Recent Developments

William L. Morrow

Charles O. Smyre

Ottis Jan Tyler

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation
William L. Morrow, et al., Recent Developments, 16 Sw L.J. 523 (1962)
https://scholar.smu.edu/smulr/vol16/iss3/8
RECENT DEVELOPMENTS

Conflict of Laws — Foreign Corporations — Jurisdiction Based Upon a Tortious Act Within the Forum

A reporter on assignment from The New York Times visited Alabama to gather background information for a story on race relations in the South. After leaving that state, the reporter wrote an article which was published by The Times in New York. The Plaintiffs, local Alabama officials, brought an action against the newspaper for libel. The Defendant, a New York corporation, did not have an office, employees, or agents in Alabama. Service of process was attempted under the Alabama substituted service statute. Defendant moved to quash service on two grounds: (1) that substituted service was not authorized under the Alabama statute since the cause of action alleged did not accrue from Defendant’s activities in the state, and (2) because application of the statute would deprive the Defendant of due process of law under the fourteenth amendment of the United States Constitution. The federal district court denied Defendant’s motion. Held, reversed: A substituted service statute permitting jurisdiction over foreign corporations for causes of action accruing from the performance of business, work, or services within a state, does not authorize service upon such a corporation for its out-of-state publication of an allegedly libelous article based upon information gathered by a reporter on an isolated visit to the state. The New York Times Co. v. Conner, 291 F.2d 492 (5th Cir. 1961).

The validity of service of process on a foreign corporation is conditioned upon a finding that the statute of the forum state actually authorizes the challenged service and jurisdiction. However, once an affirmative grant of jurisdiction is ascertained, it must then be determined whether the state law as applied offends the federal con-

---

1 The seven Plaintiffs charged that the article caused them to suffer “public contempt, ridicule, shame and disgrace” and sought a total of $3,100,000 in damages. See N.Y. Times, June 15, 1961, § 1, p. 42, col. 1.
2 Ala. Code tit. 7, § 199(1) (1940):

   Any nonresident person . . . or any corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall do any business or perform any character of work or service in this state shall . . . be deemed to have appointed the secretary of state . . . to be the . . . agent of such nonresident, upon whom process may be served in any action accrued or accruing from the doing of such business, or the performing of such work, or service, or as an incident thereto by any such nonresident, or his, its or their agent, servant or employee.
3 See Stanga v. McCormick Shipping Corp., 268 F.2d 544, 548 (5th Cir. 1959).
stitution. Historically, the basis of state jurisdiction was physical power over a defendant’s person; hence, the constitutional due process limitations were said to require the defendant’s presence within the forum before an in personam judgment could be rendered against him. The states were thus faced with a dilemma in attempting to acquire jurisdiction over foreign corporations, since a corporation in theory had no existence outside the state which chartered it. Consequently, the courts early found that “consent” to be sued in the forum state might be extracted by that state as a condition to permitting the foreign corporation to do business within the state. Soon to follow was the theory that the foreign corporation by “doing business” within the state became “present” there for purposes of jurisdiction. Finally, the concepts of fictional “presence,” “consent,” and “doing business” were swept away in the leading case of International Shoe Co. v. Washington. In their stead appeared a new test to the effect that a foreign corporation must have “certain minimum contacts” with the forum state so that the assertion of jurisdiction will not violate the “traditional notions of fair play and substantial justice.” Thus the foundation was laid for statutes allow-

4 Stanga v. McCormick Shipping Corp., supra note 3, at 548. In the instant case the Plaintiffs contended first, that the Alabama statute did not apply to the facts of the case, and second, that even if it did apply, it was repugnant to the due process clause of the fourteenth amendment. The court interpreted the statute as not authorizing jurisdiction under the circumstances and never reached the constitutional issue.

5 Pennoyer v. Neff, 95 U.S. 714 (1877). This famous case established the principle that the due process clause is violated if a court renders a personal judgment against a nonresident without having acquired jurisdiction over him, and as a matter of due process, a court cannot acquire such jurisdiction merely by serving process upon him outside the forum or by publication. The development of the doctrine of the case is annotated at 94 L. Ed. 1167.

6 Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839): [A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.

7 A corporation was not precluded from engaging in activities beyond the borders of the state of its incorporation, but any activity which it conducted outside the chartering state was dependent upon the permission of the government within whose jurisdiction it wished to operate. Hence the forum state could impose as a condition of engaging in business within its borders a requirement that the corporation appoint an agent to receive service of process within the state. See Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855).

8 Philadelphia & Reading R.R. v. McKibbin, 243 U.S. 264, 265 (1917): A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there.


10 International Shoe Co. v. Washington, supra note 9, at 316.
ing state jurisdiction based upon a single act, e.g., a tort, within the forum.11

The Alabama statute authorizing substituted service on a foreign corporation requires that before jurisdiction will attach, a cause of action must have accrued from the performance of business or some character of work or services within the state, or from some act incidental to the performance of such business or services.12 In the instant case the court found that there had not been a valid service upon the corporate Defendant since a cause of action had not accrued from the acts of the reporter within the state.13 The wrong complained of in a libel action is publication,14 and under the law of Alabama the publication occurred and a cause of action accrued only when and where the newspaper was issued, i.e., in New York, not Alabama.15

In contrast to the Alabama substituted service requirements, the earlier Texas statutes did not specify the minimum circumstances necessary to acquire jurisdiction over a foreign corporation.16 However, in 1959 the Texas Legislature adopted article 2031b,17 which declares that the act of doing business in Texas constitutes the appointment of the Secretary of State as an agent to receive process for causes of action arising from business done in the state.18 The statute expressly defines "doing business" to include (1) a single contract, (2) a single tort, or (3) any other act that may con-

13 291 F.2d at 496. The constitutional issue was never reached. See discussion note 4 supra.
14 See Prosser, Torts § 94 (2d ed. 1955).
15 Age-Herald Publ. Co. v. Huddleston, 207 Ala. 40, 92 So. 193 (1921). Thus the Plaintiffs were forced to contend that their cause of action arose from the reporter's news gathering visit to Alabama rather than from the general circulation of The Times within the state. However, the Plaintiffs failed to adopt the argument that the Huddleston case dealt with intrastate publication and was not necessarily applicable to foreign corporations and interstate publication. See Johnson Publ. Co. v. Davis, 271 Ala. 426, 124 So. 2d 441, 417 (1960); Prosser, Interstate Publication, 51 Mich. L. Rev. 99 (1953).
16 See Tex. Rev. Civ. Stat. Ann. art. 2031a (1910); Gooch, Jurisdiction Over Foreign Corporations Under Article 2031b, 39 Texas L. Rev. 214 (1960). It was generally said, however, that the foreign corporation must be "doing business" in Texas in order to be brought within the jurisdiction of the courts. The case cited by the federal courts as deciding the Texas rule was Gray Co. v. Ward, 145 S.W.2d 650 (Tex. Civ. App. 1940—Waco) error dism. judgm. cor. There was no precise test of the nature or extent of the business necessary to warrant jurisdiction. "All that is requisite is that enough be done to enable us to say that the corporation is here." Gray Co. v. Ward, supra at 614; see Acme Eng'r v. Foster Eng'r Co., 254 F.2d 219, 262 (5th Cir. 1958); Davis v. Asano Bussan Co., 212 F.2d 538, 563 (3rd Cir. 1954).
stitute doing business." The "single tort" provision of this recent statute will be crucial in a libel action against a foreign publisher, since the Texas rule, as distinct from the Alabama "single publication" concept, is that every sale or delivery of each copy of a newspaper or a magazine is an actual publication and a separate basis for liability. Accordingly, if facts similar to those of the instant case occur in Texas, a cause of action in tort for the alleged libel should arise as a result of the general circulation of the newspaper within the state, and jurisdiction over the defendant should attach because of the operation of article 2031b. The news gathering visit of the reporter to the forum state would thus be irrelevant to the plaintiff's cause of action. Apparently, in such a hypothetical case the court will be faced with a consideration of the constitutional question of due process in regard to the attempted jurisdiction based upon an alleged tortious act within the forum.

The courts have not ruled upon the constitutionality of the "single tort" provision of the Texas substituted service statute. However, courts in other states have upheld similar statutes which

---

20 "Each time a libelous article is brought to the attention of a third person, a new publication has occurred, and each publication is a separate tort. Thus, each time a libelous book or paper or magazine is sold, a new publication has taken place." Renfro Drug Co. v. Lawson, 138 Tex. 434, 443, 160 S.W.2d 246, 251 (1942), quoting Restatement, Torts § 178, comment b (1938). But see Stephenson v. Triangle Publ., Inc., 104 F. Supp. 215 (S.D. Tex. 1952), which held that the rule should be limited to actions brought against local dealers; thus in a libel action against a national magazine publisher, the federal court applied the "single publication" rule. The rule of Renfro Drug Co. v. Lawson, supra, has been criticized by the writers since in cases involving periodicals with national circulation it will subject a defendant to countless lawsuits. See Leflar, The Single Publication Rule, 25 Rocky Mt. L. Rev. 263 (1953); Prosser, supra note 15.

Most American courts, in actions brought against mass circulation periodicals and involving venue or the statute of limitations, have treated the entire edition of the newspaper or magazine as a single publication. See, e.g., Insull v. New York World-Telegram Corp., 273 F.2d 166 (7th Cir. 1959), cert. denied, 362 U.S. 942 (1960); Winrod v. MacFadden Publ., Inc., 187 F.2d 180 (7th Cir. 1951), cert. denied, 342 U.S. 814 (1951); Winrod v. Time, Inc., 334 Ill. App. 19, 78 N.E.2d 708 (1951). However, the "single publication" rule has a significant limitation in that it does not cross a state line; as to interstate defamation, the entry into a new state may create at least one new and distinct cause of action. See Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir. 1947); O'Reilly v. Curtis Publ. Co., 31 F. Supp. 364 (D. Mass. 1940); Prosser, supra note 15, at 964.

22 Tex. Rev. Civ. Stat. Ann. art. 2031b (Supp. 1961). One case has been found to date construing the statute. The "single contract" provision was squarely before a federal district court and was held unconstitutional. The court emphasized the necessity of substantial connection between the defendant and the forum state and noted the absence of evidence of contacts beyond the contract itself. Lone Star Motor Import, Inc. v. Citroen Cars Corp., 185 F. Supp. 48 (S.D. Tex. 1960). The Court of Appeals for the Fifth Circuit, however, reversed the lower court on the ground that the plaintiff's amended complaint (which alleged ample actual contacts with the state other than the mere contract) should have been admitted; thus, the necessity of ruling on the constitutionality of the "single contract" provision was avoided. Lone Star Motor Import, Inc. v. Citroen Cars Corp., 288 F.2d 69 (5th Cir. 1961).
provide jurisdiction over foreign corporations for tortious acts committed within the state even though such corporations may not be "doing business" there in the conventional sense of the term.\textsuperscript{23} The Plaintiffs in the principal case sought to base the forum state's power of jurisdiction solely upon the single isolated news gathering visit of the reporter; logically, such a tenuous relationship as the one between the Defendant and the forum, where according to state law no tortious act had been committed within the state itself, should not suffice to meet the requisite minimum contacts. However, if the same circumstances arose in Texas the asserted jurisdiction would be based not upon the reporter's visit to the state, but upon the corporate Defendant's commission of a tort within the state.\textsuperscript{24} In light of the present development of liberalized jurisdictional concepts, such tortious conduct within the state would seem to satisfy the test of minimum contacts with the forum.\textsuperscript{25} Consequently, under a fact situation similar to that of the principal case, article 2031b\textsuperscript{26} should be upheld as complying with the constitutional due process requirements.\textsuperscript{27}

\textit{William L. Morrow}


\textsuperscript{24}See text accompanying note 21 supra.

\textsuperscript{25}International Shoe Co. v. Washington, 326 U.S. 310 (1945). When a defendant has shipped its newspapers into the state, it should be prepared to defend suits arising from injuries caused by a libelous article therein. Certainly such a corporation has established a "contact" with the state. \textit{Cf.} Atkins v. Jones & Laughlin Steel Corp., 218 Minn. 571, 104 N.W.2d 888 (1960), where the defendant, a national distributor, was held amenable to the state's jurisdiction over a suit for injuries caused by goods shipped into the forum in a defective container; WSAZ, Inc. v. Lyons, 254 F.2d 242 (6th Cir. 1958), where a corporation operating a television station in West Virginia was held to have the requisite minimal contacts with the state of Kentucky because of regularly telecasting and soliciting advertising in five nearby Kentucky counties.

See McGee v. International Life Ins. Co., 355 U.S. 220 (1957), which held that a corporation is constitutionally amenable to process when suit arises out of a single transaction within the state, and this is the sole contact of the corporation with the state. There the court said: "Looking back over the long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." \textit{Id.} at 222. See also Kurland, \textit{The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts}, 25 U. Chi. L. Rev. 569 (1958); Comment, \textit{Jurisdiction Over Nonresident Corporations Based on a Single Act: A New Sole for International Shoe}, 47 Geo. L.J. 342 (1958).


\textsuperscript{27}Of course, in a case involving a newspaper as the Defendant, serious questions of
Adoption—Inheritance By Adopted Child—
Status As To Third Parties

Petitioner, guardian of the estate of the adopted minor child of the principal beneficiary of three trusts, instituted suit against the natural child of said principal beneficiary to enforce a claim to an undivided interest in the corpus of the trusts. Trust A, created in 1937, and Trust B, created in 1941, provided for descent to the principal beneficiary's "child or children" upon his death. Trust C, created in 1923, contained no provision for descent. Subsequent to the creation of the three trusts, the principal beneficiary married, fathered a child, divorced, married again, and adopted the child of his second wife. In 1946 the beneficial owners of Trust C, that is, the principal beneficiary and his sister, executed an instrument which stipulated the date of final disbursement as January 1, 1960, and which provided that the trust property would be delivered by the trustee to the beneficiaries on that date. That instrument further specified that the principal beneficiary's share "shall belong to the heirs of his body" should he die before January 1, 1960. The principal beneficiary died on May 7, 1958. Petitioner claimed under both the 1931 and 1951 Texas adoption statutes. The trial court excluded certain testimony which tended to show that two of the settlors used the terms "child or children" to include any child, natural or adopted. The trial court entered a judgment denying the claim, and on appeal the court of civil appeals affirmed.

Held: affirmed. (1) The legal relationship established by the adoption freedom of the press will also arise. This is particularly true in regard to an emotion-laden desegregation controversy where the newspaper's views may be distasteful to public opinion in a distant locality where the suit is brought; the difficulties in obtaining a fair-minded jury under such circumstances is self-evident. It should be noted that amicus curiae briefs were filed in behalf of The Times by both the Chicago Tribune and Atlanta (Ga.) Newspapers, Inc. (publishers of The Atlanta Constitution and The Atlanta Journal) contending that the trial court's ruling violated federal and state constitutional guarantees of freedom of speech and freedom of the press.

1 Tex. Acts 1931, 42d Leg., ch. 177, at 300:
   When a child is adopted in accordance with the provisions of this Article, all legal relationship and all rights and duties between such child and its natural parents shall cease and shall determine, provided however, that nothing herein shall prevent such adopted child from inheriting from its natural parent.

2 Tex. Acts 1951, 52d Leg., ch. 249, § 3, at 388:
   When a minor child is adopted in accordance with the provisions of this Article, all legal relationship and all rights and duties between such child and its natural parents shall cease and determine, and such child shall thereafter be deemed and held to be for every purpose the child of its parent or parents by adoption as fully as though naturally born to them in lawful wedlock.

RECENT DEVELOPMENTS

statutes is effective only "as between the adopting parent and the adopted child."\(^3\) (2) The settlors' intention as it existed at the time the trusts were created is determinative.\(^4\) *Cutrer v. Cutrer*, —Tex.—, 345 S.W.2d 513 (1961).

Adoption was unknown to the common law\(^5\) but has been practiced and recognized under civil law jurisprudence from its earliest days.\(^6\) Texas statutes early imported the civil law from Spanish and Mexican sources but modified the adoption provisions by giving the adopted party the position of a child only so far as to make him an heir of his adoptor.\(^7\) However, subsequent Texas adoption statutes have enlarged the rights of the adopted party.\(^8\) Because the rights of inheritance by or from an adopted child are entirely statutory, the various jurisdictions are far from uniform in their enactments.\(^9\)

The weight of authority in this country appears to be that an adopted child inherits from, but not through, his adoptive parents.\(^10\)

\(^3\) *Hock v. Hock*, 140 Tex. 475, 160 S.W.2d 638 (1943): This is the very plain intention of the statute under consideration. It intends, as to the child adopted under it, and, as between the adopting parent and the adopted child, to create a relation in law and in fact the same as exists under our laws between natural parent and natural child.

\(^4\) *Vaughn v. Vaughn*, 161 Tex. 104, 337 S.W.2d 793 (1960); *William Buchanan Foundation v. Shepperd*, 283 S.W.2d 325, *rev'd and rem'd by agreement*, 155 Tex. 406, 289 S.W.2d 553 (1956) (cardinal principle in construing a trust instrument is to ascertain settlor's intent with view of effectuating it).

\(^5\) 16 & 17 Geo. 3. c. 29 (1825); see *Humphrys v. Polak*, [1901] 2 K.B. 385.

\(^6\) *Vidal v. Commagere*, 13 La. Ann. 517 (1858) (children of adopted person become grandchildren of adopting person); see also *Hockaday v. Lynn*, 200 Mo. 456, 98 S.W. 585, 8 L.R.A.(n.s.) 117 (1906), where the court, discussing the historical background of adoption, stated that Hebrew, Roman, and other ancient civilizations recognized adoption and laid stress upon the religious aspect of providing an heir for a childless man.

\(^7\) *Adams v. Adams*, 102 Miss. 259, 59 So. 84 (1912) (child does not receive right to inherit from adoptive parent unless it is specifically granted by the decree). Under Pennsylvania law there is a complete substitution of inheritance rights from the natural to the adoptive family. See generally 4 Vernier, American Family Laws §§ 262-63 (1936); Menden, Handbook of the Law of Persons and Domestic Relations 362 nn. 38, 39 (1931).

On the other hand, a few jurisdictions have allowed the adopted child to inherit both from and through his adoptive parents. In some instances the adopted child has been permitted to take a legacy bequeathed to his adoptive parents under statutes providing that the "child" of a predeceased legatee may be substituted for the latter. On occasion, jurisdictions have allowed the adopted child to take under provisions of wills, insurance policies, and settlements in favor of the "child," "heir," or "issue" of the adoptive parent.

In determining the right of an adopted child to take under a will or trust, the intention of the testator or settlor is controlling. When the intention is not clear, it is determined by viewing the instrument in conjunction with legislative enactments pertaining to such wills and trusts. In determining whether gifts to "child or children,"

19 S.E.2d 97 (1935); Moore v. Moore, 35 Vt. 98 (1862); In re Bradley's Estate, 185 Wis. 193, 201 N.W. 973 (1921). These courts reason, inter alia, that statutes working a change in the canons of descent are to be strictly construed; the legislature should use explicit and unmistakable language to confer such rights; a testator who is not the adoptive parent has no obligation, moral or familial, to provide for such children; blood relationship has always been recognized by the common law as a potent factor in testacy and should not be treated lightly; and an adoptive parent has no moral right to impose upon another the status of a relative of an adopted child. For a harsh application of this doctrine, see In re Stewart's Estate, 30 Cal. App. 2d 594, 86 P.2d 1071 (1939), in which the court allowed an estate to escheat to the state, rather than permit the adopted children of a predeceased cousin of the intestate to take.

12 McCune v. Oldham, 213 Iowa 1221, 240 N.W. 678 (1932); Shick v. Howe, 137 Iowa 249, 114 N.W. 916, 14 L.R.A.(n.s.) 980 (1908); Denton v. Miller, 110 Kan. 292, 201 Pac. 693 (1922); Stearns v. Allen, 183 Mass. 404, 67 N.E. 349 (1900); In re Waddell's Estate, 185 Wis. 393, 201 N.W. 973 (1925). These courts reason, inter alia, that statutes working a change in the canons of descent are to be strictly construed; the legislature should use explicit and unmistakable language to confer such rights; a testator who is not the adoptive parent has no obligation, moral or familial, to provide for such children; blood relationship has always been recognized by the common law as a potent factor in testacy and should not be treated lightly; and an adoptive parent has no moral right to impose upon another the status of a relative of an adopted child. For a particularly liberal application of this doctrine, see Bedinger v. Graybill's Ex'r, 302 S.W.2d 594 (Ky. 1957), where a testatrix placed a fund in trust for her son for life, remainder to his heirs at law, and upon failure of heirs, to specified charities. Eighteen years after testatrix died the son adopted his wife. The court allowed the adopted wife to take under the will as a "child" of the son.

RECENT DEVELOPMENTS

“issue,” or “heirs of the body” include an adopted child, it will be presumed that the testator or settlor knew and acted in contemplation of the reciprocal rights and duties arising from the existing statutes relating to adoption.” Therefore, if no intention to the contrary is found and if the adoption statute can be interpreted to include an adopted child, when one other than the adoptive parent uses the term “child or children” in a will or trust the adopted child will usually take under it. However, in the construction of similar statutes, the courts of different jurisdictions have reached opposite results. Even the law in Texas seems unsettled.

The court in the instant case has taken a stand with those jurisdictions strictly construing statutes in derogation of the common law. The majority relied heavily on Hoch v. Hoch, a case not in point, where the court stated that the legal relationship established by the 1931 Texas adoption statute was effective solely as between the adopting parent and the adopted child. In the Hoch case the court expressly approved Eck v. Eck, a case declaring a provision of section 9 of the 1931 statute unconstitutional because of a caption defect. The majority in the principal case was very careful to stress

---

17 Mooney v. Toller, 111 Conn. 1, 149 Atl. 515 (1930); Hutchings v. Slemons, 141 Tex. 448, 174 S.W.2d 487, 148 A.L.R. 1320 (1943); Langer v. Miller, 124 Tex. 80, 76 S.W.2d 1025, 96 A.L.R. 816 (1934); Wilson v. Work, 122 Tex. 345, 62 S.W.2d 490 (1933); Harle v. Harle, 109 Tex. 214, 204 S.W. 317, 15 A.L.R. 1261 (1918). The court in Cutrer v. Cutrer, 345 S.W.2d at 517, states: It does not affirmatively appear that either the scrivener or any of the parties was familiar with the terms of the statute as written, but the trust instruments undoubtedly were prepared by a competent legal draftsman. If the statute is to be given any weight on the theory of presumed knowledge of the law, however, it must be assumed that the parties knew of its limited application and were also familiar with the decided cases.

18 In re Stanford’s Estate, 49 Cal. 2d 120, 315 P.2d 681 (1957); In re Ballantine’s Estate, 81 N.W.2d 259 (1957) (dictum); see cases cited note 12 supra.


21 See cases cited note 11 supra.

22 Hoch v. Hoch, 140 Tex. 471, 168 S.W.2d 638 (1943).

23 The principal question in the Hoch case, supra note 22, concerned the appointment of an administrator of the estate of a decedent.


25 Section 40 of the Texas Probate Code seems to have remedied this caption defect, according to the language of Rothman v. Gillett, supra note 24 (dictum).
the intention of the settlor at the time the trust was created and then proceeded to base its holdings on the Hoch case, construing the same 1931 statute on which petitioner relied. The court's holding with respect to Trust C is fundamentally sound, since the term "heirs of his body" was used in the 1946 instrument governing this trust. However, the court could easily have held differently with respect to Trusts A and B, because the controlling words in these trusts were "child or children." In effect, the court applied the intention and the terms of the settlor of Trust C to the other two trusts even though those trusts were couched in entirely different terms and were created by other settlors. Moreover, the exclusion by the court of extrinsic evidence pertaining to Trusts A and B seems erroneous, because these trusts were created at a time when it appeared that the terms employed would include adopted children. Even though the settlors' interpretation of the 1931 statute proved erroneous, it clearly seems that the trust instruments were ambiguous and the testimony of the surviving settlor should have been admitted to show her intention. Petitioner contended that the 1951 adoption statute should apply since a contingent remainder, which vested at the death of the principal beneficiary, was involved. The court rejected this theory, citing the case of Murphy v. Slaton where the court in construing a joint and mutual will held that the rights of all parties to property belonging to the testator and testatrix became fixed at the death of the testator and not at the death of the life tenant.

Valid arguments may be made for and against the decision.

---

29 See Restatement, Property § 306, comment g (1940). But see Guilmins v. Koonsman, 154 Tex. 401, 279 S.W.2d 179, 183 (1955) (word "issue" construed to mean child or children); Federal Land Bank v. Little, 130 Tex. 173, 107 S.W.2d 174 (1937) (word "heir" or "heirs" has often been construed to mean child or children) (dictum).
30 See Mooney v. Tolles, 111 Conn. 1, 149 Atl. 515 (1930); Munie v. Gruenewald, 289 Ill. 468, 124 N.E. 605, 607 (1919); Smyth v. McKissick, 222 N.C. 644, 24 S.E.2d 621 (1943); cases cited note 12 supra.
31 Trust A was created by Stella Cook Wessels; Trust B, identical in all respects with Trust A except for the amount, was created by Dr. Andrew B. Wessels; and Trust C was created by F. W. Cook, father of the settlor of Trust A.
32 See Tex. Acts 1931, 42nd Leg., ch. 177, at 300, quoted note 1 supra.
33 Caption held unconstitutional in Eck v. Eck, 145 S.W.2d 231 (Tex. Civ. App. 1940—Austin) error dism. judgm. cor.
34 See Wignmore, Evidence § 2472 (3d ed. 1940):
Declarations of intention, though ordinarily excluded from consideration, are receivable to assist in interpreting an equivocation—that is, a term which, upon application to external objects, is found to fit two or more of them equally.
35 345 S.W.2d at 518.
36 154 Tex. 33, 273 S.W.2d 188 (1954).
assuming the court’s ruling as to the settlors’ intention at the time of the creation of the trusts to be correct, the most persuasive argument in favor of the holding is that it prevents gifts in trust to parties contrary to the settlor’s intention. Yet it can well be argued that the decision, if followed in future cases, may defeat a settlor’s intention. There can be no doubt that the holding retrogresses from the legislative trend enlarging the rights of adopted persons, the Rothman v. Gillett case notwithstanding. However, it is too early to predict the results of the instant case. As its holding is only concerned with the right of adopted children to take from other than adoptive parents, it strongly indicates that the highest court of this state will strictly construe such statutes. Inasmuch as the court refused to follow the 1951 adoption statutes in arriving at its decision, it seems reasonable to assume that trusts containing the terms “child or children,” “issue,” and “heirs of the body,” created either by adopting parents or third persons prior to the enactment of these statutes, will not be construed to include adopted children. This case should serve as a warning to all future legal draftsmen preparing trust instruments to incorporate provisions that ensure the rights of children which may be adopted, considering, of course, the settlor’s intention.

Charles O. Smyre

Bills and Notes—Material Alterations—Filling in Blanks

Plaintiff in October 1958 filed suit in the District Court of Dallas County, basing his claim upon a verified account and in the alternative upon a note which had been executed by Defendant in December 1953. The note was payable to the order of Ray K. Glenn “at

31 5 S.W.2d 956 (Tex. Civ. App. 1958—Fort Worth) error ref. n.r.e. Although this case is not in point, it illustrates the trend toward enlarging the rights of adopted persons. A Mrs. Alice McMullen died on or about November 27, 1954, intestate as to a portion of her estate. Several persons adopted prior to 1920 by sisters of Mrs. McMullen who had predeceased her were declared capable of inheriting from and through collateral kin of the deceased, by reason of the 1951 amendment of Tex. Rev. Civ. Stat. Ann. art. 46a, § 9, notwithstanding the opening words of § 9: “When a minor child is adopted in accordance with the provisions of this article...” The court expressly emphasized the quoted clause and after briefly discussing the arguments of the opposing parties held:

Under the record made in the case there is no question but that all these appellees were “lawfully adopted children” of their adoptive parents. Their status in this respect was occasioned by and incident to the form and procedure of their adoption, and under and by reason of the provisions of V.A.T.S., art. 46b (as originally enacted and amended), which validated their adoptions and the instruments under which their adoptions were intended to be effective. (p. 937)
Tarrant County, the county of his residence. After the plea was filed, Plaintiff filled in the blank space with the words "Dallas, Texas" and notified Defendant of the legal authority upon which it had relied. Plaintiff, however, nonsuited in Dallas County and then filed a suit in the District Court of Tarrant County on the same claims as had been filed in Dallas County. Defendant pleaded that the note was avoided by the action of the Plaintiff in filling in the blank space because the addition constituted a material alteration and moreover, that the verified account was untrue. The trial court sustained this contention, and the court of civil appeals affirmed. Held, reversed: The filling in of a blank space on a promissory note is not a material alteration since there is implied authority to make the completion; however, the insertion must be made within a reasonable length of time after issue. Republic Nat'l Bank v. Strealy, —Tex.—, 350 S.W.2d 914 (1961).

The rules of law governing bills and notes have been codified in the Uniform Negotiable Instruments Act, which was approved in 1896 and subsequently adopted in every state. The Act attempted to provide uniformity throughout all the states and the commercial world by adopting the generally prevailing view—that of the law merchant. The portions of the Act relevant to this case are sections

1 348 S.W.2d 284.
2 The court, however, permitted recovery on the verified account, finding that there had not been a novation of the original account by execution of the note.


§ Uniform Laws Annot. pt. 1, xiii (1943). However, the Uniform Commercial Code, which supersedes the Uniform Negotiable Instruments Act, has been recently adopted in the states of Arkansas, Connecticut, Illinois, Kentucky, Massachusetts, New Hampshire, New Mexico, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, and Wyoming. § Uniform Laws Annot. 1 (Supp. 1961).

3 Britton, op. cit. supra note 2. Many conflicts had developed within the several states in the field of negotiable instruments due to various factors. Beutel, Colonial Sources of the Negotiable Instruments Law of the United States, 34 Ill. L. Rev. 137 (1939). The most influential factors were: (1) the English common law—Since very few of the local cases were reported and many of the statutes were not printed, and because English cases and treaties were usually available, both the courts and the bar easily came under the influence of the King's Court. (2) the traditional law merchant—During the reign of James I and for the next one hundred years, England had the separate system of Law Merchant. Georgia, North Carolina, and South Carolina continued such a system long after the revolution. (3) a strong hostility to English law—A demonstration of the hostility was the passing of statutes by Pennsylvania, Kentucky, and New Jersey which forbade the courts to take notice of English common law, English cases, or any compilation, commentary, digest, lectures, treatise, or other explanations of the law. (4) the growth of new banking institutions—To pay off debts as the result of the various wars, bills of credit began to flood the states, and to bolster the credit systems, state banks were created with circulating privileges. (5) the enactment of statutes influenced by local customs—To enforce the rights of assignees of commercial paper, many states passed statutes which were based on local custom and commercial practice. Beutel, The Development of State Statutes on Negotiable Paper Prior to the Negotiable Instruments Law, 40 Colum. L. Rev.
14, 124, 7 and 125. All of these sections are declaratory of the common law. Section 124 of the Act declares that any negotiable instrument which is materially altered is avoided. Section 125 lists as alterations any change in the (1) date, (2) sum payable, either for principal or interest, (3) time or place of payment, (4) number or relations of the parties, (5) medium or currency with which payment is to be made, or (6) any change which adds a place of payment where no place is specified. The inclusion of the phrase "... or any other change or addition which alters the effect of the instrument in any respect ..." means that any change in the instrument which would produce a different effect from that of the original form is sufficient to avoid the note. However, there are some changes


8 N.I.L. § 14:
Where an instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

7 N.I.L. § 124:
Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

8 N.I.L. § 125:
Any alteration which changes:
(1) The date;
(2) The sum payable, either for principal or interest;
(3) The time or place of payment;
(4) The number or the relations of the parties;
(5) The medium or currency in which payment is to be made;
Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.


that do not affect the validity of the instrument, e.g., the addition of descriptive words regarding the subject matter, a change in the marginal figures, and marginal notations. These modifications in no way affect the body of the note or the original obligation between the parties. In contrast to sections 124 and 125, section 14 confers authority upon the holder of any instrument to provide wanting "material particulars" by filling in the blanks. However, the filling in must be done strictly within the authority as conferred by the issuer and within a reasonable time.

These rules have been applied to the place of payment provisions. The place of payment is generally considered to be material to the instrument, and any change in or addition to the place of payment is generally held to be a material alteration. However, the absence of the place of payment does not impair the negotiability of the instrument, since a note is presumed to be payable at the place

held to constitute material alterations are: change of the words "order" to "bearer," First Nat'l Bank v. Wood, 109 S.C. 70, 95 S.E. 140, 1918D L.R.A. 1061; addition of a seal, Bowman v. Berkey, 259 Pa. 327, 101 Atl. 49 (1918); addition of the names of witnesses to a signature, Cook v. Parks, 46 Ga. App. 749, 169 S.E. 208 (1933); Swank v. Kaufman, 255 Pa. 316, 99 Atl. 1000 (1917); erasure of the words "without recourse," Waltham State Bank v. Tuttle, 160 Minn. 250, 199 N.W. 970 (1924); Pittman v. Bell, 196 N.C. 803, 144 S.E. 522 (1928); writing in of the word "surety" after the name of one of the co-makers, Eastman Nat'l Bank v. Naylor, 139 Okla. 229, 266 Pac. 778 (1928); the fraudulent notation by the payee of fictitious credits in favor of two several joint makers, Voris v. Birdsell, 62 Okla. 286, 162 Pac. 911 (1917); Washington Fin. Corp. v. Glass, 74 Wash. 651, 134 Pac. 480, 46 L.R.A.(n.s.) 1043 (1913); extension of the date of maturity, Fairfield County Nat'l Bank v. Hammer, 89 Conn. 592, 95 Atl. 31 (1917); Moskowitz v. Deutsch, 46 Misc. 603, 92 N.Y. Supp. 721 (1901); acceleration of the date of maturity, Polomaki v. Laurell, 86 Ore. 491, 168 Pac. 935 (1917); changes in the place of payment, First Nat'l Bank v. Barnum, 160 Fed. 245 (M.D. Pa. 1908); Marion Sav. Bank v. Lesby, 200 Iowa 220, 204 N.W. 456 (1925).

12 Whittier v. First Nat'l Bank, 73 Colo. 153, 214 Pac. 536 (1923).
14 N.I.L. § 14. What is a reasonable time is a question for the trier of facts, Griffin v. Mullin, 21 S.W.2d 109 (Mo. App. 1929), unless the facts are clearly established, in which event it is a question of law, Brown v. Thomas, 120 Va. 763, 2 S.E. 782 (1917), and the question must be determined by the circumstances of each case, In re Ferrara, 109 N.J. Eq. 49, 116 Atl. 265 (1931). See also N.I.L. § 193, which reads: "In determining what is a 'reasonable time' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case."
15 Commercial Sec. Co. v. Donald Drug Co., 112 S.C. 457, 100 S.E. 359 (1919);
16 Wright v. Austin, 1 S.W.2d 703 (Tex. Civ. App. 1928—San Antonio) no writ hist.
17 N.I.L. § 125 (3); Commercial Sec. Co. v. Donald Drug Co., supra note 15.
19 N.I.L. § 6:
(1) It...
(1) Does not specify the place where it is drawn or the place where it is payable. . . .
where it is dated.\textsuperscript{20} The importance of the place of payment with respect to the relations between the parties is clear in two situations. First, section 87\textsuperscript{21} declares that "where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." This has been interpreted as designating the bank as agent of the maker and therefore is of real importance as to the method of payment.\textsuperscript{22} Second, in most cases venue can be predicated upon the place of performance of the contract.\textsuperscript{23} Therefore, if suit must be filed, the place of payment becomes critical in establishing the location for the action.\textsuperscript{24}

In the principal case the Defendant contended that since the Plaintiff had added a place of payment where no place of payment was specified, there was a material alteration under section 125, and according to section 124 the note was null and void. This contention, if sustained, would have caused a conflict between those sections and section 14, where the holder is given prima facie authority to fill in the blanks of any material particular. The court started with the assumption that the legislature did not intend that the sections be in conflict and that it was the court's duty to reconcile the two provisions. Section 125 is concerned with a "change" and an "addition" while section 14 deals with "completions" or "filling in the blanks." A change clearly means marking out, erasing, detaching, or writing over another part.\textsuperscript{25} However, the court rationalized that "addition," as used in section 125, means the insertion of a new clause where there is no blank space; whereas, "completion," as used in section 14, means the insertion of a new clause in the blank space provided. Because the note in this case had a blank space for filling in the place of payment, section 14 would apply and not section 125. Necessarily then there could have been no material alteration and no avoidance of the note.

The distinction drawn between sections 14 and 125 seems clearly correct. It must be presumed that the drafters of the uniform act did not intend that the two sections be in conflict. Other jurisdictions which have dealt with the problem of a possible conflict have

\begin{itemize}
\item\textsuperscript{20} Hughes v. R. O. Campbell Coal Co., 201 Ky. 839, 258 S.W. 671 (1924).
\item\textsuperscript{21} N.I.L. § 87.
\item\textsuperscript{22} See Iowa Loan & Trust Co. v. Seaman, 203 Iowa 310, 210 N.W. 937 (1926); United States Nat'l Bank v. Shupak, 54 Mont. 542, 172 Pac. 324 (1918).
\item\textsuperscript{23} See, for example, Tex. Rev. Civ. Stat. Ann. art. 1995-5 (1950), where suit may be brought in the county of performance where such county is expressly stated in the written contract.
\item\textsuperscript{24} The principal case is an example of this importance.
\item\textsuperscript{25} Citizens' State Bank v. Martens, 204 Iowa 1378, 215 N.W. 714 (1927); Diamond Distilleries Co. v. Gott, 137 Ky. 583, 126 S.W. 131 (1910).
\end{itemize}
ruled in accordance with the principal case. Furthermore, the reasoning is in harmony with the common law rule that where a writing containing unfilled blanks has been delivered there is implied authority to fill in the blanks. In considering whether the words “material particular” in section 14 include the place of payment (the place of payment not being necessary for negotiability), the court relied on decisions from other states which declare “that a ‘material particular’ does not mean such as may be necessary to make the instrument a negotiable note, but includes ‘any particular’ proper to be inserted in such an instrument.” This reasoning is supported by the fact that section 1, which lists the formal requisites of a negotiable instrument, uses the term “requirements” instead of the term “particular.” This variation in terminology indicates that the drafters of the uniform act did not intend that the authority to fill in blanks be limited to the formal requirements of negotiability but that it be applicable to any item considered material to the holder. Obviously, as the principal case illustrates, the place of payment is material to the holder. Since the holder had the prima facie authority to fill in the blanks, only an express agreement between the parties would circumvent section 14. Because there was no evidence of such an agreement, the court found the statutory presumption to be existing. Section 14 also requires that any filling in be done within a reasonable length of time. In the instant case Plaintiff failed to make any pleading on the point. Because Plaintiff had the burden of pleading and proving compliance with the reasonable time requirement, the court felt it could not enforce the note, since as a matter of law it could not say that the blank had been filled in within a reasonable time. The ruling appears correct. One

---


27 See Mazzac v. Lincoln Bonding & Ins. Co., 169 Neb. 629, 100 N.W.2d 881 (1960); Simpson v. First Nat’l Bank, 94 Ore. 147, 185 Pac. 913 (1919); Holman v. Higgins, 114 Tenn. 387, 183 S.W. 1008 (1916); Curlee Clothing Co. v. Wickliffe, 126 Tex. 173, 91 S.W.2d 677 (1936).


25 350 S.W.2d at 918-19.

23 N.J.L. § 1: “An instrument to be negotiable must conform to the following requirements: . . .” [Emphasis added.]


22 350 S.W.2d at 919.

20 Justice Smith, concurring, stated that he would permit recovery on the note by placing the burden of proof as to the reasonable time on the Defendant. His theory was
asserting any right has the burden of proving that he has complied with all requirements before being entitled to recovery.\textsuperscript{24}

The supreme court's holding in the principal case places Texas in line with the other states.\textsuperscript{25} This result is desirable from a commercial and a practical standpoint in that it continues to carry out the primary purpose of the Uniform Negotiable Instruments Act, \textit{i.e.}, to have a uniform system of rules for bills and notes in all the states.\textsuperscript{26} The holding also promotes the purpose for which the bill and the note were created, namely, to substitute for cash as media of exchange. Thus, the businessman can feel more secure in his dealings with persons from other states by knowing that the rules of law applicable to any negotiable instrument involved in a transaction will be the same. Moreover, the principal case is important in placing venue. The holder of an instrument, to facilitate collection, should be able to maintain the suit at his convenience; and where venue is predicated upon the place of performance, the place of payment becomes significant. Since a note is to circulate freely, a holder instituting litigation should be able to choose his forum. The principal case permits a holder to make that choice by authorizing him to fill in the place of payment without risk of avoiding the note.

\textit{Ottis Jan Tyler}

\begin{quote}
that since the Plaintiff had prima facie authority to fill in the instrument, it must be presumed that the blank had been filled in within a reasonable length of time. He stated: This is especially true in the absence of any pleading or proof that Strealy suffered injury as a direct result of the delay of the bank in actually filling in the blank, an act which had been impliedly authorized upon delivery of the note. Why should the blank be required to prove that it acted within a reasonable time when there was no denial or claim that it had not so acted. 350 S.W.2d at 921-22.

Compare, however, Madden v. Gaston, 137 App. Div. 294, 121 N.Y. Supp. 951 (1910), which held that in resolving the reasonable time question there is no presumption one way or the other.

\textsuperscript{24}Madden v. Gaston, \textit{supra} note 33; Massey v. Massey, 267 Pa. 239, 110 Atl. 341 (1919); Brown v. Thomas, 120 Va. 763, 92 S.E. 977 (1917).

\textsuperscript{25}It is interesting to note that the civil appeals decision stated that the holdings of other jurisdictions were not uniform. 343 S.W.2d at 286. The court then proceeded to discuss several cases which were contrary (see cases cited note 26 \textit{supra}) to its position but failed to discuss or cite any case supporting its holding. It may be pointed out that no case has been found in support of the civil appeals position. See \textit{S Uniform Laws Annot.} §§ 14, 123 (1943) for a collection of all the cases.

\textsuperscript{26}See Britton, \textit{op. cit. supra} note 2, at § 4.