civ. App. 1915); Walker, *supra* at 516. Even courts adhering to the majority view have held, however, that a temporary cessation of production for the purpose of improving or repairing the well does not result in termination. *Woodruff v. Brady, supra; Western States Oil & Land Co. v. Helms*, 143 Okla. 206, 288 Pac. 964 (1930); *Scarborough v. New Domain Oil & Gas Co.*, 276 S.W. 331 (Tex. Civ. App. 1925) *error dism.* Whether a particular cessation is considered temporary must be determined by looking to the reason for the cessation as well as the time element involved, see *Western States Oil & Land Co. v. Helms, supra; Watson v. Rochmill, supra,* although the parties may expressly stipulate in the lease what will constitute a temporary cessation, *Haby v. Stanolind Oil & Gas Co.*, 228 F.2d 298 (5th Cir. 1955); *Woodson Oil Co. v. Pruett*, 281 S.W.2d 159 (Tex. Civ. App. 1955) *error ref. n.r.e.*

The Oklahoma and Texas cases following the majority view have generally defined the estate granted by a "thereafter" clause as a determinable fee, and it is fundamental that a determinable fee terminates automatically upon the happening of a stated event. *Anthis v.*

Sullivan Oil & Gas Co., supra; Curtis v. Harris, 76 Okla. 226, 184 Pac. 574 (1919); Walker, *supra* at 492, 512. Accordingly, Oklahoma and Texas courts have held that a lease terminates by its own terms in the absence of production after the primary term, without regard to equitable considerations. *Woodruff v. Brady, supra; Watson v. Rochmill, supra.* The cases permitting cessation of production for a reasonable time to improve or repair the well, *e.g., Western States Oil & Land Co. v. Helms, supra,* are cases of construction which are based on the theory that the parties did not *intend* for a temporary interruption of production caused by attempts to improve or repair the well to work a termination. See *Scarborough v. New Domain Oil & Gas Co., supra;* see also Discussion Notes, 9 OIL & GAS REP. 712 (1958). Such cases do not purport to be applying equitable principles. *But see Woodruff v. Brady, supra* (indicating that equitable considerations do govern these cases). The decision of the instant case, however, can be justified only by resort to equitable principles, for it would seem probable that the parties did not intend to *excuse* a temporary cessation of production resulting from a dispute between the lessees.

Where cessation is for repairs or improvements, non-termination seems both logical and just, as such cessation is for the mutual benefit of the lessor and the lessee. Under the rule of the principal case, however, any cessation which is for a reasonable period of time will not terminate the lease, and the reason for the cessation is material only in determining the reasonableness of the period. Thus, as in the principal case, a cessation which is not for the benefit of both parties may not cause a termination if its duration is short. This rule seems unjust to the lessor whose reservior may be drained by adjoining wells during a cessation which is not in furtherance of the purposes of the lease. It is believed, therefore, that the principal case represents an undesirable departure from existing law.

William M. Ravkind

Procedure — Recitations in Judgments — Presumption of Validity

In an in rem action brought in a Texas court, *Ps* obtained a default judgment against *nonresident Ds.* Although *Ds* had been cited by publication, the statutory requirements had not been fulfilled, and thus, since *Ds* did not waive this defect by appearance, the judgment was void. However, the judgment *recited* that *Ds* were "duly and legally cited by publication." *Ds* subsequently brought an equitable proceeding in a federal district court to nullify the default judgment. *Ps* resisted the action and contended that, under Texas law, recitals of legal citation in a judgment import absolute verity and may not be proved incorrect. *Held*: The Texas rule according absolute verity to recitations in a judgment cannot be imposed to prevent an inquiry into facts in the record showing that nonresident service was not legally obtained. *O'Boyle v. Bevil*, 259 F.2d 506 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959).

An attack in a federal court against a state-court judgment is a collateral attack, since a direct attack can only be brought in the same court in which the judgment was rendered. *Pena v. Bourland*, 72 F. Supp. 290 (S.D. Tex. 1947), *aff'd*, *Pena v. Hammond*, 172 F.2d 312 (5th Cir. 1949); *Cohen v. Portland Lodge No. 142, B.P.O.E.*, 152 Fed. 357 (9th Cir. 1907); *Bragdon v. Wright*, 142 S.W.2d 703 (Tex. Civ. App. 1940) *error dism.*; RESTATEMENT, JUDGMENTS § 11 (1942). A judgment rendered without jurisdiction over both the subject matter and the parties involved in the suit is void and subject to collateral attack, except when the Texas presumption rule is applicable. *Crawford v. McDonald*, 88 Tex. 626, 33 S.W. 325 (1895). Most jurisdictions follow the rule that recitations in a judgment are presumed to be correct; but in a subsequent collateral attack, they permit the court to impeach these recitations by looking beyond the judgment to the rest of the record. *Merchants Nat'l Bank v. Morris*, 252 Ala. 566, 42 So. 2d 240 (1949); Annot., 68 A.L.R. 385, 395 (1928). Texas courts, however, may look to the rest of the record in a collateral attack *only* if the judgment is silent as to jurisdiction. *Hopkins v. Cain*, 105 Tex. 591, 143 S.W. 1145 (1912). Thus in Texas, even though a judgment is in fact void, jurisdictional recitations in the judgment of a domestic court of general jurisdiction are conclusively presumed to be correct in a collateral attack on the judgment, *Empire Gas & Fuel Co. v. Albright*, 126 Tex. 485, 87 S.W.2d 1092 (1935); *Williams v. Hays*, 77 Tex. 283, 13 S.W. 1029 (1890); *Bemis v. Bayou Development Co.*, 184 S.W.2d 645 (Tex. Civ. App. 1944), *appeal dismissed*, 326 U.S. 681 (1945), unless the judgment reciting service recites facts upon which that conclusion is predicated, and such facts show want of service, see, *e.g.*, *Fowler v. Simpson*, 79 Tex. 611, 15 S.W. 682 (1891) (judgment recited the precise writ upon which the court acted). Accordingly, jurisdictional recitations in a judgment are accorded absolute verity, and the rest of the record is not available to impeach the recitations in a collateral proceeding. *Hopkins v. Cain, supra; Dunklin v. Land,* 297 S.W.2d 360 (Tex. Civ. App. 1956).

However, even in Texas, recitations of jurisdiction are not conclusive when a collateral attack is brought against (1) a judgment rendered by a court acting under special statutory power, *Mingus v. Wadley,* 115 Tex. 551, 285 S.W. 1084 (1926); (2) an order by a judge acting in a non-judicial capacity, *e.g.*, removing the disabilities of a minor, *Cunningham v. Robison,* 104 Tex. 227, 136 S.W. 441 (1911); or (3) an out-of-state judgment, *Allee v. Van Cleave,* 263 S.W.2d 276 (Tex. Civ. App. 1953); *Rawleigh v. Little,* 32 S.W.2d 214 (Tex. Civ. App. 1930) *error ref.* Another possible exception is an in personam action in which a nonresident was cited by publication, *Lutcher v. Allen,* 95 S.W. 572 (Tex. Civ. App. 1906) *error ref.*, but this seems contra to *Martin v. Burns,* 80 Tex. 676, 16 S.W. 1072 (1891). It is clear, however, that the presumption rule applies when a *nonresident* is cited by publication in an *in rem* action. *State Mortgage Corp. v. Affleck,* 51 S.W.2d 274 (Tex. Comm. App. 1932) *error ref.*

It might be argued that the Texas presumption rule is procedural in nature, and hence would not be binding on a federal court. *Klaxon Co., v. Stentor Elec. Mfg. Co.,* 313 U.S. 487 (1941); *cf. Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938). However, as the court in the instant case, by recognizing the rule, seems to treat it as substantive, it would appear that the constitutionality of the Texas presumptions is in issue. Since there is a dissent, and the two concurring opinions are based upon different reasoning, there is no majority opinion. The first concurring opinion recognized the rule of absolute verity, but concluded that the Texas law is not settled where there is an *anterior* defect in citation, viz., where the affidavits (necessary to citation by publication) were sworn to prior to the day suit was filed. 259 F.2d at 510. The opinion states that constitutional requirements of due process would compel an examination of the whole record in this case, but did not state whether the rule of absolute verity would itself be unconstitutional. This may be technically correct in that there are no Texas cases exactly in point, see *Durst v. Park,* 177 S.W.2d. 301 (Tex. Civ. App. 1943) (on appeal, judgment held valid when affidavit was made one day prior to the filing of suit), but clearly Texas accords absolute verity to jurisdictional recitations in an rem action, *State Mortgage Corp v. Affleck, supra,* and the rule as stated in the

Affleck case should be broad enough to cover *any* defect in citation. The holding of the first concurring opinion is limited to a situation where nonresident service is not legally obtained, 259 F.2d at 513, but *McDonald v. Mabee,* 243 U.S. 90 (1917), could have been cited as authority for finding the presumption rule itself unconstitutional. The *McDonald* case failed to mention the Texas presumptions, but nonetheless stated without qualification that constitutional due process would prevent the enforcement of a void judgment. The second concurring opinion questions the constitutionality of upholding a void judgment, and compares an attack upon a state-court judgment in a federal court to cases involving full faith and credit, *i.e.,* cases giving effect to *valid* out-of-state judgments, citing *Griffin v. Griffin,* 327 U.S. 220 (1946), and *Bass v. Hoagland,* 172 F.2d 205 (5th Cir. 1949). However, seeking to enforce in one state a judgment of another state is not the same as the situation where a collateral attack upon a state-court judgment is made in a federal court; hence the *Griffin* and *Bass* cases probably would not be applicable.

In view of the unqualified declaration in *McDonald v. Mabee, supra,* that enforcement of a void judgment violates due process, it would appear that the Texas courts might be in error in following a rule of "absolute verity." However, as the present court failed to declare the presumption rule unconstitutional as such, the principal case probably will have little effect on Texas law. On the other hand, federal courts may follow the instant decision, and anyone who can qualify through diversity and jurisdictional amount should attack these judgments in a federal court rather than in the state courts. Even though the instant case may be limited to a defect in nonresident citation, the opinions of the two concurring judges seem to indicate that they will try to avoid the presumption rule in other cases. Thus, this case illustrates the dubious validity of a rule which in practical effect treats as valid those judgments which are completely void, and it is unfortunate that the Supreme Court refused to consider this problem by denying certiorari.

Wynn G. Stanton

Torts — Contributory Negligence of Infant — Proximate Cause

While pushing his bicycle across an expressway, *P,* an eight-year-old boy, was injured when hit by *D's* car. Although *D* was found negligent in the trial court, *P* was denied recovery because his violation of the statute forbidding pedestrians and bicycles on the expressway was held contributory negligence as a matter of law. The jury found that the statutory violation by *P* was a proximate cause of his injury. *Held*: The violation of a statute by a child is not necessarily "contributory negligence per se," but usually a child's contributory negligence is determined by his failure to conform to the standard of "ordinary care"; *i.e.*, the care required of an ordinarily prudent child of the same age, intelligence, experience, and capacity. Likewise, "proximate cause" should be defined so that the plaintiff will be required to exercise "ordinary care" (as defined above) to foresee the result of his actions. *Rudes v. Gottschalk*, —Tex.—, 324 S.W.2d 201 (1959).

The doctrine of contributory negligence requires a person to exercise the same reasonable precaution for his own interest as is required of others. PROSSER, TORTS 283 (2d ed. 1955); Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3 (1927). In Texas, contributory negligence affords the defendant a limitation on his liability, and, accordingly, must be pleaded and proved by him. *Koons v. Rook*, 295 S.W. 592 (Tex. Comm. App. 1927). However, the standard of care used to determine a child's contributory negligence is not the same as that applied to an adult, *Houston & T.C. Ry. v. Boozer*, 70 Tex. 530, 8 S.W. 119 (1888); *J. Weingarten, Inc. v. Carlisle*, 172 S.W.2d 170 (Tex. Civ. App. 1943) *error ref. w.o.m.*, unless he had full knowledge and appreciation of the danger, *Gonzalez v. Broussard*, 274 S.W.2d 737 (Tex. Civ. App. 1954) *error ref. n.r.e.* Thus, since a child may not be able to exercise the intelligence and judgment of an adult or have the capacity to perceive a risk or realize its danger, *Missouri, K. & T. Ry. v. Rodgers*, 89 Tex. 657, 36 S.W. 243 (1896); *Texas & Pac. Ry. v. Ball*, 85 S.W. 456 (Tex Civ. App. 1905) *error ref.*; RESTATEMENT, TORTS § 283(e), 289(h), the standard of care applied to him is that of a child of like age, intelligence, capacity, and experience, *Texas & Pac. Ry. v. Phillips*, 91 Tex. 278, 42 S.W. 852 (1897); *Green v. Ligon*, 190 S.W.2d 742 (Tex. Civ. App. 1945) *error ref. n.r.e.*; *Galveston Elec. Co. v. Antonini*, 152 S.W. 841 (Tex. Civ. App. 1912) *error ref.*; RESTATEMENT, TORTS § 464. It is conclusively presumed that a child under the age of three is incapable of contributory negligence. *Karotkin Furniture Co. v. Decker*, 32 S.W.2d 703 (Tex. Civ. App. 1930), *aff'd*, 50 S.W.2d 795 (Tex. Comm. App. 1932). (The age span of three-to-five is a "twilight zone" on which there are no cases.) Between the ages of five and fifteen he is subject to a child's standard of care. See *Gulf Prod. Co. v. Quisenberry*, 128 Tex. 347, 97 S.W.2d 166 (1936); *Brown v. Panhandle & S.F. Ry.*, 294 S.W.2d 223 (Tex. Civ. App. 1956) *error ref. n.r.e.* Above the age of fifteen, he is presumed to be subject to the ordinary rules of contributory negligence. *Seinsheimer v. Burkhart*, 132 Tex. 336, 122 S.W.2d 1063 (1939); *Dallas Ry. & Terminal Co. v. Rodgers*, 147 Tex. 617, 218 S.W.2d 456 (1949) (dictum).

Proximate cause is a prerequisite to the *defendant's* responsibility for harm and arises, after fault and actual causation have been established, as a policy limitation on his liability. PROSSER, *op. cit. supra* at 252-53; Green, *Proximate Cause in Texas Negligence Law*, 28 TEXAS L. REV. 471, 480 (1951). "Foreseeability, or anticipation of harm" is an essential element in the issue of proximate cause and determines the extent of liability. *East Texas Motor Freight Lines v. Loftis*, 148 Tex. 242, 223 S.W.2d 613 (1949); *Texas & Pac. Ry. v. Bingham*, 90 Tex. 223, 38 S.W. 162 (1896). Although proximate cause (a policy limitation) must be proved before the defendant is *liable*, a plaintiff is barred from *recovery* by the doctrine of contributory negligence if his fault is the actual cause of his injury. *Kath v. Brodie*, 132 Colo. 338, 287 P.2d 957 (1955); *Aitchison v. Reter*, 245 Iowa 1005, 64 N.W.2d 923 (1954); *Robinson v. American Ice Co.*, 292 Pa. 336, 141 Atl. 244 (1928); RESTATEMENT, TORTS § 465; *cf. Crane v. Neal*, 389 Pa. 329, 132 A.2d 675 (1957). Early Texas cases were in accord with this view, see, *e.g.*, *Murray v. Gulf C. & S.F. Ry.*, 73 Tex. 2, 11 S.W. 125 (1889); *Koons v. Rook*, *supra*, but subsequent cases have limited the defense of contributory negligence by holding that the plaintiff's conduct must also be *a* proximate cause of his injury and that the same rules which govern the issue of proximate cause in a negligence case control the issue in a case of contributory negligence, see, *e.g.*, *Foster v. Beckman*, 85 S.W.2d 789 (Tex. Civ. App. 1935) *error ref.*; *Dallas Ry. Co. v. Eaton*, 222 S.W. 318 (Tex. Civ. App. 1920) *error dism.* Thus, foreseeability being an essential element of proximate cause, later cases allow a plaintiff to recover even though he contributed to his injury so long as he did not foresee the result. This view has been criticized on the theory that when the term proximate cause is used in relation to the plaintiff's fault, it correctly refers only to *actual* causation. Green, *Proximate Cause in Texas Negligence Law*, 28 TEXAS L. REV. 471, 481 (1951).

Foreseeability, being a policy limitation on the defendant's *liability*, logically cannot be a part of proximate cause when used in connection with the plaintiff's contributory negligence, because the plaintiff is not subject to liability and the policy considerations are not applicable.

Texas courts not only have required a plaintiff's contributory negligence to be a proximate cause (defined in terms of foreseeability) of his injury before the plaintiff is barred from recovery, but also have used foreseeability as a test of *both* proximate cause and negligence. *Hill v. Texas N.M. & O. Coaches, Inc.*, 153 Tex. 581, 272 S.W.2d 91 (1954); *Dallas Ry. & Terminal Co. v. Black*, 152 Tex. 322, 257 S.W.2d 416 (1953). The confusion which results from this double usage of foreseeability is further multiplied by inconsistent definitions of the term proximate cause. Some courts have defined proximate cause as that which is "reasonably foreseeable under the circumstances," thus omitting any reference to a standard of care. *Panhandle & S.F. Ry. v. Miller*, 64 S.W.2d 1076 (Tex. Civ. App. 1933) *error dism.*; *Texas & Pac. Ry. v. Short*, 62 S.W.2d 995 (Tex. Civ. App. 1933) *error ref.* These cases reason that to include a standard of care in the definition of proximate cause would result in submitting the issue of negligence twice. Other courts have included a standard of care to which the defendant must conform in foreseeing the result, thus proximate cause and negligence are determined by the same test. See, *e.g.*, *Southland Greyhound Lines, Inc., v. Cotton*, 126 Tex. 596, 91 S.W.2d 326 (1936); *Kirkpatrick v. Neal*, 153 S.W.2d 519 (Tex. Civ. App. 1941) *error ref. w.o.m.*; *Wills v. Henderson*, 78 S.W.2d 683 (Tex. Civ. App. 1935) *error ref.* The court of civil appeals in the instant case seems to have fallen into this error since it notes that where the standard of care in reference to negligence was to refrain from reckless conduct, *Kirkpatrick v. Neal, supra* (guest statute), or to exercise a high degree of care, *Dallas Ry. & Terminal Co. v. Black, supra* (common carriers), ordinary care was the criterion for determining forseeability of the result in reference to proximate cause. 315 S.W.2d at 367. Faced with the issue of what standard of care to apply to an infant plaintiff on the issue of proximate cause, the court of civil appeals applied the "ordinary care standard." Realizing that a child may not be able to foresee or anticipate the danger that an adult might foresee, the supreme court submits two definitions of ordinary care: (1) in reference to an adult, it is the care exercised by an ordinarily prudent person, (2) in reference to a child, it is the care exercised by a person of his own age, intelligence, capacity, and experience. These definitions are to be used in defining both negligence and proximate cause. Moreover, the court apparently thought it was immaterial that the cases which were relied upon in determining the definition of proximate cause (which included foreseeability) were concerned solely with the definition to be used in reference to a *defendant,* not a plaintiff.

In the principal case the court attempts to protect the infant plaintiff from the consequences of his own negligent conduct by using proximate cause to soften the defense of contributory negligence. Although consistent with recent Texas cases, this confusing result would have been avoided had the court held that (1) either the defendant need prove *only* that plaintiff's contributory negligence had a causal connection with his own injury, or that foreseeability is not an element of proximate cause when applied to *plaintiff's* negligence, and (2) that a standard of care is *never* correctly applied in the determination of foreseeability as an element of proximate cause. It would seem more rational to eliminate the defense of contributory negligence than to further confuse the law of negligence by applying proximate cause in the issue of contributory negligence, since to do so increases the chance of defendant's liability. Moreover, since proximate cause originated as a policy limitation to lessen the liability of the defendant by preventing strict liability, an anamolous result is reached when it is also used to increase his chances of liability.

Cecil A. Ray, Jr.