

instrumentalities of one government, state or national, from taxation by the other.<sup>11</sup> This immunity is not allowed because of the proposition that a tax on the income is a tax on the source, but because it was thought that such a tax, whether upon the instrumentality itself or the income produced by it, would equally burden the operations of government.

The only criticism that can be leveled upon the decision in the instant case is that it adds one more instance of double taxation.<sup>12</sup> It is generally conceded that the state in which the land is situated may also tax the income therefrom, regardless of the residence of the owner.<sup>13</sup> However, double taxation is common in the income tax field and its eradication, if thought desirable, is a subject for legislation, not judicial decision.<sup>14</sup>

M. B.

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TORTS—DUTY OF DRIVER OF VEHICLE TO GRATUITOUS GUEST—STATUTORY MODIFICATIONS OF COMMON LAW—[Texas].—A Texas statute bars actions for injuries or death of a gratuitous automobile guest unless the accident was intentional or caused by the operator's gross negligence or reckless disregard of the rights of others.<sup>1</sup> In a recent case the above-mentioned statute was declared constitutional.<sup>2</sup>

In the absence of legislative enactment the gratuitous automobile guest generally enjoys the status of a licensee at common law. It is therefore the duty of the driver to use ordinary care neither to create new dangers nor to increase those already existing.<sup>3</sup> The Texas doctrine represents a wide-

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11. Cf. *Collector v. Day*, 11 Wall. 113, 124, 20 L. ed. 122 (1871); *Gillespie v. Oklahoma*, 257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 333 (1922).

12. Cf. *People of New York ex rel. Whitney v. Graves et al.*, — U. S. —, 57 S. Ct. 237, 81 L. ed. 195 (1937), comment, 50 Harv. L. Rev. 704, which held that the state of New York had jurisdiction to tax the profits realized by a non-resident upon the sale of his interest in a membership in the New York Stock Exchange. This recent decision is indicative of the general disregard of the possibility of double taxation in determining what is jurisdiction to tax income. The case proceeded on the "business situs" doctrine.

13. *Lake Superior Mines v. Lord*, 271 U. S. 577, 581, 582, 46 S. Ct. 627, 70 L. ed. 1093 (1925); *Shaffer v. Carter*, 252 U. S. 37, 40 S. Ct. 221, 64 L. ed. 445 (1920).

14. An advisory opinion contra to the result in the instant case was handed down by the Supreme Court of New Hampshire in the Opinion of the Justices, 84 N. H. 559, 573, 149 Atl. 321 (1930), based on the holding in *Pollock v. Farmer's Loan and Trust Co.*, supra, note 9. See also Note, 23 Va. L. Rev. 196 (1936), and *Rottschaefer, State Jurisdiction to Tax Income* (1937) 22 Iowa L. Rev. 292.

1. Tex. Ann. Civil Stat. (Vernon, Supp. 1935) art. 6701b.

2. *Paschall v. Gulf C. & S. F. Ry. Co.*, 100 S. W. (2d) 183 (Tex. 1936).

3. 1 Berry, *Automobiles* (6th ed. 1929) 581; Harper, *Torts* (3rd ed. 1933) sec. 81; 3 Cooley, *Torts* (4th ed. 1932) 524; Restatement, *Torts* (1934) sec. 323 (1); Collected cases in 20 A. L. R. 1014; 26 A. L. R. 1425; 40 A. L. R. 1338; 47 A. L. R. 327; 51 A. L. R. 581; 61 A. L. R. 1252.

spread type of statutory revision.<sup>4</sup> Kansas<sup>5</sup> and Illinois<sup>6</sup> have comparable statutes. Arkansas follows the common law rule.<sup>7</sup>

Missouri, by statute, exacts the highest degree of care of the driver of a motor vehicle.<sup>8</sup> An instruction based on this statute has frequently been given in favor of a guest riding without pay.<sup>9</sup> It would thus appear that recovery in Missouri in automobile guest cases is even easier than in states adhering to common law principles.

There are several objections made to the common law theory as compared with the Texas type of statute. The former view has been challenged most frequently by insurance companies. It was they who induced legislatures to enact the gross negligence rule.<sup>10</sup> The asserted evil lay in the situation where a driver carrying liability insurance had an accident through which his guest, very often a relative or close friend, was injured. In the ensuing tort action the insurance company was the actual defendant. Friendly suits, notorious for their collusion and cooperation between the assured and his guest, frequently followed.<sup>11</sup> It has been pointed out that in addition to the

4. Numerous states have adopted the gross negligence rule. The bases of the statutory liability thus imposed have been heedlessness, gross negligence, reckless disregard of the rights of others, and intoxication. Cal. Gen. Laws (Deering, 1931) act 5128, sec. 141¾; Colo. Laws 1931, c. 118; Conn. Gen. Stat. (1930) sec. 1628; Del. Laws 1933, c. 26; Idaho Code Ann. (1932) sec. 48-901; Ill. Rev. Stat. (Cahill, 1931) c. 95a, sec. 43; Ind. Stat. Ann. (Burns, 1929) sec. 101421; Iowa Code (1931) sec. 5026-b1; Ga. Ann. Code (Parks, Supp. 1932) sec. 3473; Kan. Rev. Stat. Ann. (Supp. 1933) sec. 8-1226; Ky. Stat. (Carroll, Supp. 1931) sec. 12-7; Mich. Comp. Laws (1929) sec. 4648; Neb. Comp. Stat. (Supp. 1931) sec. 39-1129; Nev. Laws 1933, c. 34; N. D. Laws 1931, ch. 184, sec. 2; Ohio Code Ann. (Throckmorton, 1934) sec. 6308-6; Ore. Code Ann. (1930) sec. 55-1209; S. C. Code (Mickie, 1932) sec. 5908; S. D. Laws 1933, c. 147; Tex. Ann. Civ. Stat. (Vernon, Supp. 1935) art. 6710b; Vt. Pub. Laws (1933) sec. 5113; Wash. Comp. Stat. (Remington Supp. 1935) sec. 6297, c. 18; Wyo. Rev. Stat. Ann. (Courtright, 1931) sec. 72-701.

5. Kan. Rev. Stat. Ann. (Supp. 1933) sec. 8-122b (reckless and wanton negligence).

6. Ill. Rev. Stat. (Cahill, 1931) c. 95a, sec. 43 (willfull, wanton injury and misconduct).

7. *Black v. Goldweber*, 172 Ark. 862, 291 S. W. 76 (1927); *Bennett v. Bell*, 176 Ark. 690, 3 S. W. (2d) 996 (1928).

8. *R. S. Mo. 1929*, sec. 7775; *Mo. Stat. Ann.* sec. 7775, p. 5197; *Rowe v. St. Louis-San Francisco Ry. Co.*, 41 S. W. (2d) 631 (Mo. App. 1931); *Roark v. Stone*, 224 Mo. App. 445, 30 S. W. (2d) 647 (1930); *Gude v. Weick Bros. Undertaking Co.*, 322 Mo. 778, 16 S. W. (2d) 59 (1929); *Woods v. Moore*, 227 Mo. App. 1037, 48 S. W. (2d) 202 (1932); *Steger v. Meham*, 63 S. W. (2d) 109 (Mo. 1933); *Robinson v. Ross*, 47 S. W. (2d) 122 (Mo. App. 1932); cf. *Alley v. Wall*, 272 S. W. 999 (Mo. App. 1929).

9. *Kaley v. Huntley*, 333 Mo. 771, 63 S. W. (2d) 21 (1933); *Tabler v. Perry*, 337 Mo. 154, 85 S. W. (2d) 471 (1935); *Scism v. Alexander*, 93 S. W. (2d) 36 (Mo. App. 1936).

10. *Leach and Gardere, Guest Statutes and Interpretations in Various Jurisdictions*, *Best's Insurance News* (July 10, 1933) 144, 145; *Comment*, 5 *Fordham L. Rev.* 183 (1936).

11. See *Naudzius v. Lahr*, 253 Mich. 216, 234 N. W. 581 (1931); *comment*, 38 *Yale L. J.* (1928); *comment*, 22 *Calif. L. Rev.* 119 (1933); *comment*, 19 *Ky. L. J.* 84 (1930).

burden thus placed on insurance companies the public is the ultimate sufferer because of the high insurance rates sure to follow.<sup>12</sup> The Texas holding alleviates considerably the problem in such a situation. Those who oppose it dislike the undue favor which they allege has been bestowed on insurance companies by legislatures.

It has also been urged in some quarters as a criticism of the common law view that an analogy should be drawn from the gratuitous bailee cases, where liability exists only as a result of gross negligence.<sup>13</sup> This thesis is based on the theory that he who undertakes to perform a duty gratuitously should not be under the same measure of obligation as he who enters upon the same undertaking for pay.<sup>14</sup>

One unusual case refutes the common law view on the ground that it is "unsportsmanlike" and puts an undue burden on the driver. It was also maintained in that case that such a rule works against public policy inasmuch as it tends to discourage the giving of rides to those who are in need and deserving of the same.<sup>15</sup>

Criticism of the common law theory will apply *a fortiori* to the stricter Missouri view. It is suggested, therefore, that Missouri revise its present statutory enactment so as specifically to exclude the driver from being held to the highest degree of care as to his gratuitous guest. The substitution of the gross negligence doctrine is to be recommended.

C. J. D.

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TORTS—HUMANITARIAN DOCTRINE AS A DEFENSE—[Texas].—In *Charbonneau v. Hupaylo*<sup>1</sup> the Texas Court of Civil Appeals held that the plaintiff could not recover from a defendant driver who negligently turned his car across the path of the plaintiff's following car, if the facts showed that the plaintiff could have avoided the accident after discovering the defendant in a position of peril. Cases rarely arise in which the discovered peril or last clear chance doctrine is utilized as a defense.<sup>2</sup> The English<sup>3</sup> and

12. Cf. comment, 12 Texas L. Rev. 303 (1933).

13. Goddard, *Outlines of Bailments and Carriers*, (2d ed. 1928) 44; Sales v. Funk, 175 Mo. App. 500, 161 S. W. 1175 (1913); Adler v. Planter's Hotel Co., 181 S. W. 1062 (Mo. 1916).

14. *Massaletti v. Fitzroy*, 22 Mass. 487, 118 N. W. 168 (1917).

15. *O'Shea v. Lavay*, 175 Wis. 456, 185 N. W. 525, 20 A. L. R. 1008, 1010 (1921); comment, 18 Calif. L. Rev. 184 (1929).

1. 100 S. W. (2d) 745 (Tex. Dec. 1936).

2. Comment, 14 Boston U. L. Rev. 850 (1934).

3. *Butterfield v. Forrester*, 11 East. 60, 103 Eng. Rep. 926 (1809). The plaintiff was riding along the road on horseback and was injured when he ran into an obstruction negligently left across the roadway by the defendant. The court refused recovery, becoming the first court to enunciate the doctrine that a plaintiff who could have avoided the accident by the use of ordinary care following defendant's negligence cannot recover. The decision preceded by 33 years the case of *Davies v. Mann*, 10 M. & W. 547, 152 Eng. Rep. 588 (1842), which is now recognized as the leading case upon the Last Clear Chance Doctrine.