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## Recent Developments

Ottis Jan Tyler

Byron L. Falk

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# RECENT DEVELOPMENTS

## Constitutional Law — Eminent Domain — Landowner's Rights to Airspace

Plaintiff, the owner of land adjacent to a municipal airport, instituted a viewers' proceeding<sup>1</sup> against the Defendant, the owner and operator of the airport. The petition alleged an appropriation of the Plaintiff's land because of a substantial interference with the use and enjoyment of it caused by flights of aircraft at low altitudes when taking off and landing at the airport. The Board of Viewers found that at the Plaintiff's property the surface of the approach area was only 11.86 feet above Plaintiff's residence.<sup>2</sup> The airport was opened for commercial air travel under the approval of a "Master Plan"<sup>3</sup> submitted to the Civil Aeronautics Authority. *Held*: A governmental body which is the promoter, owner, and lessor of the airport is liable for the appropriation of adjacent land resulting from take-off and landing of privately owned aircraft even though the flights are within the Navigable Air Space.<sup>4</sup> *Griggs v. County of Allegheny*, 369 U.S. 84 (1962) (7-2), reversing 402 Pa. 411, 168 A.2d 123 (1961).

The power of eminent domain has been defined as the right of

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<sup>1</sup> Plaintiff petitioned the court for the appointment of viewers to assess and award damages against an entity clothed with the power of eminent domain which had effected a taking without following the condemnation procedure provided by statute. 402 Pa. 411, 168 A.2d 123.

<sup>2</sup> The facts as found by the viewers were that the surface of the approach area as used by aircraft of private airlines was 11.86 feet above the Plaintiff's residence, that the possible danger due to these low flights, the noise and vibrations which they caused, and the lights pointing at the premises at night had greatly damaged and depreciated the value of the property. The court assumed that such facts, which were undisputed, showed a sufficiently substantial deprivation to constitute a taking.

<sup>3</sup> The "Master Plan" was submitted to the Civil Aeronautics Authority for approval as required under § 1102 of the National Airport Act, 60 Stat. 170 (1946), 49 U.S.C. § 1101 (1958). Included in the plan was an agreement between the Civil Aeronautics Authority and the County whereby in consideration for federal funds to help construct the airport the County agreed to prevent the use of adjoining land which would create a hazard to the taking-off and landing of aircraft at the airport by the enforcement of zoning ordinances or "by the acquisition of easements or other interests in lands or airspace." Brief for Petitioner, p. 17.

<sup>4</sup> "Navigable air space" means air space above the minimum altitudes of flight prescribed by regulations issued under this act." Civil Aeronautics Act of 1938, 52 Stat. 977 (1938), 49 U.S.C.A. § 401(24) (1951). Civil Air Regulations § 60.17 issued pursuant to this authority prescribes the navigable airspace as "Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes: 1000 feet over congested areas and 500 feet over other than congested areas." 14 C.F.R. § 60.17 (1956).

The Federal Aviation Act of August 23, 1958, enacted subsequently to this action, repealed the above quoted section and now reads: "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." 72 Stat. 737 (1958), 49 U.S.C. § 1301(24) (1958).

the sovereign to take private property for public use without the owner's consent if just compensation is made.<sup>5</sup> It must therefore be distinguished from the valid exercise of the police power.<sup>6</sup> Eminent domain is governed by the fifth amendment,<sup>7</sup> which expressly requires the payment of just compensation when the federal government takes private property for public use.<sup>8</sup> The due process clause of the fourteenth amendment<sup>9</sup> has been interpreted as imposing the same limitation upon the states.<sup>10</sup> The taking under the right of eminent domain can be exercised only by an entity clothed with the power.<sup>11</sup> However, the taking need not be limited to physical invasion of the land but also can be effected by actions to the side,<sup>12</sup> above,<sup>13</sup> or below<sup>14</sup> the property. Moreover, the statute of limitations does not run against the landowner as regards eminent domain proceedings.<sup>15</sup> But the entity clothed with the power may acquire title by adverse possession<sup>16</sup> or by imposition of a servitude,<sup>17</sup> since a taking occurs when the landowner has been substantially deprived of the use and enjoyment of his land.<sup>18</sup>

The old common law doctrine of *ad coelum*,<sup>19</sup> although accepted in America in non-aviation cases,<sup>20</sup> has never been followed in any

<sup>5</sup> Scott v. Toledo, 36 Fed. 385 (N.D. Ohio 1888).

<sup>6</sup> "When private property rights are actually *destroyed* through the governmental action, then police power rules are usually applicable." Ackerman v. Port of Seattle, 55 Wash. 2d 400, 348 P.2d 644 (1960).

<sup>7</sup> U.S. Const. amend. V: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

<sup>8</sup> Kohl v. United States, 91 U.S. 367 (1876).

<sup>9</sup> U.S. Const. amend. XIV: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

<sup>10</sup> Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

<sup>11</sup> 1 Nichols, Eminent Domain § 3.1, at 185. See notes 7 and 8 *supra*, for the provisions applicable to the federal government; see notes 9 and 10 *supra*, for the provisions applicable to the states. The exercise of the power by any other body arises from express legislative action. The power is ordinarily authorized to public corporations and political subdivisions; the power is, however, conferred upon private corporations when organized and existing under the authority of a state to serve the public. Nichols, *op. cit. supra*, at § 3.2. Taking private property for use as a municipally owned airport has been held to be for public benefit. Burnham v. Mayor & Alderman of Beverly, 309 Mass. 388, 35 N.E.2d 242 (1941). The granting of the power to an airline for acquiring a landing site has been upheld. Central Hanover Bank & Trust Co. v. Pan Amer. Airways, 137 Fla. 808, 188 So. 820 (1939).

<sup>12</sup> *In re New Street in City of New York*, 215 N.Y. 109, 109 N.E. 104 (1915) (surface railway).

<sup>13</sup> United States v. Causby, 328 U.S. 256 (1946) (airplanes).

<sup>14</sup> *In re Board of Rapid Transit R.R. Comm'rs*, 197 N.Y. 81, 90 N.E. 456 (1909) (subways).

<sup>15</sup> Carter v. Ridge Turnpike Co., 208 Pa. 565, 57 Atl. 988 (1904).

<sup>16</sup> Ackerman v. Port of Seattle, 55 Wash. 2d 400, 348 P.2d 664 (1960).

<sup>17</sup> *Ibid.*

<sup>18</sup> United States v. Causby, 328 U.S. 256 (1946).

<sup>19</sup> "*Cujus est solum ejus est usque ad coelum et ad inferos*," [He who owns the soil owns it up to the sky.] Brown, Legal Maxims 395 (8th Amer. ed. 1882).

<sup>20</sup> See Rhyne, Airports and the Courts 98 (1944) (collection of the cases).

case involving the flight of aircraft.<sup>21</sup> However, all the courts considering such cases prior to 1947 had to contend with the doctrine, as it was always the plaintiff's first ground of argument.<sup>22</sup> The doctrine was forever renounced by the Supreme Court in *United States v. Causby*.<sup>23</sup> In that case the United States had leased a local municipal airport for use by military planes. Near the airport Causby lived upon land which he owned. The planes in landing and taking off passed at levels as low as eighty-three feet over the property and, due to the noise, vibrations, and lights from the airplanes, living conditions had become unbearable. The Court held that these facts were sufficient to cause a substantial interference with the use and enjoyment of the land constituting an unconstitutional taking for which the owner must be compensated.<sup>24</sup> The Court there recognized that Congress had declared a portion of the atmosphere as navigable airspace and therefore within the public domain.<sup>25</sup> The Court then held that flights below these limits were not within the public domain and that any landowner injured by such flights must be compensated.<sup>26</sup> Thus, the Court established an adequate remedy in contrast to the prior situation in which all actions by adjacent landowners had been limited to trespass and nuisance remedies which had been completely unsatisfactory.<sup>27</sup>

In the instant case the defendant airport contended that under Civil Aeronautics Authority Regulation 60.17<sup>28</sup> the flights complained of by the Plaintiff were within the navigable airspace and thus within the public domain; therefore, it could not be guilty of a taking.<sup>29</sup> The Court rejected this argument by following the rationale of the *Causby* case that the use of land presupposes the use of some airspace above it.<sup>30</sup> The Court rejected the argument that since the flights were within the navigable airspace, the federal government

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<sup>21</sup> Rhyne, *Airport Legislation and Court Decision*, 14 J. Air L. & Com. 289 (1947).

<sup>22</sup> *Id.* at 292.

<sup>23</sup> 328 U.S. 256 (1946).

<sup>24</sup> *Ibid.*

<sup>25</sup> Justice Douglas speaking for the majority said, 328 U.S. at 261:

But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

<sup>26</sup> *Id.* at 264.

<sup>27</sup> See Rhyne, *supra* notes 20, 21.

<sup>28</sup> See note 4 *supra*.

<sup>29</sup> Brief for Respondent, p. 10.

<sup>30</sup> 369 U.S. at 89: "Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the 'superadjacent airspace' will often 'affect the use of the surface of the land itself.' 328 U.S. at 265."

was doing the taking rather than the County. The majority could see no difference between the responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built. In drawing an analogy to the construction of a bridge the Court said:

A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned?<sup>31</sup>

The court in quoting *Ackerman v. Port of Seattle*<sup>32</sup> rationalized that an adequate approach way is as necessary a part of the airport as is the ground on which the airport itself is constructed. Without the approach way, the airport would indeed be inoperable.<sup>33</sup>

The holding of the principal case is in accord with the *Ackerman* case<sup>34</sup> and a similar Georgia case.<sup>35</sup> The Georgia court reasoned that the legislature had given the city the power to obtain lands of an area sufficient for the operation of an airport. The city was not to operate the airport in a manner that would unreasonably interfere with nearby landowners; therefore, the city had failed to obtain enough land or acquire easements to prevent the low flights over private property.<sup>36</sup> Consequently, the city had to pay for the easement which it had appropriated. The *Ackerman* case<sup>37</sup> stated that the Port's failure to provide adequate facilities necessitated the frequent low flights over the private property. Since the Port had the power to acquire an approachway by condemnation, its failure to exercise the power resulted in the taking of an approachway over the land without compensation.<sup>38</sup> It also had to pay. Both of these cases were almost completely ignored by the Pennsylvania Supreme Court in the instant case.<sup>39</sup> Moreover, the *Causby* case was factually distinguished because the county did not own the airplanes. The court had reasoned that since the *Causby* opinion did not mention the ownership of the airport the holding was therefore based upon the

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<sup>31</sup> 369 U.S. at 89.

<sup>32</sup> 55 Wash. 2d 401, 348 P.2d 664 (1960).

<sup>33</sup> 369 U.S. at 90.

<sup>34</sup> 55 Wash. 2d 401, 348 P.2d 664 (1960).

<sup>35</sup> *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E.2d 245 (1945).

<sup>36</sup> 20 S.E.2d at 249.

<sup>37</sup> 55 Wash. 2d 401, 348 P.2d 664 (1960).

<sup>38</sup> 348 P.2d at 669.

<sup>39</sup> The court, in a footnote, merely stated that the argument the County was giving as to the flights being within the navigable airspace had been rejected by the Supreme Court of Washington, 168 A.2d at 126 n.3. The *Kersey* case was not cited.

ownership of the airplanes. Who owned or operated the airport was therefore considered irrelevant.

The Supreme Court's opinion in the principal case is an expansion of the newly-discovered remedy developed in the *Causby* case. The Plaintiff should not have to proceed against the airlines on a tort claim. This remedy would be practically useless, since it is virtually impossible for any landowner to prove the plane's ownership and the extent of each plane's noise. Moreover, some apportionment of damages would have to be made causing the landowner to sue numerous defendants, each of whom would presumably attempt to shift liability to the other.<sup>40</sup> It has been held that the airlines cannot be trespassers when flying within the public domain<sup>41</sup> and those cases involving nuisance have held the airport to be the nuisance;<sup>42</sup> but operations authorized by legislative enactment cannot be legal nuisances<sup>43</sup> thus ruling out the latter possibility. The remedy of eminent domain provided by the principal case appears to give the better result.

*Ottis Jan Tyler*

### Evidence — Dead Man's Statute — Applicability to Motor Vehicle Collisions

A collision between a truck-trailer driven by Plaintiff A and an automobile driven by the decedent resulted in personal injuries to Plaintiff A and the death of decedent. A joint action was instituted against the father of decedent, individually and as heir of the estate of decedent, and against the administrator of the estate of decedent by Plaintiff A for personal injuries and damages to the truck, by Plaintiff B for damages to the trailer it owned, and by Plaintiff C for damages to the goods being transported.<sup>1</sup> The trial court excluded for purposes of all the causes of action the testimony of Plaintiff A

<sup>40</sup> See Note, *Airplane Noise*, 74 Harv. L. Rev. 1581, 1586 (1961); cf. *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W.2d 731 (1952), where two separate tortfeasors, acting individually, but both contributing to the tortious act, were held both jointly and severally liable. See also Annot., 91 A.L.R. 759 (1934).

<sup>41</sup> *Cheskov v. Port of Seattle*, 55 Wash. 2d 416, 348 P.2d 673 (1960); see *Allegheny Airlines v. Village of Cedarhurst*, 238 F.2d 812 (2d Cir. 1956) (following the rationale of the *Causby* case).

<sup>42</sup> *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E.2d 245 (1945).

<sup>43</sup> *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

<sup>1</sup> The parents of decedent filed a counterclaim for funeral expenses, and also for loss of contributions, as beneficiaries under the Wrongful Death Statute. Tex. Rev. Civ. Stat. Ann. art. 4671 (1948). The administrator counterclaimed for damages to decedent's automobile.

regarding the collision on the theory that the Dead Man's Statute<sup>2</sup> prohibited the testimony of an interested party as to transactions with the decedent. *Held, reversed*: A motor vehicle collision between strangers is not a "transaction" within the meaning of the Dead Man's Statute. Thus the testimony of a surviving driver as to his observations of the situation prior to and at the time of the accident is admissible. *Harper v. Johnson*, —Tex.—, 345 S.W.2d 277 (1961).

At common law all persons interested in a suit were disqualified from giving testimony.<sup>3</sup> However, following England's lead, all states altered the harsh exclusionary rule to make these persons competent witnesses.<sup>4</sup> It was reasoned that the advantages of allowing those who knew most to testify far outweighed the danger of perjury thought to accompany pecuniary interest.<sup>5</sup> However, one of the common-law disqualifications was retained in varying forms by nearly all the states as an exception to the general competency statute.<sup>6</sup> This statute, commonly known as the Dead Man's Statute, operates to exclude testimony by interested parties concerning transactions with the deceased in actions by or against his estate.<sup>7</sup> The avowed purpose of the statute is to save the estates of dead men from dishonest claims by silencing those most apt to testify falsely and thereby placing them on a par with the deceased, whose lips have been sealed by death.<sup>8</sup> Since the statute acts contrary to the

<sup>2</sup> Tex. Rev. Civ. Stat. Ann. art. 3716 (1948); see note 7 *infra* for the text of the statute.

<sup>3</sup> 2 Wigmore, Evidence § 575 (3d ed. 1940). In 1843, in the wake of a reversal in legal thinking spawned by the writings of Jeremy Bentham, Lord Denham's Act was passed removing the disqualification. *Ibid.* at § 576. See also 1 McCormick & Ray, Texas Law of Evidence §§ 331-32 (2d ed. 1956); Ray, *The Dead Man's Statute—A Relic of the Past*, 10 Sw. L.J. 390 (1956).

<sup>4</sup> 2 Wigmore, *op. cit. supra* note 3, § 488. The Texas statute, first enacted in 1871, is now embodied in Tex. Rev. Civ. Stat. Ann. art. 3714 (1948). It reads: "No person shall be incompetent to testify on account of color, nor because he is a party to a suit or proceeding or interested in the issue to be tried."

<sup>5</sup> 2 Wigmore, *op. cit. supra* note 3, § 575.

<sup>6</sup> 2 Wigmore, *op. cit. supra* note 3, §§ 488, 578.

<sup>7</sup> The Texas provision, presently found in Tex. Rev. Civ. Stat. Ann. art. 3716 (1948), states:

In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent.

A full discussion of the statutes of other states is beyond the scope of this note. See generally, however, 2 Wigmore, *op. cit. supra* note 3; Annots., 80 A.L.R.2d 1296 (1961); 77 A.L.R.2d 676 (1961); 146 A.L.R. 250 (1943).

<sup>8</sup> *Sears, Roebuck & Co. v. Jones*, 303 S.W.2d 432, 436 (Tex. Civ. App. 1957—Waco) *error ref. n.r.e.* See also *Holland v. Nimitz*, 232 S.W. 298 (Tex. Com. App. 1921) *adopted, aff'd on rehearing*, 111 Tex. 425, 239 S.W. 185 (1922); *Moores v. Wills*, 69 Tex. 109, 5 S.W. 675 (1887); *Whatley v. Whatley*, 169 S.W.2d 989 (Tex. Civ. App. 1943—Amarillo) *error ref.*

general privilege of all parties to testify, the courts have stated that it should be strictly construed;<sup>9</sup> the decisions, however, have not been consistent with this announced principle.<sup>10</sup> On the other hand, the legal analysts have suggested that in order for the statute to prohibit testimony by a witness not called by the opposite party, three requirements must be satisfied:<sup>11</sup> (1) the action must be one contemplated by the statute;<sup>12</sup> (2) the person whose testimony is offered must be a party to the suit, not merely an interested person;<sup>13</sup>

<sup>9</sup> Pugh v. Turner, 145 Tex. 292, 197 S.W.2d 822 (1946), 172 A.L.R. 707 (1948); Ragsdale v. Ragsdale, 142 Tex. 476, 179 S.W.2d 291 (1944); Martin v. McAdams, 87 Tex. 225, 27 S.W. 255 (1894); Roberts v. Yarboro, 41 Tex. 449 (1874).

<sup>10</sup> International Travelers' Ins. Ass'n v. Bettis, 120 Tex. 67, 35 S.W.2d 1040 (1931); Holland v. Nimitz, 232 S.W. 298 (Tex. Com. App. 1921) *adopted, aff'd on rehearing*, 111 Tex. 425, 239 S.W. 185 (1922); see note 19 *infra* for a statement of the holdings in these two cases. In Parks v. Cauble, 58 Tex. 216 (1882), the witness was prevented from testifying even though "it was not a transaction with him" to which his testimony referred.

<sup>11</sup> 1 McCormick & Ray, *op. cit. supra* note 3, §§ 321-30; Cheek, *Testimony as to Transactions With Decedents*, 5 Texas L. Rev. 149 (1927).

<sup>12</sup> Since the types of action envisioned are those where judgment may be had for or against executors, administrators, guardians, and heirs or legal representatives of the deceased in their representative capacities, the statute is not applicable to suits brought under the Wrongful Death Statute, Tex. Rev. Civ. Stat. Ann. art. 4671 (1948), where the plaintiff sues in his own right. Wallace v. Stevens, 74 Tex. 559, 12 S.W. 283 (1889); Canales v. Bank of California, 316 S.W.2d 314 (Tex. Civ. App. 1958—Eastland) *error ref. n.r.e.*; Armstrong v. Marshall, 146 S.W.2d 250 (Tex. Civ. App. 1940—Austin) *error dism., judgm. cor.*; Humble Oil & Ref. Co. v. Ooley, 46 S.W.2d 1038 (Tex. Civ. App. 1932—Eastland) *error dism.* Hence, in the principal case, the court of civil appeals, after erroneously finding that a motor vehicle collision is a "transaction with decedent," held that the action by the parents of decedent against the plaintiffs under the Wrongful Death Statute, for loss of contributions which they would reasonably have expected to receive from decedent, was not an action where judgment could be had by or against heirs or legal representatives of decedent; rather, the action was by beneficiaries in their own right. 331 S.W.2d 482 (Tex. Civ. App. 1959—Texarkana); see Annot., *Competency of Witness in Wrongful Death Action as Affected by Dead Man Statute*, 77 A.L.R.2d 676 (1961).

It has been held that the statute is not applicable to criminal actions, Green v. State, 153 Tex. Crim. 442, 221 S.W.2d 612 (1949), nor to suits involving legatees or devisees, Newton v. Newton, 77 Tex. 508, 14 S.W. 157 (1890).

In suits involving multiple claims by a single party, the testimony will be admitted for purposes of actions not covered only if such actions are distinctly severable. King v. Morris, 1 S.W.2d 605 (Tex. Com. App. 1928); Webb v. British American Oil Producing Co., 281 S.W.2d 726 (Tex. Civ. App. 1955—Eastland) *error ref. n.r.e.*; Armstrong v. Marshall, *supra*. "But [where] the interests upon which the recovery is sought are not severable . . . [and where] from its nature the testimony would necessarily affect both interests, and its effect is incapable of limitation . . ." it must be excluded for all purposes. Spencer v. Schell, 107 Tex. 44, 47, 173 S.W. 867, 868 (1915). See also Dominy v. Dominy, 305 S.W.2d 389 (Tex. Civ. App. 1957—Houston) *no writ hist.*

<sup>13</sup> In determining if a witness is a "party" under the second requirement of the statute, the test is whether he will be bound by any judgment which may be rendered under the pleadings. Chandler v. Welborn, 156 Tex. 312, 294 S.W.2d 801 (1956). Therefore the testimony of the witness is admissible if he is joined *pro forma*, Lehman v. Krahl, 155 Tex. 270, 285 S.W.2d 179 (1956); Rozelle v. Smith, 324 S.W.2d 627 (Tex. Civ. App. 1959—Fort Worth) *error ref. n.r.e.*, or if he is a nominal party, Ragsdale v. Ragsdale, 142 Tex. 476, 179 S.W.2d 291 (1944). However, the offered witness is disqualified if he is a real party in interest, even though not of record. Ragsdale v. Ragsdale, *supra*; see 1 McCormick & Ray, *op. cit. supra* note 3, §§ 327-28. Under the Texas statute, if the witness seeks to testify in favor of the estate, he is nevertheless incompetent. International Travelers' Ins. Ass'n v. Bettis, 120 Tex. 67, 35 S.W.2d 1040 (1931). The disqualifying interest must exist when the testimony is offered, Chandler v. Welborn, *supra*; Pugh v. Turner, 145 Tex. 292, 197 S.W.2d 822



and (3) the testimony offered must relate to a statement by, or "transaction" with, the decedent.

In regard to the third requirement, with which the principal case is concerned, the courts have taken widely divergent views in treating the word "transaction."<sup>14</sup> The criterion frequently propounded as determinative when analyzing a given state of facts seems to be more a statement of policy than a functional guideline: "The test laid down in our decisions in ascertaining what is a 'transaction with' the deceased about which the other party to it cannot testify is to inquire whether in case the witness testifies falsely, the deceased, if living, could contradict it of his own knowledge."<sup>15</sup> However, some attempts to define the word "transaction" have been forthcoming in a number of cases. Speaking generally, the definitions adduced from the opinions can be reduced to two, one which is exceedingly broad<sup>16</sup> and the other not quite so generous.<sup>17</sup> Since the statute is to be construed strictly,<sup>18</sup> the more limited definition, which excludes purely unilateral situations, should be utilized. That this has not consistently been the case is verified in a number of de-

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(1946), 172 A.L.R. 707 (1948), unless the testimony is being submitted via depositions, in which case the crucial time is when the testimony is uttered, *Ragsdale v. Ragsdale*, *supra*. Therefore, if at the time of the transaction with the decedent, the witness was not interested in the event, he still may be incompetent, but if he has ceased to be a party to the action when the testimony is offered, the statute is not applicable. *Ragsdale v. Ragsdale*, *supra*. However, the burden of proving that the transfer of a claim against the estate was made bona fide and that the witness retains no interest therein, resides on the party offering the witness. *Ditto v. Ditto Inv. Co.*, 158 Tex. 104, 309 S.W.2d 219 (1958).

<sup>14</sup> *Annotts.*, 80 A.L.R.2d 1296 (1961); 77 A.L.R.2d 276 (1961); 146 A.L.R. 250 (1943); 41 A.L.R. 343 (1926); 1 McCormick & Ray, *op. cit. supra* note 3, §§ 329-30.

<sup>15</sup> *International Travelers' Ins. Ass'n v. Bettis*, 3 S.W.2d 478, 480 (Tex. Civ. App. 1928—Austin), *rev'd on other grounds*, 120 Tex. 67, 35 S.W.2d 1040 (1931). The quotation is from the opinion in *Van Wagenen v. Bonnot*, 74 N.J. Eq. 843, 70 Atl. 143, 18 L.R.A. (N.S.) 400 (1908). See also *Holland v. Nimitz*, 232 S.W. 298 (Tex. Com. App. 1921) *adopted, aff'd on rehearing*, 111 Tex. 425, 239 S.W. 185 (1922); *Huff v. Huff*, 72 S.W.2d 675 (Tex. Civ. App. 1934—Eastland) *error dismissed*; *Van Meter v. Goldfarb*, 317 Ill. 620, 148 N.E. 391 (1925), 41 A.L.R. 343 (1926).

<sup>16</sup> "Transactions and communications embrace every variety of affairs which can form the subject of negotiation, interviews, or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition, or language of another." *Holcomb v. Holcomb*, 95 N.Y. 316, 325 (1884). See also *Whitney v. Brown*, 75 Kan. 678, 90 Pac. 277, 278 (1907); *Barnett's Adm'r v. Brand*, 165 Ky. 616, 177 S.W. 461, 463 (1915); *Holland v. Nimitz*, *supra* note 15; *Madero v. Calzado*, 281 S.W. 328, 331 (Tex. Civ. App. 1926—San Antonio) *error dismissed*; *Maciejczak v. Bartell*, 187 Wash. 113, 60 P.2d 31 (1936) (collection of numerous definitions by courts and text-writers); *Black, Law Dictionary* 1668 (4th ed. 1951); 42 *Words & Phrases, Transaction With and Transactions With Deceased* 395-401 (perm. ed. 1952).

<sup>17</sup> "[T]he word 'transaction' imports a mutuality or concert of action. . . . [It] also imports more than the unilateral observations of the survivor. . . ." *Shaneybrook v. Blizard*, 209 Md. 304, 121 A.2d 218, 222 (1956). Webster, *New International Dictionary* 2688 (2d ed. 1951), often cited by the courts, defines the word as follows: "A business deal; an act involving buying and selling. . . ." See also 42 *Words & Phrases, op. cit. supra* note 16.

<sup>18</sup> See note 9 *supra*.

cisions.<sup>19</sup> The Texas courts have held, *inter alia*, the following to be "transactions":<sup>20</sup> (1) conversations between witness and deceased concerning alleged gift,<sup>21</sup> (2) execution of deeds<sup>22</sup> and delivery<sup>23</sup> of deeds and property, (3) contracts,<sup>24</sup> (4) services rendered,<sup>25</sup> (5) payment or transmission of money,<sup>26</sup> (6) marriage,<sup>27</sup> (7) creation of partnership,<sup>28</sup> and (8) the physical condition and mental capacity of testator.<sup>29</sup>

In the principal case<sup>30</sup> the supreme court faced for the first time the issue of whether or not an automobile collision is a "transaction with decedent" within the meaning of the Dead Man's Statute. Previous to the instant case, the sole Texas opinion treating the problem was *Andreades v. McMillan*.<sup>31</sup> In that case, the court of

<sup>19</sup> In *International Traveler's Ins. Ass'n v. Bettis*, 3 S.W.2d 478, 480 (Tex. Civ. App. 1928—Austin), the court of civil appeals stated: "The term 'transaction' has been variously defined, and the trend of the decisions seems to be to give such a term a liberal interpretation when dealings with decedents are involved." (Emphasis added.) While disapproving of this language, and reversing on other grounds, the supreme court upheld the exclusion of the testimony of decedent's son in an action to recover on an insurance policy. 120 Tex. 67, 35 S.W.2d 1040 (1931). The son would have testified that he saw decedent prick his finger while the two were stringing barbed wire, thus contracting blood poisoning resulting in death. In *Holland v. Nimitz*, 232 S.W.2d 298 (Tex. Com. App. 1921) *adopted, aff'd on rehearing*, 111 Tex. 425, 239 S.W.2d 185 (1922), the court excluded the testimony of the daughter-heir of testatrix who would have related observations of testatrix suggesting insanity.

<sup>20</sup> See 1 McCormick & Ray, *op. cit. supra* note 3, §§ 329-30; Cheek, *Transactions With Decedent*, 5 Texas L. Rev. 149 (1927).

<sup>21</sup> *Apel v. Gallagher*, 278 S.W.2d 527 (Tex. Civ. App. 1955—Amarillo) *error ref. n.r.e.*; *Essex v. La Boue*, 223 S.W.2d 35 (Tex. Civ. App. 1949—Galveston) *error disp.*

<sup>22</sup> *Haley v. Lee*, 241 S.W. 567 (Tex. Civ. App. 1922—Austin) *no writ hist.*

<sup>23</sup> *Caldwell v. Tucker*, 246 S.W.2d 923 (Tex. Civ. App. 1952—Austin) *no writ hist.*; *North v. North*, 2 S.W.2d 481 (Tex. Civ. App. 1927—Waco) *no writ hist.*

<sup>24</sup> *Heard v. Busby*, 61 Tex. 13 (1884); *Agey v. Russell*, 314 S.W.2d 884 (Tex. Civ. App. 1958—El Paso) *no writ hist.*; *Horlock v. Guardian Trust Co.*, 274 S.W. 204 (Tex. Civ. App. 1925—Beaumont) *no writ hist.*

<sup>25</sup> *Barnhill v. Kirk*, 44 Tex. 589 (1876); *Gordon v. Pledger*, 271 S.W.2d 344 (Tex. Civ. App. 1954—Galveston) *error ref. n.r.e.*

<sup>26</sup> *Altgelt v. Brister*, 57 Tex. 432 (1882); *Neitch v. Hillmann*, 69 S.W. 494 (Tex. Civ. App. 1902—Texas) *no writ hist.*

<sup>27</sup> *Berger v. Kirby*, 105 Tex. 611, 153 S.W. 1130 (1913), 51 L.R.A. (N.S.) 182 (1914); *Hupp v. Hupp*, 235 S.W.2d 753 (Tex. Civ. App. 1950—Fort Worth) *error ref. n.r.e.*

<sup>28</sup> *Rascoe v. Walker-Smith Co.*, 98 Tex. 565, 86 S.W. 728 (1905).

<sup>29</sup> *Ragsdale v. Ragsdale*, 142 Tex. 476, 179 S.W.2d 291 (1944); *Holland v. Nimitz*, 232 S.W. 298 (Tex. Com. App. 1921) *adopted, aff'd on rehearing*, 111 Tex. 425, 239 S.W. 185 (1922).

<sup>30</sup> 345 S.W.2d at 280. It is impossible to treat here the consideration given this issue by jurisdictions other than Texas. Such a discussion would entail an examination of the wording of each particular statute. Moreover, to make accurate comparisons, the exact fact patterns of each case should be studied fully. For example, the surviving driver of a two-automobile collision in Alabama cannot testify against the estate of the other driver, *Southern Natural Gas Co. v. Davidson*, 225 Ala. 171, 142 So. 63 (1932), but a passenger in one of the automobiles of a two-automobile collision can testify against the estates of the two drivers, *Gibson v. McDonald*, 265 Ala. 426, 91 So. 2d 679 (1956), noted, 11 Sw. L.J. 525 (1957). See Stout, *Should the Dead Man's Statute Apply to Automobile Collisions?*, 38 Texas L. Rev. 14 (1959), suggesting that the slight majority of jurisdictions agree with the instant case. See also 2 Wigmore, *op. cit. supra* note 3, §§ 488, 578; Annot., 80 A.L.R.2d 1296 (1961).

<sup>31</sup> 256 S.W.2d 477 (Tex. Civ. App. 1956—El Paso) *error disp.* In the main case, the

civil appeals reluctantly held that a motor vehicle collision is a "transaction." The court considered the language of *Holland v. Nimitz*,<sup>32</sup> binding, even though the case did not involve an automobile collision. The *Holland* case, while holding that a daughter seeking to set aside the will of her mother could not testify as to observations of the testatrix suggesting lack of testamentary capacity, stated that "transaction with" includes "every method by which one person can derive impressions or information from the conduct, condition or language of another."<sup>33</sup> In the principal case, after reiterating the well-established principle that the Dead Man's Statute must be strictly construed,<sup>34</sup> the court held that the term "transaction" should not be extended judicially to cover an automobile collision.<sup>35</sup> Whether or not this suggests a movement by the supreme court to follow the announced principle of strict construction when interpreting the statute in other situations, such as what actions and persons are encompassed, is purely conjectural. Indeed, one cannot be certain how the supreme court will hold in reference to other alleged "transactions" in the future, because a motor vehicle collision appears to have been ruled out on two independent grounds, *viz.*: (1) that it is an "impersonal, fortuitous and involuntary relationship"<sup>36</sup> and (2) that the offered witness seeks to testify to unilateral observations made of the decedent, and not in regard to a "business deal" or mutual relationship engaged in with him.<sup>37</sup> If the former is the real basis of the holding, then the case does little more than overrule *Andreades v. McMillan*.<sup>38</sup> However, if the court relied on the latter, such decisions as *Holland v. Nimitz*<sup>39</sup> and *International Travelers' Ins. Ass'n v. Bettis*<sup>40</sup> might be decided differently today.

In holding that a motor vehicle collision is not a "transaction with decedent," the court is probably in line with the majority of

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court tersely explained its refusal to hear the *Andreades* case as follows: "[A]pplication for writ of error in that case was dismissed for want of jurisdiction." 345 S.W.2d at 280.

<sup>32</sup> 232 S.W. 298 (Tex. Com. App. 1921) *adopted, aff'd on rehearing*, 111 Tex. 425, 239 S.W. 185 (1922).

<sup>33</sup> 232 S.W. at 299.

<sup>34</sup> 345 S.W.2d at 280.

<sup>35</sup> *Id.* at 281. The court made reference to the definition found in Webster, New International Dictionary, *op. cit. supra* note 17. It concluded that "to hold that the term 'transaction' includes such an event as an automobile collision is to disregard the customary, common and ordinary meaning of the word. . . ."

<sup>36</sup> 345 S.W.2d at 280.

<sup>37</sup> *Ibid.*

<sup>38</sup> 256 S.W.2d 477 (Tex. Civ. App. 1956—El Paso) *error dismissed*.

<sup>39</sup> 232 S.W. 298 (Tex. Com. App. 1921) *adopted, aff'd on rehearing*, 111 Tex. 425, 239 S.W. 185 (1922).

<sup>40</sup> 120 Tex. 67, 35 S.W.2d 1040 (1931); see note 19 *supra* for a summary of the facts and a statement of the holding.

those jurisdictions which have considered the problem, or which have altered their statutes' application by legislative action.<sup>41</sup> The trend of the later decisions also seems to be towards the majority view.<sup>42</sup> The textwriters concur in their outcry against the Dead Man's Statute,<sup>43</sup> an archaic vestige in the law of evidence. In Texas, for example, there is presently a desire on the part of some substantially to limit the statute by legislative action.<sup>44</sup> The reasons behind the movement appear sound: (1) that the statute certainly does not act to preserve the estates of dead men when it operates to exclude evidence by supporters of the estate; and (2) that the best way to curb false testimony, if indeed the evidence offered by interested parties is corrupt, is not by total exclusion, but by the devices of cross-examination, rebuttal testimony, and ultimately by a discerning trier of the facts. In the absence of repeal or legislative restriction, limitations on the application of the Dead Man's Statute, as demonstrated by the instant case, are welcomed.

Byron L. Falk

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<sup>41</sup> See note 30 *supra*.

<sup>42</sup> *Herring v. Eiland*, 81 So. 2d 645 (Fla. 1955); *Day v. Stickle*, 113 So. 2d 559 (Fla. Dist. Ct. App.), *cert. denied*, \_\_\_ Fla. \_\_\_, 115 So. 2d 414 (1959), 80 A.L.R.2d 1291 (1961); *Turbot v. Repp*, 247 Iowa 69, 72 N.W.2d 565 (1955); *Shaneybrook v. Blizzard*, 209 Md. 304, 121 A.2d 218 (1956); *Knoepfle v. Suko*, \_\_\_ N.D. \_\_\_, 108 N.W.2d 456 (1961); *Cristofiel v. Johnson*, 40 Tenn. App. 197, 290 S.W.2d 215 (1956). *But see In re Muller's Estate*, 166 Neb. 376, 89 N.W.2d 137 (1958); *Zeigler v. Moore*, 75 Nev. 91, 335 P.2d 425 (1959).

<sup>43</sup> *Wright v. Wilson*, 154 F.2d 616, 620 (3d Cir. 1946), 170 A.L.R. 1237 (1947); 2 *Wigmore*, *op. cit. supra* note 3, § 578; Ray, *The Dead Man's Statute—A Relic of the Past*, 10 Sw. L.J. 390 (1956); 1 McCormick & Ray, *op. cit. supra* note 3, § 337; McCormick, *The New Code of Evidence of the American Law Institute*, 20 Texas L. Rev. 661 (1942) (a discussion of the Model Code which does away with the disqualification); Comment, *A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law*, 49 Nw. U.L. Rev. 481, 504 (1954).

<sup>44</sup> For a discussion of the Texas Committee for the Improvement of the Law of Evidence's proposals for changing the Texas Dead Man's Statute see Ray, *The Dead Man's Statute—A Relic of the Past*, *supra* note 43, at 395-97; 1 McCormick & Ray, *op. cit. supra* note 3, § 337.