Recent Case Notes

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RECENT CASE NOTES

COMMUNITY PROPERTY — DEED RECITALS — PAROL EVIDENCE

The testatrix, during her marriage to the plaintiff, acquired three tracts of land, the deed to each reciting that the conveyance was made to her as her separate property. Consideration for the first two deeds consisted of cash and notes signed by testatrix; for the third, cash and a cashier’s check based upon a loan from a bank. Both testatrix and plaintiff signed a note payable to the bank, which was secured by a deed of trust describing all three tracts of land. There was no evidence of any direct participation in the three transactions by the plaintiff beyond these signatures. In an action against beneficiaries under said testatrix’s will plaintiff sought to establish that all three tracts of land were community property. Held, the first two tracts were community, as the recitals were rebuttals by parol evidence; the third tract was separate, as plaintiff was a “party to the transaction” in which testatrix acquired this tract and therefore could not overcome the recitals. Hodge et al. v. Ellis, ..........Tex..........., 227 S.W.2d 900 (1955) (6-3 decision).

There is usually a rebuttable presumption that property acquired during the marital state is community property. Tex. Rev. Civ. Stat. (1925) art. 4619; Allardyce v. Hambleton, 96 Tex. 30, 70 S. W. 76 (1902); Wilson v. Wilson, 145 Tex. 607, 201 S.W.2d 226 (1947). It has been held in many cases that this presumption is replaced by a presumption in favor of the separate property of the wife where the deed recites that the property is being conveyed as her separate property or that the consideration is paid from her separate property. McCutcheon v. Purinton, 84 Tex. 603, 19 S.W. 710 (1892); Paudler v. Paudler, 210 F.2d 765 (5th Cir. 1954); Markum v. Markum, 273 S.W. 296 (Tex. Civ. App. 1925) error dism.

In applying the “party to the transaction” test in the principal case the court reasoned that participation in the transaction by the husband would make the presumption of separate property conclusive. If consideration subsequently moved from the hus-
band’s separate estate it would be regarded as a gift to the wife. In this respect, although beyond the scope of this note, the principal case seems at least by inference to overrule the statement in *Gleich v. Bongio*, 128 Tex. 606, 99 S.W.2d 881 (Tex. Comm. App 1937): “Mere intention... cannot convert property purchased with an obligation binding upon the community into the separate estate of either spouse.... The vendor must have agreed with the vendee to look only to his or her separate estate for... payments.” The brief dissenting opinion in the principal case took the position that evidence was undisputed to the effect that the plaintiff had no knowledge of the contents of the deed to the third tract and that no donative intent could be found, reasoning in this connection that his signing of the note and deed of trust did not prove knowledge by him of the deed’s recitals, or manifest his consent thereto.

When consent of the husband to deed recitals of separate property is ascertained, courts have not been reluctant to determine the property to be the separate estate of the wife. Acquiescence is an inescapable conclusion when recitals appear in a deed drawn under a husband’s personal direction. *Smith v. Buss*, 135 Tex. 556, 144 S.W. 2d 529 (1940). When evidence has failed to show lack of knowledge and assent to the recitals, property has been held to be separate where the husband signed vendor’s lien notes. *Goldberg v. Zellner*, 235 S.W. 870 (Tex. Comm. App. 1921); *Paudler v. Paudler*, supra. During a period in which the husband by statute exercised management over both the community estate and the separate estate of the wife, it was presumed that the husband had knowledge of such a recital, the presumption being based on the statutory right of management. *McCutchen v. Purinton*, supra. But the statute has since been changed as regards the management of the wife’s separate estate, and this reasoning is no longer appropriate. *Tex. Rev. Civ. Stat.* (1925) Art. 4614. As the dissenting opinion in the principal case suggests, the problem arises in determining just when knowledge and assent can be presumed, if at all. Several of the above cases were cited by the majority, but in all of them the evidence of knowledge and assent seemed more compelling than in the principal case.

Texas courts have on occasion invoked the parol evidence rule to prohibit attack by a husband on recitals in a deed to the wife.
The test for application of the rule is closely analogous to the test for finding an implied gift on the basis of the recitals, and seems to be a matter of degree of participation by the husband in the transaction. Hence, the rule has been invoked when the husband himself was the grantor. Kahn v. Kahn, 94 Tex. 114, 58 S.W. 825 (1900); McKivett v. McKivett, 123 Tex. 298, 70 S.W. 2d 694 (1934); Davis v. Davis, 141 Tex. 613, 175 S.W. 2d 226 (1943). The same result prevailed when a husband was found to have given his assent to the deed by signing the contract of sale. Lindsay v. Clayinan, 151 Tex. 593, 254 S.W. 2d 777 (1952).

As an alternative basis for its decision, the court in the principal case invokes the parol evidence rule by finding the husband to be a party to the entire transaction by virtue of his participation in a part. In an apparent extention of earlier principles, knowledge and assent to the recitals is imputed as a matter of law.

Certainly any participation by the husband is material in transactions where recitals of the separate nature of property are involved. But it is submitted that such participation should be examined not as a solution in itself, but as evidence toward the ultimate question of whether he actually knew of the recitals, and, if consideration was to come from other than the separate property of the wife, whether a gift was intended. Such would, it seems, be consistent with the earlier decisions in Texas, and afford due respect to the presumption that property acquired during the marriage is that of the community.

Wm. D. Powell, Jr.

CONSTITUTIONAL LAW — PRIVILEGE AGAINST SELF-INCRIMINATION — IMMUNITY

Defendant, being questioned before a grand jury as to matters of national security and defense, refused to answer certain questions on grounds of self-incrimination, claiming protection under the Fifth Amendment. The U. S. Attorney sought to have the defendant answer the questions by invoking 68 Stat. 745, 18 U.S.C. 3486. The statute provides that in matters of national security and when in the judgment of the U. S. Attorney the defendant's testimony is necessary in the public interest, a witness who has asserted his privilege against self-incrimination may be
compelled to testify before a grand jury in return for immunity from prosecution on any matter concerning which he is compelled to testify. Furthermore, his testimony shall not be used as evidence in any criminal proceeding against him in any court. The defendant claimed that the statute is unconstitutional, and that the grant of immunity does not give him sufficient protection to compensate for his privilege against self-incrimination. Held: Statute is constitutional and is sufficiently protective of defendant’s rights. *In re Ullman*, 128 F. Supp. 617 (S.D.N.Y. 1955).

This case is the first under the amended statute, which is interpreted to mean that Congress can extend immunity to federal witnesses with regard to all state prosecution. Such Congressional grants have been upheld since *Brown v. Walker*, 161 U. S. 591 (1896), as long as the immunity provides full and complete substitution for the privilege against self-incrimination. *Counselman v. Hitchcock*, 142 U. S. 547 (1892).

The principle has gone through various phases, the most liberal of which came as a result of *Murdock v. United States*, 284 U. S. 141 (1931), in which the court held that the Congressional immunity statute granted sufficient protection under the Fifth Amendment as long as federal prosecution was barred, and that protection from state prosecution was not necessary.

Despite this interpretation which allowed Congress full investigative power, the legislature continued to modify the statute, extending additional protection to the witness. Before the statutory amendment presently under consideration, the protection had increased to the point that the state could not use any testimony which the witness had divulged in federal examination. The state could prosecute, apparently, upon its own evidence. *Adams v. Maryland*, 347 U. S. 179 (1954).

The present amendment to Section 3486 extends to the witness full protection from all prosecution in any court, state or federal, as to any matters testified about before a federal grand jury. The question must then be asked: Does Congress have such broad and sweeping power as to prevent the execution of normal state police powers?

The first link in supporting such power can be found in *McGrain v. Daugherty*, 273 U. S. 135 (1927), where it was held a
legitimate use of the "legislative power" for Congress to compel an individual to give testimony before one of its committees. With this principle established, Congress may pass such laws as are "necessary and proper" to realize its power to obtain testimony. U. S. Const. Art. I, Sec. 8. There is no doubt that the statute is within the accepted definition of the "necessary and proper" clause as set forth in McCulloch v. Maryland, 4 Wheat. 316 (1819), in so far as it applies to Congressional committees. The only serious constitutional objection to the statute is that it also applies to federal grand juries. Since a grand jury's investigation is for the purpose of returning indictments, such an investigation would not seem to be an exercise of the "legislative power" or necessary and proper to the enactment of legislation. The justification for extending the immunity to grand jury investigations is that such legislation is necessary for the public security and defense, which is of paramount national concern and therefore within the scope of Congressional power.

Once it is established that Congress has the power to legislate on the subject, laws passed in the exercise of that power become the "supreme law of the land" by U. S. Const. Art VI, Sec. 2, and are therefore binding on the states, without regard to their own laws on the subject.

It will be said that this latest development is a dangerous usurpation of state's rights. The accuracy of this statement will not be disputed, but in view of the past decisions of the Supreme Court it would seem clear that the constitutional validity of this amendment to the statute will also be upheld by that court. It can be shown that Congress has the power to enact laws in this field, and with this power established, the various degrees in which Congress may act would be for them to decide at their own discretion. Their constitutional right to do so should be, and has been, affirmed.

Thomas H. Davis, IV.

Federal Income Taxation — Community Property — Estate Administration

Taxpayer, a widow and resident of Texas, paid the tax on income accruing from her half of the community property after her
husband's death, which property was being held by her husband's executor. The commissioner asserted that the executor should report all of the income from community property. *Held:* The taxpayer was correctly paying the tax, because income accruing to the property which belonged to the former community belongs under Texas law one-half to the surviving spouse and one-half to the decedent's estate. *Sneed v. Commissioner,* 220 F.2d 313 (5th Cir. 1955), affirming 17 T.C. 1344 (1952).

The Commissioner relied on *Barbour v. Commissioner,* 89 F.2d 474 (5th Cir. 1937), which held an administrator liable for payment of the tax on all income from the community property received during the administration of the estate and not disbursed to the widow. In holding that the income was taxable to the estate, rather than to the ultimate recipient, the *Barbour* case had relied on Article 3630 Tex. Rev. Civ. Stat. (1925), and on Texas decisions, such as *Lovejoy v. Cockrell,* 63 S.W.2d 1009 (Tex. Comm. App. 1939), which give an administrator power over the community property during his administration to the exclusion of the widow.

Each judge of the Court of Appeals wrote a separate opinion in the principal case. Judge Holmes held that the executor has the primary duty to report such income; but if he fails to do so, there is no reason why the widow should not attend to it herself. The executor is the widow's agent or trustee, handling her half of the community funds to pay community debts. He limited the *Barbour* case to instances in which the widow had neither paid the tax nor received the income from her half of the community estate. His opinion leaves optional who should pay the tax and ignores possible tax avoidance due to different tax brackets of widow and estate. Judge Rives concurred specially, holding the *Barbour* case indistinguishable. The executor, as the widow's agent or trustee, never actually acquires title to the widow's half of the community property. Except to pay one-half of the debts, the executor has no rights to her half, and the widow's ownership continues uninterrupted. Judge Rives' opinion and that of the Tax Court would overrule the *Barbour* decision. When the indebtedness of the community exceeds its assets, this view would result in
taxing money never received by the widow. This result is not unjust for the widow owed the debts paid by the administrator. Judge Tuttle dissented, stating that the two cases could not be distinguished. He stressed the clear holding in the *Barbour* case that the tax on the community estate was the liability of the executor and not that of the widow. Such income under the *Barbour* rule is not income to the widow until she has received it from the executor. That rule avoids the apparent injustice of taxing the widow for money she may never receive.

The death of either spouse dissolves the community, but it is deemed to continue for the purposes of administration and liquidation of the deceased spouse's estate. *Hooke's Succession*, 46 La. Ann. 353, 15 So. 150 (1894); *Bortle v. Osborne*, 155 Wash. 585, 285 Pac. 425 (1930). It is fairly well established in other states that an executor is only taxable on one-half of the income from the former community property, the other half being taxable to the surviving spouse. *Bishop v. Commissioner*, 152 F.2d 389 (9th Cir. 1954). The executor is not taxed on the entire community income because the surviving spouse's share of the community property is not a part of the estate of the deceased spouse, although for practical reasons the survivor's share is subject to administration along with that of the decedent. *Henderson's Estate v. Commissioner*, 155 F.2d 310 (5th Cir. 1946), and for a collection of cases, see 164 A.L.R. 1036 (1946).

Texas law has not been as clear concerning this problem as that in other states. Under the *Barbour* decision, where the husband died, the administrator was held liable for the tax on all of such income. However, the rule is contra where a husband acts as his wife's executor. In *Blackburn's Estate v. Commissioner*, 180 F.2d 952 (5th Cir. 1950), the deceased wife's estate was held subject to tax on only one-half of the income from the former community property, leaving the surviving husband taxable on the other half. The principal case did not settle this conflict. The decision leaves this area of the law more confused that it was. Had widow Sneed chosen not to pay the tax, who would have to pay it? Under the *Barbour* rule the executor owes the tax. Under the Sneed rule the executor still has the primary duty to pay, but the
surviving widow can pay the tax if she so desires. Under the rule of the Blackburn case, where the husband is the survivor, he would be liable. The majority rule, from most other states, and the most logical rule, would hold the survivor liable for his half of the tax, whether the survivor is husband or wife, on the ground that the executor never really had a taxable interest in the income from the survivor’s share of the community property. *U.S. v. Merrill,* 211 F.2d 297 (9th Cir. 1954); see also 3 MERTENS, LAW OF FEDERAL INCOME TAXATION § 19.45 (Supp. 1955), which endorses the Tax Court’s opinion in the principal case.

In analyzing the legal principles involved in these cases, one must consider them in the light of basic principles of taxation. Income should be taxed to its owner. *Helvering v. Horst,* 311 U.S. 112 (1940). However, the Barbour decision taxed the administrator, not as the owner of the money, but as the person with temporary exclusive control over it. This confusion of control with ownership explains the result, but cannot justify it. Subsequent decisions have limited or distinguished the Barbour case, trying without overruling it to force the law back to the principle of taxing income to its owner. The Blackburn case, holding the Barbour rule inapplicable when the wife was the deceased, and the Sneed, making payment by the widow optional, are two examples of this judicial limitation.

The practical effect of the Sneed case, when combined with the Blackburn case and the vast weight of authority from other states, is that the Barbour case, although not actually overruled, has been stripped of authority. It is undesirable to have two lines of decision—one covering the wife as survivor under the Barbour rule, the other covering the husband as survivor under the Blackburn rule. In the past, taxpayers have taken advantage of the Barbour decision by end-of-the-year disbursements from the estate to the surviving widow to equalize the income between the two taxpayers. It is submitted that in the future, the Internal Revenue Service is not likely to permit such apportionment of income between surviving spouse and decedent’s estate.

Robert N. Best.
MINES AND MINERALS—COMPULSORY DRILLING AND PRODUCTION
UNITS—CORRELATIVE RIGHTS

Under statutory authority, an administrative commission established drilling units within an extensive gas producing area. Each unit was to contain one well with the production therefrom to be shared by the members of the unit in proportion to the number of acres owned. The lessor and lessee of the land on which a well is located appeal from the order on the ground that there is no absolute evidence that the gas reservoir extends throughout their particular unit. Held: The commission order is valid and does not constitute the taking of appellants' property without due process of law. *Panhandle Eastern Pipe Line Co. v. Corporation Comm'n, Okla.* 285 P. 2d 847 (1955).

The principal issue involved in this type of case is who is entitled to share in the production from the particular well. To decide this issue, the correlative rights of the mineral owners in the common pool must be determined. Early cases held that if a land owner had the right to drill a well, he had the right to produce all the oil and gas from the common reservoir, regardless of whether he might drain his neighbor's property in the process; it was also recognized that the adjoining landowner had the correlative right to go and do likewise. *Bernard v. Monongahela,* 216 Pa. 362, 65 Atl. 801 (1907); *Kelly v. Ohio Oil Co.,* 57 Ohio St. 317, 49 N.E. 399 (1897); *Westmoreland & Cambria Nat. Gas Co. v. Dewitt,* 130 Pa. 235, 18 Atl. 724 (1889). Later cases placed some restrictions on this law of capture where to follow it would be wasteful or illegal. For example, one correlative right of the land owner is to not have the common reservoir negligently damaged by his neighbor. *Elif v. Texon Drilling Co.,* 146 Tex. 575, 210 S.W. 2d 558 (1948). However, there is no correlative right to do an illegal act. Therefore, if a well is drilled in violation of a well spacing permit the adjacent land owner cannot go and do likewise. *Loeffler v. King,* 228 S.W. 2d 201 (Tex. Civ. App. 1950) *rev'd on other grounds,* 149 Tex. 626, 236 S.W. 2d 772 (1951). A recent Mississippi case would further modify the law of capture by conferring upon a member of a common reservoir the correlative right to not have the reservoir depleted.
Most oil and gas producing states have sought to regulate the drilling and production of these minerals in order to prevent waste and to adjust correlative rights. They have generally been upheld in this by virtue of their police powers. *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1900). The Oklahoma spacing unit statutes here in controversy, 52 Okla. Stat. § 87.1, (1951) were upheld in *Patterson v. Stanolind Oil & Gas Co.*, 181 Okla. 155, 77 P.2d 83 (1938), appeal dism., 305 U.S. 376 (1939).

The principal case considers the extent to which the reservoir must underlie the entire drilling unit. Before drilling units are established, the Corporation Commission of Oklahoma hears evidence upon the extent of land drained by each well. The finding of the Commission as to the extent of the drainage is upheld by the courts when supported by substantial evidence. *Patterson v. Stanolind Oil & Gas Co.*, supra. The burden is upon the party challenging the order to show that the Commission finding is not based on such evidence. *Grisom Oil Corp. v. Corporation Comm’n*, 186 Okla. 548, 99 P.2d 134 (1940). Some confusion could result from the manner in which the court in the principal case refers to a requirement that all land in a drilling unit must overlie the reservoir. The statute dealing with drilling units does not require this, 52 Okla. Stat. § 87.1 (1951), although the statute dealing with field wide unitization does contain such a provision, 52 Okla. Stat. § 287.4 (1951). Of course, constitutional law would demand that the drilling unit statute be interpreted as meaning that no person without an actual interest in the reservoir could share in the production. However, the problem of proving a lack of interest is difficult in view of the fact that the Commission’s findings as to the extent of the pool are final when supported by substantial evidence. *Patterson v. Stanolind Oil & Gas. Co.*, supra.

Further confusion could result from the principal case in connection with the court’s discussion of the possibility of modifying the drilling unit at some date in the future when further evidence of the true shape of the gas reservoir is available. Undoubtedly, there could be such an adjustment under the drilling unit statutes, 52 Okla. Stat. § 87.1 (c) (1951). For this proposition, the court
cites two cases, both styled Spiers v. Magnolia Petroleum Co., 206 Okla. 503, 244 P.2d 843 (1951); 206 Okla. 510, 244 P.2d 852 (1951). Both of these opinions involve the problem of field wide unitization, and not separate drilling units, which was the subject before the court for decision in the principal case.

In this opinion, the court combined the separate appeals of lessor and lessee. The consolidation of these appellants further precludes clarity in the decision. Usually, lessors would not be involved directly in litigation of this type because their rights are normally determined when the drilling unit is established. 52 Okla. Stat. § 87.1 (1951); Patterson v. Stanolind Oil & Gas Co., supra. Under ordinary circumstances, the statute provides that the lessor will share on an acreage basis. However, since it appears from the decision that the lessor was challenging the basis on which he is to share in the production, this case may stand for the proposition that a lessor is entitled to dispute the statutory acreage formula for dividing the royalty, after the drilling unit has been established.

The true holding of the case cannot be disputed because to require absolute proof that all parts of a drilling unit overlie the producing reservoir would be to sanction the wasteful practice of excessive drilling, the prevention of which is the whole purpose of the legislation. Also, as the court pointed out, it is not seriously contended by appellants that the well does not drain an area the size of the drilling unit. Since the Commission has found this contested unit to be the area in fact drained, the correlative rights of the parties involved are properly adjusted.

Louis Phillip Bickel.

MINES AND MINERALS — MERGER — EXPIRATION OF MINERAL LEASE WITH SURFACE LEASE SUBJECT TO IT

Martin executed a five-year sand and gravel mining lease. Shortly thereafter he executed a five-year agricultural lease to Hagar of land covered by the prior mineral lease. Hagar's surface lease was renewable upon the same conditions and covenants, among which was the right of the mineral lessee to conduct mining operations on the land covered by the surface lease. Near the
end of his term Hagar gave notice of renewal while the original mineral lease was in force. The original mineral lease expired and was not renewed; some time later Martin executed the present mineral lease which also covers the land held by Hagar. When the mineral lessee sought to begin mining operations, Hagar refused to let him enter. Held: Hagar was enjoined, and the mineral lessee was allowed to enter and begin operations. Hagar v. Martin, 277 S.W.2d 195, 4 Oil and Gas Rep. 1157 (Tex. Civ. App. 1955) error ref., n.r.e.

The problem presented by the principal case is whether or not the owner of realty can make a valid mineral lease giving rights of ingress and egress and reasonable surface user after having made a surface lease. In this case there had been a mineral lease prior to the surface lease, severing the two estates, and the court held that the severance did not terminate (i.e., that there was no merger) on the termination of the first mineral lease. Therefore, the owner could make the second mineral lease without securing a subordination of the surface tenant's rights.

The owner of land may make a valid severance of the mineral estate and the surface estate by executing a mineral lease. Stephens County v. Mid-Kansas Oil and Gas Co., 113 Tex. 160, 254 S.W. 290 (1923); Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W. 2d 27 (1929); Harris v. Currie, 142 Tex. 43, 176 S.W.2d 302 (1943); Stanolind Oil and Gas Co. v. Wimberly, 181 S.W.2d 942 (Tex. Civ. App. 1944). When such a severance occurs, the ownership of the severed mineral interest carries with it by implication a right of ingress and egress and reasonable surface user to explore for and to recover the minerals, as pointed out in the Stanolind and Harris cases, supra. It is also settled that a surface tenant is entitled to the full and complete use of his land, unless otherwise provided in the conveyance or contract. Wheatley v. Kollaer, 133 S.W. 903 (Tex. Civ. App. 1910). These seemingly conflicting rules are based on the same underlying principle, i.e., the beneficial ownership of interests in realty includes the right to make use of such interests. Andrews v. Brown, 10 S.W.2d 707 (Tex. Comm. App. 1928); Stradley v. Magnolia Pet. Co., 155 S.W. 2d 649 (Tex. Civ. App. 1941) error refused. Where there is a conflict of rights arising under this principle, that right which
is prior in time should prevail, unless the parties evidence some other intent. The intention of the parties should prevail in the construction of the instrument. *Parker v. Standard Oil Co. of Kansas*, 250 S.W.2d 671, 1 Oil and Gas Rep. 1397 (Tex. Civ. App. 1952) *error ref., n.r.e.*; *Bumpass v. Bond*, 131 Tex. 266, 114 S.W.2d 1172 (1938).

The principal case was settled on the assumption that the severance did not terminate, although it could have been settled by a construction of the instruments. The Texas rule seems to be that the question as to whether or not a merger has taken place depends upon a showing as to the intention of the person in whom the estates are vested, and that the estates will be held not to have merged where merger was not intended. The application of this rule is subject to the provision that the rights of third parties must not be adversely affected. *Beeler v. Terrell*, 245 S.W. 459 (Tex. Civ. App. 1922); *Humphreys-Mexia Co. v. Gammon*, 113 Tex. 247, 254 S.W. 296 (1923); *Ferguson v. Ragland*, 243 S.W. 721 (Tex. Civ. App. 1922).

This rule is an elaboration of the old common law rule of merger as applied by the courts of equity, and it has been adapted to the problems presented in the field of oil and gas. These include not only the problem of whether the lessor can make a subsequent mineral lease without securing a subordination of an outstanding surface lease, but also problems of adverse possession. For an example, see *Noble v. Kahn*, 240 P. 2d 757, 1 Oil and Gas Rep. 443, (Okla. Sup. Ct. 1952).

Bob Dickenson.

**NEW TRIAL — JURY MISCONDUCT — PROBABLE INJURY**

In a personal injury suit, the jury returned a verdict of "no negligence" and "unavoidable accident." On a negligence issue the vote was, at first, ten negative and two affirmative. At this point, the foreman stated that in his opinion it was immaterial how they answered the negligence issue as the plaintiff would recover his damages regardless. The next ballot resulted in a unanimous negative finding. Plaintiff alleged jury misconduct in a motion for new trial. *Held*: Plaintiff failed to prove that the jury misconduct resulted in injury to him in light of the entire record. (Four judges

Rule 327, *Tex. Rules Civ. Pro.* (1941) states that “the Court may grant a new trial if such misconduct . . . be material . . . and if it reasonably appears from the record as a whole that injury probably resulted to the complaining party.” The italicized portion indicates language added to *Tex. Rev. Civ. Stat.* (1925) Art. 2234, the old statute governing jury misconduct, when the new rules were formulated. Under Rule 327 the burden of proving injury was shifted to the complaining party.

In applying Rule 327 to the present case, the majority opinion reasoned as follows: First, the statement by the foreman, although misconduct in itself, was only an opinion, and in view of the careful instructions by the court, the length of the testimony and argument of counsel, it is improbable that the jurors were influenced thereby. *Barrington v. Duncan*, 140 Tex. 510, 169 S.W.2d 462 (1943). Second, there is usually a tendency for the minority to eventually go along with the majority. (This basis was without cited authority.) Third, the majority opinion discussed in critical terms the testimony admitted by the trial court in its examination of the jurors at the hearing on the motion for a new trial. In determining jury misconduct, the mental processes of jurors are not admissible in evidence, although the trial judge may use such in determining credibility. *Traders & General Insurance Co. v. Lincecum*, 130 Tex. 220, 107 S.W.2d 585 (1937). The fact that evidence of mental processes appeared in the record might have influenced the majority.

The dissent thought that the burden placed on the complaining party by Rules 327 to show probable injury was fulfilled in that at least two jurors answered an issue with a pre-conceived legal effect. *Ford v. Carpenter*, 147 Tex. 447, 216 S.W.2d 558 (1949). The purpose of special issue submission is to limit the jury’s function to determining questions of fact. Their answers should be based upon the evidence without regard to what legal effect they will have on the judgment. *Monkey Grip Rubber Co. v. Walton*, 53 S.W.2d 770 (Tex. Comm. App. 1932).

The problem in the principal case narrows itself to the determination of what, as a matter of law, constitutes “probable injury.”
A correct determination of this problem requires some understanding of the old "harmless error" rule 62a (Supreme Court Rules), formulated in 1912. Prior to 1912, it was the general rule that any error of law in the trial court was presumed to be prejudicial, and required reversal unless it appeared from the entire record that no injury had been done. Rule 62a eliminated the presumption of harm, and complainant had to prove injury. However, the courts early recognized that certain types of serious errors should not be within the purview of this rule. The leading case in this area is *Golden v. Odiorne*, 112 Tex. 544, 249 S.W.2d 822 (1923), (wrongful overruling of general demurrer to petition for failure to state a cause of action). Other exceptions to 62a were enunciated, and eventually jury misconduct was made the subject of a special statute, Art. 2234, which made Rule 62a inapplicable to errors of this type. *Texas Milk Products Co. v. Birtcher*, 138 Tex. 178, 157 S.W.2d 633 (1941).

Old Rule 62a was carried over into the new rules as Rule 434, Tex. Rules Civ. Pro. (1941). Rule 434 does not apply to jury misconduct since this is specifically covered by Rule 327, Tex. Rules Civ. Pro. (1941). But, as we have noted above, Rule 327 once again has created a burden of proof upon the complaining party, analogous to the effect that Rule 62a had in 1912. The controversial background of the present rule has caused it to be compared with the situation in criminal law which would result if the presumption of innocence were eliminated and the accused were forced to prove his innocence. *Inglett v. Commercial Standard Ins. Co.*, 172 S.W.2d 987 (Tex. Civ. App. 1943), (concurring opinion).

The majority opinion in the present case made mention of the tendency of a minority group to ultimately go along with the majority. It was obviously using this reasoning to show that no injury resulted from the misconduct. Is this a delicate approach to the controversial majority verdict? Rule 291, Tex. Rules Civ. Pro. (1941), requires all jury verdicts to be unanimous. However, Art. V, § 13, Texas Constitution authorizes enabling legislation to provide for majority verdicts in civil cases. This opinion may, at least by inference, indicate the growing tendency toward a majority verdict.
The dissent failed to mention a point supporting their view that probable injury was shown; and that is a consideration of, what the verdict would have been if the negligence issue had been answered against the defendant, or if it had not been answered at all. In the first instance, the verdict would have resulted in a fatal conflict, in view of the previous finding of unavoidable accident. *Cf. Kilgore v. Howe*, 204 S.W.2d 1005 (Tex. Civ. App. 1948). In the second instance, a mistrial would have been declared as the issue was material and disputed. *Ford Rent Car Co. v. Hughes*, 90 S.W. 2d 290 (Tex. Civ. App. 1936).

The principal case would seem to have led the judiciary into a procedural corner. It displays an even wider split as to what is “probable injury” than was formerly the case. The very point of the case becomes moot since no presumptions are indulged in, and the appellate judge need only apply his own determination of “probable injury” by viewing the entire record. Analysis of the record may not disclose any evidence that jury misconduct affected the verdict, and absent any presumptions, the rights of a litigant are concluded by any facts which the judge may consider significant such as the length of the testimony and argument of counsel. On the other hand, Rule 327 was drawn to prevent trivial incidents from becoming reversible error, and to avoid cluttering the docket with insignificant technical appeals. Both of these factors must be weighed in passing judgment upon the merits of Rule 327. Jury misconduct is of such a nature in itself that presumptions may be warranted. As for now, these presumptions are eliminated, and the question is still with us—what construction can be given the phrase “probable injury”?

*John R. Vandevoort.*

WILLS — COMPETENCY OF WITNESS — DEAD MAN'S STATUTE

In a will contest, the husband of a beneficiary under the will was introduced as one of the two subscribing witnesses to testify to the execution of the will. Contestants objected to his testimony upon the following reasoning: if a husband must be joined with his wife in suits involving her separate property, he is a proper party to the will contest (as the property bequeathed to the wife
would be her separate property); therefore, his testimony as to the execution of the will is barred by operation of the Dead Man's statute, Tex. Rev. Civ. Stat. (1925) Art. 3716. Held: The husband's testimony is incompetent, and the will is invalidated for lack of two subscribing witnesses. The court refused to apply Tex. Rev. Civ. Stat. Art. 8296, which declares void a gift to a legatee or devisee who is also an attesting witness to the will, if the will cannot be otherwise established, and thereby removes the disqualification of such witness. Kralh v. Lehmann, 277 S. W. 2d 792 (Tex. Civ. App. 1955).

The Texas Dead Man's statute forbids either party to a suit by or against the executors, administrators, guardians, heirs or legal representatives of a decedent to testify to transactions with the decedent unless called to testify thereto by the opposite party. The provisions of this statute extend to proceedings to probate a will, Gamble v. Butchee, 87 Tex. 643, 30 S. W. 861 (1895); Sanders v. Kirbre, 94 Tex. 564, 63 S. W. 626 (1901), and the act of attesting a will constitutes a transaction with the decedent. Leahy v. Timon, 110 Tex. 73, 215 S. W. 951 (1919). Tex. Rev. Civ. Stat. (1925) Art. 8283, requiring two "credible witnesses" to subscribe to a non-holographic will, contemplates as a "credible witness" one who is competent under the law to testify to the execution of the will. Gamble v. Butchee, supra; Fowler v. Stagner, 55 Tex. 393 (1881). This statutory requirement is in addition to the common law requirement that a beneficiary under a will cannot be a subscribing witness thereto because of his interest in the will. Brown v. Pridgen, 56 Tex. 124 (1882). From these authorities, then, it follows that a party to a will contest will not be permitted to testify to the execution of the will, the latter act being equivalent to a transaction with the decedent barred by Art. 3716. Thus barred, the party cannot qualify as a "credible witness" within the meaning of Art. 8283.

Applying these principles to the fact pattern in the instant case, the court arrived at a decision which, it is submitted, is the only decision possible under existing law; any other holding, besides being logically defective, would violate legal precedents which are too well-settled to be misinterpreted at this late date. Tex. Rev. Civ. Stat. (1925) Art. 1985 requires the husband to be
joined with his wife in suits for separate debts and demands against her; a suit involving the wife's separate property being included within the scope of the statute. *Whitney Hardware Co. v. McMahan*, 231 S. W. 1117 (Tex. Civ. App. 1917). There is ample authority for the proposition that such joinder renders his testimony as to transactions with the decedent vulnerable to the bar of the Dead Man's statute. *Leahy v. Timon*, *supra*; *Garcia v. Galindo*, 189 S. W. 2d 12 (Tex. Civ. App. 1945) *error ref.*, w.o.m.; *Davis v. Roach*, 138 S. W. 2d 268 (Tex. Civ. App. 1940) *error dism.*, judgm. correct.

The situation in the principal case must be distinguished from the converse fact situation, *i.e.*, a suit involving the husband's separate property. The wife of a beneficiary under a will is competent to testify as to the execution of the will and is not disqualified by Art. 3716, since a wife is not required by statute to join her husband as a party in suits concerning his separate property. This distinction is discussed and explained in *Davis v. Roach*, *supra*, and *Mitchell v. Deane*, 10 S. W. 2d 717 (Tex. Com. App. 1928).

Proponents attempted to save the will by application of Art. 8296. This statute is designed to alleviate against the harshness of the common law rule disqualifying an attesting witness to a will who is also a beneficiary thereunder. It would seem clear that the statute is not designed to apply to the situation presented by the principal case where an attesting witness is disqualified under Art. 8283 solely because incompetent to testify by the Dead Man's statute. The court apparently recognized this distinction in refusing to apply Art. 8296 to the present case, but went on to point out that prior cases had strictly construed "legatee" and "devisee" not to include the spouse of a legatee or devisee. *Ridgeway v Keene*, 225 S. W. 2d 647 (Tex. Civ. App. 1950) *error ref.*, n.r.e. It is submitted that clarity of thought would have been promoted if the court had simply stated that the statute was not in point. Indeed, unless the doctrine of "unity of spouses" is followed, it is difficult to see how the husband had any interest under the will to sacrifice; and this doctrine has been expressly rejected. *Gamble v. Butchee*, *supra*.

The case at hand is significant in that it is apparently the first
case to come before our courts in which the husband of a beneficiary under a will is also an attesting witness thereto. It is interesting to note that in an earlier issue of this journal, 7 Sw. L. J. 525, the writer hypothesized a problem strikingly similar to that in the principal case, although differing with the holding of this court in his anticipated interpretation of Art. 8296.

Although the result is legally sound, it once more focuses attention on the ambiguous requirement that a husband must join his wife in her separate property litigation. The rule probably had its original justification in the common and early Texas laws giving the husband control and dispositive powers over his wife's separate property; but since the statutes of 1913, and later, have transferred this right of control and disposition to the wife it does not seem unreasonable to hold that the reason behind the rule have practically disappeared. It is felt that it is likewise reasonable to submit that any law which compels a difference in the competency of the husband or wife to attest or corroborate the execution of a will, under which his or her spouse is a beneficiary, is unrealistic, unfair, and a proper subject of remedial legislation.

Wayne Wile.

Workman's Compensation—Benefits—Community Property

H was totally disabled in the course of his employment, receiving therefor workmen's compensation benefits. W sued for divorce and to impound the weekly benefits, claiming one-half of the fund as her share of the community. Held: the weekly benefits are the separate property of the husband because the benefits are compensation for injury and not for loss of earnings, and recovery for personal injury is separate property under New Mexico law. The dissent took the view that the benefits are community property on the theory that the compensation is for loss of earnings which would have been community property. Richards v. Richards, ......N.M......, 283 P. 2d 881 (1955).

The fact that compensation benefits are given for the injury but are based on earnings of the employee has given rise to conflicting theories as concerns the determination of the nature of the
benefits as separate or community property. The reasoning of the majority in the principal case is an illustration of the personal injury theory. By this theory the compensation is paid to the employee for the injury suffered, and the nature of the benefits as separate or community property will be determined by applying the prevailing state law as regards recovery for personal injury. This reasoning was adopted because there was a supposed change in the basis for recovery under the New Mexico Workmen's Compensation act due to a statutory amendment. Under this supposed change the extent and aggravation of the injury became the basis of recovery in place of loss of earnings. 


Since the amount of compensation is governed by the amount of the employee's wages, the benefits are reasoned to be in lieu of earnings; therefore whether the benefits are separate or community property should be decided by applying the prevailing state law as regards the nature of personal earnings. **Defuniak, Principles of Community Property**, § 81. By applying this theory it follows that the only injuries compensated for are those which produce disability and presumably reduce the earning power of the employee. **Larson, Law of Workmen's Compensation**, § 8.

Another minority theory has been used by the Louisiana court. **Brownfield v. Southern Amusement**, 196 La. 73, 198 So. 656 (1940). Although the court in the Brownfield case conceded that the benefits are for loss of earnings, it held that the workmen's compensation act is looked upon as an entirety, and the benefits are separate property because the claim to recover is made a personal claim which only the employee may enforce. This theory has excluded the use of the community property statutes, and this fact has limited its acceptance among community property states.

The practical effect of the difference between applying the wage theory or the personal injury theory is limited for the reason that
most of the community property states hold that earnings and recovery for personal injury are both community property. Therefore, the distinction between the two theories is useful only where a state holds that recovery for personal injury is the separate property of the injured spouse. However, the distinction was vital to the decision of the principal case since in New Mexico the recovery for personal injury is separate property. Soto v. Vande- venter, 56 N.M. 483, 245 P.2d 826 (1952).

The better theory seems to be that the benefits are in lieu of earnings and would therefore become the community property of the spouses. This theory seems the sounder for the reason that the earning capacity is reduced by the injury, the benefits are paid as a percentage of past wages, and the right to receive such benefits stem from the contract of employment. Allowing recovery on the personal injury theory is in conflict with the basic theory of workmen's compensation acts which were passed to provide the employee with compensation during his disability.

Jere Hayes.

WORKMEN'S COMPENSATION—TOTAL AND PERMANENT DISABILITY

An employee sustained a double hernia while doing manual labor for his employer. He was kept on his job doing light lathe work subsequent to the injury and prior to and during his hearing as to total and permanent disability based on medical evidence. This evidence stated that operative procedure would be dangerous and that said employee was unfit for manual labor. There were no allegations nor proof by the employee that he suffered pain while doing the lathe work, or that the work was slight and trivial. Held: Whether the employee is entitled to total and permanent disability is an issue of fact for the determination of the Commission, and their finding of disability will not be disturbed if based on competent medical evidence. McKissick Products Corp. v. Gardner, Okla., 280 P.2d 718 (1955).

There are two distinct lines of decision in Oklahoma jurisprudence dealing with the question of whether a claimant for total and permanent disability may continue to work without prejudicing his claim.
The line of decisions upon which the principal case was supposedly decided rests on the theory of a strict construction of "total and permanent disability." These decisions do not go so far as to state that the term means a total incapacity to do any further work, but qualify it to some extent by requiring proof of the triviality of the work being performed, or that he is continuing to work at danger to his life. The underlying principle behind such a theory seems to be that the employee should not be entitled to compensation if he is still able to work. *Dierks Lumber & Coal Co. v. Lindley*, 182 Okla. 185, 77 P.2d 44 (1938); *Oklahoma Gas & Electric Co. v. Hardy*, 179 Okla. 624, 67 P.2d 445 (1937).

The other prevailing line of decisions is based upon the theory of a liberal construction of the phrase "total and permanent disability." The principle behind these decisions seems to be that a strict interpretation would encourage idleness on the part of injured employees. This line stresses the fact that an injured employee might not be willing to risk what is rightfully his (total and permanent disability), by going back to work. He would be fearful of failing to prove, as required under the strict construction cases, that he experienced pain in continuing to work or that the job was trivial. *Burnet Hauert Lumber Co. v. Thompson*, 185 Okla. 627, 95 P.2d 630 (1939); *Special Indemnity Fund v. Harmon*, 200 Okla. 358, 194 P.2d 869 (1948). The test applied in this line of cases seems to be lack of ability to carry out the duties required of him at the time of the injury. If he is not able to do those duties, and can prove his disability, then his continued working has no effect on the question of his disability. *Harbour-Longmire-Pace Co. v. State Industrial Comm.*, 147 Okla. 207, 296 P. 456 (1931).

Since the question before the court was the competency of the evidence presented to sustain the finding, the court was faced with the well established principle that the Commission's decision on a question of fact is binding on the court if reasonably supported by competent evidence. *Raulerson v. State Industrial Commission*, 76 Okla. 8, 183 P. 880 (1919). The court, by making the rather weak argument that claimant had proved that the work he was doing was trivial or in danger to his life, stated that the evidence presented was competent to sustain the findings of the Commission.
on questions of fact. The only evidence presented as to disability was the testimony of two doctors. One doctor merely stated that further operations would be inadvisable, and gave no estimate of disability. The other doctor stated that claimant was unfit for any type of manual labor. From this evidence, the court concluded that if the work claimant was doing was manual labor, then he was doing it at danger to his life. The court went further and stated that if the work was not manual labor, then it would be slight and trivial.

This argument brought the courts finding within the exceptions stated in Dierks Lumber, supra, and stamped the courts decision as following the strict construction line of decisions. But, was this the actual principle which the court used in arriving at its decision, or did the court just render “lip service” to Dierks Lumber, and actually base its decision on the fear of future idleness of claimants?

It is submitted that the latter is the correct answer. Lip service is certainly indicated when the court goes to such extremes to mold the evidence to fit the requirements set out by the strict construction line.

The court could have arrived at the same just result by applying the test used in the liberal construction field. The lack of ability to do the duties required of the claimant at the time of the injury is indicated directly by the doctors. No strained implications are needed to see that claimant cannot continue to do manual labor. Certainly this finding would be more consistent with intent of the drafters of the Act, as they very evidently did not intend the strict construction applied which would require a claimant to be bedfast and unable to appear in court in order to qualify for total and permanent disability. Even the later decisions advocating the stricter construction have recognized this flagrant disregard of the drafters’ intentions by qualifying their decisions as stated in Dierks Lumber and Oklahoma Gas, supra.

Malcolm E. Dorman.