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Guest Statute Applicability To Motor Driven Golf Carts

impose a penalty upon the accused. The defendant would still be coerced into forfeiting his absolute right not to testify before the determination of guilt in order to gain another right:[39] the right to a rational determination of sentence. Only a two-stage trial would fully protect a defendant from infringement of his privilege against self-incrimination.

If *Johnson* is read in light of the extended protection offered under the fifth amendment privilege against self-incrimination, it indicates an important defect in the criminal procedure of most states.[40] Two possible alternatives are available to correct this defect. The legislatures of five states have now provided for a two-stage trial in all capital cases.[41] However, the legislative process is generally slow and legislators are not necessarily acquainted with the procedural problems faced by courts.[42] A better solution has been reached by the United States Court of Appeals for the District of Columbia Circuit, which has directed its lower courts to bifurcate any trial in a capital case where there would otherwise be substantial prejudice to the accused.[43]

JEFFREY R. REIDER

GUEST STATUTE APPLICABILITY TO MOTOR DRIVEN GOLF CARTS

Guest statutes exist in a majority of states[1] to protect owners and

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be set aside if it appears that the defendant was not asked if he had anything to say why sentence should not be pronounced. Ball v. United States, 140 U.S. 118 (1891).

[39]*See* Simmons v. United States, 390 U.S. 377 (1968).

[40]*See* Knowlton, *Problems of Jury Discretion in Capital Cases,* 101 U. OF PA. L. REV. 1099, 1100 (1953).

[41]CAL. PEN. CODE § 190.1 (Supp. 1967); CONN. GEN. STAT. ANN. § 53-10 (Supp. 1966); N.Y. REV. PEN. LAW § 125.30 (1967); PA. STAT. ANN. tit. 18, § 4701 (1963); TEX. CODE CRIM. PROC. art. 37.07 (1966).

[42]Anton, *The Legislature, Politics and Public Policy; 1959,* 14 RUTGERS L. REV. 269 (1960).

[43]Frady v. United States, 348 F.2d 84 (D.C. Cir. 1965), *cert. denied,* 382 U.S. 909 (1965).

[1]ALA. CODE tit. 36, § 95 (Recompiled 1958); ARK. STAT. ANN. § 75-913 (Repl. Vol. 1957); CAL. VEHICLE CODE ANN. § 17158 (West 1960); COLO. REV. STAT. ANN. § 13-9-1 (1963); DEL. CODE ANN. tit. 21 § 6101 (1953); FLA. STAT. ANN. § 320.59 (1958); IDAHO CODE ANN. § 49-1401 (1967); ILL. ANN. STAT. ch. 95½, § 9-201 (Smith-Hurd 1958); IND. ANN. STAT. § 47-1021 (Repl. Vol. 1965); IOWA CODE ANN. § 321.494 (1966); KAN. STAT. ANN. § 8-122b (1964); MICH. STAT. ANN. § 9.2101 (Rev. 1960); MONT. REV. CODES ANN. § 32-1113 (1947); NEB. REV. STAT. § 39-740 (1943); NEV. REV. STAT. § 41.180 (1963); N.M. STAT. ANN. § 64-24-1 (1953); N.D.

operators of motor vehicles from liability for simple negligence[2] which causes injury to guests being gratuitously transported.[3] The South Dakota guest statute reads:

> No person transported by the owner or operator of a motor vehicle as his guest without compensation for such transportation shall have cause of action for damages against such owner or operator for injury, death, or loss, in case of accident, unless such accident shall have been caused by the willful and wanton misconduct of the owner or operator of such motor vehicle . . . .[4]

The Supreme Court of South Dakota recently refused in *Nepstad v. Randall*[5] to apply the statute to motor vehicles not designed primarily for public highway transportation when operated upon private property at the time of the accident.

In *Nepstad* the operator of a motor driven golf cart[6] provided gratuitous transportation for another golfer whose own golf cart had run out of gas on the golf course. While riding on the hood of the cart, the guest was thrown to the ground and injured when the operator made a sudden turn. The injured guest sued to recover damages and in his complaint alleged that the defendant's negligent operation of the motor driven cart had caused the accident and injury. The defendant moved to dismiss the complaint on the ground that it failed to state a cause of action in alleging only ordinary negligence. The defendant contended that under the provisions of the guest statute the plaintiff was required to allege willful and wanton misconduct on the part of the defendant-operator. The trial court

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CENT. CODE § 39-15-02 (1960); OHIO REV. CODE ANN. § 4515.02 (Baldwin 1964); ORE. REV. STAT. § 30.115 (1967); S.C. CODE ANN. § 46-801 (1962); S.D. CODE § 44.0362 (1939); TEX. REV. CIV. STAT. art. 6701b (1948); UTAH CODE ANN. § 41-9-1 (1953); VT. STAT. ANN. tit. 23, § 1491 (Repl. Vol. 1967); VA. CODE ANN. § 8-646.1 (Repl. Vol. 1957); WASH. REV. CODE § 46.08.080 (1961); WYO. STAT. ANN. § 31-233 (Compiled 1967).

[2]See AM. JUR. 2D *Desk Book* Doc. 123 (1962), for a listing of states having guest statutes and the degrees of fault required to be shown under each in order to hold uncompensated motor vehicle owners and operators liable to guests injured during operation of a motor vehicle.

[3]AM. JUR. 2D *Automobiles and Highway Traffic* § 471 (1963).

[4]S.D. CODE § 44.0362 (1939).

[5]152 N.W.2d 383 (S.D. 1967).

[6]The motor driven golf cart involved in the principal case is described in a dissenting opinion as being "a miniature pickup in design. Its gasoline motor is in front covered with side panels and a hood like a conventional car. It is equipped with a windshield, steering wheel, balloon tires, gear shift, self starter, transmission, seats for two persons, a luggage rack in the rear, bumpers, hand and foot brakes, headlights, a tail light, and a cloth canopy top. Records . . . show similar devices are licensed to operate on the public highways of this state [S.D.]." *Id.* at 388.

denied defendant's motion to dismiss the complaint holding the guest statute inapplicable. Judgment was entered for the plaintiff, and the South Dakota Supreme Court affirmed, holding that "a motor driven golf cart while being operated on a golf course is not a 'motor vehicle' within the meaning of the guest statute."[7]

The majority in *Nepstad* construed "motor vehicle" as referring either to motor vehicles designed for use on public highways or to motor vehicles not so designed but being operated upon a public highway at the time of an accident. They concluded that, a motor driven golf cart would be within the meaning of "motor vehicle" as used in the guest statute, only if operated on a public highway, rather than on private property, at the time of the accident. This decision prompted one dissenting opinion.

When faced with a problem of statutory construction courts have applied a variety of so-called "rules of construction." Although some may be given more weight than others initially, there are many exceptions to them and there is much interplay between them.

The cardinal rule for construction of a statute is to ascertain the specific legislative intent.[8] Where the language of a statute is plain and unambiguous, such intent is to be determined from the language itself.[9] However, the literal meaning of a statute will not be followed where it leads to a result contrary to the legislative intent as derived from other sources,[10] *i.e.*, legislative purpose, definitions in statutes themselves, and prior interpretations. In construing a statute the broad legislative purpose is a prime consideration in determining legislative intent.[11] The majority of courts construing guest statutes give considerable emphasis to what they consider the legislative purpose

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[7]*Id.* at 386. Besides the issue of whether the motor driven golf cart was a motor vehicle within the meaning of the guest statute, other issues argued on appeal in the principal case were: whether the plaintiff had assumed the risk of being thrown from the hood of the golf cart; whether the defendant was negligent; whether the comparative negligence statute was applicable to the case and whether evidence as to loss of earning power justified the trial court's instructing the jury as to such.

[8]Selective Life Ins. Co. v. Equitable Life Assurance Soc'y of the United States, 101 Ariz. 594, 422 P.2d 710 (1967); Prout v. Monroe, 4 Conn. Cir. 15, 224 A.2d 566 (1966); State Highway Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

[9]State v. Logan, 198 Kan. 211, 424 P.2d 565 (1967); State v. Levell, 181 Neb. 401, 149 N.W.2d 46 (1967); State v. Ortega, 77 N.M. 312, 422 P.2d 353 (1956).

[10]Wilson v. United States, 369 F.2d 198 (D.C. Cir. 1966); People v. Ali, 57 Cal. Rptr. 348, 424 P.2d 932 (1967); Newbolt v. Board of Educ., 409 S.W.2d 513 (Ky. 1966).

[11]Employees Serv. Ass'n v. Grady, 243 Cal. App. 2d 672, 52 Cal. Rptr. 831 (1966); Oppelt v. Mayo, 26 Conn. Supp. 329, 223 A.2d 47 (1966); Illinois Nat'l Bank v. Chegin, 35 Ill. 2d 375, 220 N.E.2d 226 (1966).

behind guest statute enactment.[12] Although the majority in *Nepstad* concluded that highway safety was the purpose of the guest statute, such statutes are generally interpreted as being designed only to relieve uncompensated owners and operators from liability for ordinary negligence which causes injury to "ungrateful"[13] guests.[14] Another purpose often assigned to guest statutes, and the one which the Supreme Court of South Dakota has earlier assigned to its guest statutes,[15] is the prevention of fraud and collusion between gratuitous guests and operators of motor vehicles against liability insurers.[16] These same motives which prompted legislatures to deprive guests of their common law right of action when accidents occur on a public highway apply with equal force to accidents occurring on private property.[17] In *Kitchens v. Duffield*[18] the court remarked "it is just as reprehensible for a guest to sue his host for ordinary common law negligence in the operation of his motor vehicle on a private way as it would be on a public thoroughfare."[19] In *Fishback v. Yale*[20] a gra-

[12]Truitt v. Gaines, 199 F. Supp. 143 (D. Del. 1961), *aff'd*, 318 F.2d 461 (3d Cir. 1963); Fishback v. Yale, 85 So. 2d 142 (Fla. 1955); Nielsen v. Kohlstedt, 254 Iowa 470, 117 N.W.2d 900 (1962); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); Kitchens v. Duffield, 83 Ohio App. 41, 76 N.E.2d 101 (1947), *aff'd*, 149 Ohio St. 500, 79 N.E.2d 906 (1948); Oswald v. Weiner, 218 S.C. 206, 62 S.E.2d 311 (1950); Schlin v. Gau, 80 S.D. 403, 125 N.W.2d 174 (1963); Houston Belt & Terminal Ry. v. Burmester, 39 S.W.2d 271 (Tex. Civ. App. 1957); Andrus v. Allred, 17 Utah 2d 106, 404 P.2d 972 (1965); Becket v. Hutchinson, 49 Wash. 2d 888, 308 P.2d 235 (1957); Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

[13]Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

[14]Truitt v. Gaines, 199 F. Supp. 143 (D. Del. 1961), *aff'd*, 318 F.2d 461 (3d Cir. 1963); Nelson v. McMillan, 151 Fla. 847, 10 So. 2d 565 (1942); Nielsen v. Kohlstedt, 254 Iowa 470, 117 N.W.2d 900 (1962); Gifford v. Dice, 269 Mich. 293, 257 N.W. 830 (1934); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); Spring v. Liles, 236 Ore. 140, 387 P.2d 578 (1963); Oswald v. Weiner, 218 S.C. 206, 62 S.E.2d 311 (1950); Andrus v. Allred, 17 Utah 2d 106, 404 P.2d 972 (1965); Jensen v. Mower, 4 Utah 2d 336, 294 P.2d 683 (1956); Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

[15]Schlim v. Gau, 80 S.D. 403, 125 N.W.2d 174 (1963).

[16]Truitt v. Gaines, 199 F. Supp. 143 (D. Del. 1961), *aff'd*, 318 F.2d 461 (3d Cir. 1963); Rogers v. Lawrence, 227 Ark. 117, 296 S.W.2d 899 (1956); Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); Kitchens v. Duffield, 83 Ohio App. 41, 76 N.E.2d 101 (1947), *aff'd*, 149 Ohio St. 500, 79 N.E.2d 906 (1948); Schlim v. Gau, 80 S.D. 403, 125 N.W.2d 174 (1963); Houston Belt & Terminal Ry. v. Burmester, 309 S.W.2d 271 (Tex. Civ. App. 1957); Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

[17]Cram v. Inhabitants of Cumberland, 148 Me. 515, 96 A.2d 839 (1953); City of Redfield v. Wharton, 79 S.D. 557, 115 N.W.2d 329 (1962); Hickerson v. State, 161 Tex. Cr. App. 140, 275 S.W.2d 801 (1955).

[18]83 Ohio App. 41, 76 N.E.2d 101 (1947), *aff'd*, 149 Ohio St. 500, 79 N.E.2d 906 (1948).

[19]76 N.E.2d at 106.

[20]85 So. 2d 142 (Fla. 1955).

tuitously transported guest was injured in an automobile accident which occurred on a hunting club's private road. The Supreme Court of Florida nevertheless held that its guest statute[21] applied. Courts in Ohio[22] and Washington[23] have also held guest statutes applicable when automobile accidents occurred off the public highways.[24] Considering the generally assigned legislative purposes, it appears unnecessary for the court to infer that motor vehicles not designed primarily for public highway transportation are exempt from the operation of the guest statute while they are being operated on private property.

Unlike the South Dakota guest statute and the majority of others, the guest statutes of five states[25] eliminate consideration of the location of the vehicle at the time of the accident in determining guest statute applicability. These five statutes expressly limit their applicability to motor vehicles being operated upon a public highway at the time of the accident.[26] However, in the absence of language indicating such a restrictive intention courts have generally treated the fact that the accident occurred on private property[27] irrelevant.

As mentioned earlier, another possible source for determining legislative intent is the definitions included with the statutes. In determining what is a "motor vehicle" for guest statute purposes, the majority in *Nepstad* referred to the definition of "motor vehicle" contained in the statutes governing the operation of motor vehicles on

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[21]FLA. STAT. ANN. § 320.59 (1958).

[22]Kilgore v. U-Drive-It Co., 149 Ohio St. 505, 79 N.E. 2d 908 (1948); Kitchens v. Duffield, 83 Ohio App. 41, 76 N.E.2d 101 (1947), *aff'd*, 149 Ohio St. 500, 79 N.E.2d 906 (1948).

[23]Becket v. Hutchinson, 49 Wash. 2d 888, 308 P.2d 235 (1957).

[24]The Supreme Court of Kansas in *In re Hayden's Estate*, 174 Kan. 140, 254 P.2d 813 (1953), held the Kansas guest statute, KAN. STAT. ANN. § 8-122-b (1964), inapplicable to an airplane accident because the accident did not occur on a public highway.

[25]ARK. STAT. ANN. § 75-913 (Repl. Vol. 1957); CAL. VEHICLE CODE ANN. § 17158 (West 1960); NEV. REV. STAT. § 41.180 (1963); TEX. REV. CIV. STAT. art. 6701b (1948); UTAH CODE ANN. § 41-9-1 (1953).

[26]*E.g.*, ARK. STAT. ANN. § 75-913 (1947) which reads:

> No person transported as a guest in any automobile vehicle upon the public highways or in aircraft being flown in the air or while upon the ground, shall have a cause of action against the owner or operator... for damage on account of any injury, death or loss occasioned by the operation of such... unless such vehicle or aircraft was wilfully and wantonly operated in disregard of the rights of others.

[27]Fishback v. Yale, 85 So. 2d 142 (Fla. 1955); Kilgore v. U-Drive-It Co., 149 Ohio St. 505, 79 N.E.2d 908 (1948); Kitchens v. Duffield, 83 Ohio App. 41, 76 N.E.2d 101 (1947), *aff'd*, 149 Ohio St. 500, 79 N.E.2d 906 (1948); Becket v. Hutchinson, 49 Wash. 2d 888, 308 P.2d 235 (1957).

public highways,[28] statutes intended to promote highway safety. The majority reasoned that because the guest statute was in the Code chapter containing highway safety statutes it was therefore a highway safety statute and controlled by the definitions applicable to such statutes. The special concurring opinion in *Nepstad*[29] revealed that the guest statute was originally enacted independent of the highway regulations and was located in a separate Code chapter prior to the Code revision. No statutory provision made the highway regulation definitions applicable to the guest statute.

It is a settled rule of statutory construction that where existing provisions are incorporated into a codification without change they are deemed to retain their original meaning[30] and relative position after incorporation.[31] In construing a particular section of revised statutes, courts should refer to the original statutes to determine the meaning of the section.[32] Furthermore, the location of a statute in a revised codification may not be used in the construction of the statute[33] because shifting a statute from one chapter to another does not require the courts to abandon the prior judicial construction of the statute.[34] The special concurring opinion in *Nepstad* criticized the majority's reliance upon the location of the guest statute in the Code in construing the statute.

Reference to the highway regulation statutes in construing the guest statute involves the rule of construction that laws in *pari materia* are to be construed with reference to each other.[35] However, the rule that statutes in *pari materia* must be construed together is only applicable to statutes which relate to the same subject matter[36] or have the same scope and aim.[37] When statutes have

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[28]S.D. CODE § 44.0301 (1939).

[29]152 N.W.2d at 386.

[30]Adamowski v. Bard, 193 F.2d 578 (3d Cir. 1952); Robertson v. Dorsey, 195 Md. 271, 73 A.2d 503 (1950); State v. Conally, 227 S.C. 507, 88 S.E.2d 591 (1955); City of Redfield v. Wharton, 79 S.D. 557, 115 N.W.2d 329 (1962).

[31] *In re* Meservey's Will, 34 Del. 482, 155 A. 593 (Super. Ct. 1931).

[32]Cram v. Inhabitants of Cumberland, 148 Me. 515, 96 A.2d 839 (1953); City of Redfield v. Wharton, 79 S.D. 557, 115 N.W.2d 329 (1962); Hickerson v. State, 161 Tex. Cr. App. 140, 275 S.W.2d 801 (1955).

[33]Publix Asbury Corp. v. City of Asbury Park, 18 N.J. Super. 286, 86 A.2d 798 (1951).

[34]Petron v. Waldo, 272 Minn. 513, 139 N.W.2d 484 (1965).

[35]State v. Taylor, 49 Hawaii 624, 425 P.2d 1014 (1967); State *ex rel.* Schwab v. Riley, 417 S.W. 2d 1 (Mo. 1967); State *ex rel.* Retchless v. Cook, 181 Neb. 863, 152 N.W.2d 23 (1967); Owens-Illinois Glass Co. v. Battle, 154 S.E.2d 854 (W. Va. 1967).

[36]Graham v. Corporon, 196 Kan. 564, 413 P.2d 110 (1966).

[37]Board of Pub. Instruction v. State *ex rel.* Hilliard, 188 So. 2d 337 (Fla. Dist. Ct. App. 1966).

no common purpose and scope and do not relate to the same object, thing, or person they are not in *pari materia*[38] and are not to be construed together.[39] The guest statute has been held to operate in the field of substantive law and not to be part of highway regulations.[40] Thus the *pari materia* principle should not apply.

However, even assuming that the highway regulations and the guest statute are in *pari materia* and the highway regulations definition controlling, the *Nepstad* majority disregarded permissive language in the definitions. The South Dakota Code's highway regulations define "vehicle" as "every device in, upon, or by which any person or property is or *may be* transported or drawn upon a public highway...."[41] and define "motor vehicle" as "every vehicle, as herein defined, which is self-propelled...."[42] The *Nepstad* dissent considered the motor driven golf cart, even under the highway regulations definition, to be clearly within the class of motor vehicles which may be used upon a public highway, noting that some motor driven golf carts have been licensed for operation on South Dakota highdays. Nevertheless, the majority in *Nepstad* selectively extracted from the definitions the phrase "upon a public highway" and defined "motor vehicle" in the guest statue to include only motor vehicles in use upon a public highway, rather than applying the entire definition.

Courts construing guest statutes have frequently mentioned that such statutes are in derogation of common law and some courts have enunciated support for strict interpretation[43] against owners and operators. Others have declared support for liberal interpretation[44] in their favor. However, even courts which declare that guest statutes are in derogation of common law and should therefore be strictly con-

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[38]Singleton v. Larson, 46 So. 2d 186 (Fla. 1950).

[39]Bernhardt v. Long, 357 Mo. 427, 209 S.W.2d 112 (1948).

[40]Kitchens v. Duffield, 83 Ohio App. 41, 76 N.E.2d 101 (1947), *aff'd*, 149 Ohio St. 500, 79 N.E.2d 906 (1948).

[41]S.D. CODE § 44.0301(a) (1939) (emphasis added).

[42]S.D. CODE § 44.0301(b) (1939).

[43]Truitt v. Gaines, 199 F. Supp. 143 (D. Del. 1961), *aff'd*, 318 F.2d 461 (3d Cir. 1963); Rogers v. Lawrence, 227 Ark. 117, 296 S.W.2d 899 (1956); Praeger v. Israel, 15 Cal. 2d 89, 98 P.2d 732 (1940); Lloyd v. Runge, 186 Kan. 54, 348 P.2d 594 (1960); Naphtali v. Lafazan, 8 App. Div. 2d 22, 186 N.Y.S.2d 1010 (1959); Clinger v. Duncan, 166 Ohio St. 216, 141 N.E.2d 156 (1957); Voelki v. Latin, 58 Ohio App. 245, 16 N.E.2d 519 (1938); Spring v. Liles, 236 Ore. 140, 387 P.2d 578 (1963); Brown v. Gamble, 60 Wash. 2d 376, 374 P.2d 151 (1962).

[44]Nielsen v. Kohlstedt, 254 Iowa 470, 117 N.W.2d 900 (1962); Cappellano v. Pane, 178 Neb. 493, 134 N.W.2d 76 (1965); Peterson v. Snell, 80 S.D. 496, 127 N.W.2d 142 (1964); Schlim v. Gau, 80 S.D. 403, 125 N.W.2d 174 (1963).