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## THE JUDICIAL AVOIDANCE OF LIBERAL STATUTORY CONSTRUCTION: IS ARTICLE 10, SECTION 8 LOST AND FORGOTTEN?

CHARLES A. BECKHAM, JR.

The Texas Supreme Court's position that statutes in derogation of the common law are to be strictly construed<sup>1</sup> recently has come under increasing criticism from the Fort Worth Court of Civil Appeals.<sup>2</sup> The supreme court has based its position upon a long line of cases adopting the time-honored canon of statutory construction that statutes in derogation of the common law are to be strictly construed.<sup>3</sup> In support of its view, the Fort Worth Court of Civil Appeals has pointed to an act of the legislature passed over ninety years ago which expressly abrogated the canon of strict construction.<sup>4</sup> As it reads today, article 10, section 8 of the civil statutes states:

The rule of the common law that statutes in derogation thereof shall be strictly construed shall have no application to the Revised Statutes; but the said statutes shall constitute the law of this State respecting the subjects to which they relate; and the provisions thereof shall be liberally construed with a view to effect their objects and to promote justice.<sup>5</sup>

Arguably, a plain reading of the statute makes it clear that the legislature intended a liberal construction of its statutes, but since its enactment, article 10, section 8 has fallen prey to judicial avoidance and preference for the common law rule of strict construction.<sup>6</sup>

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1. See, e.g., *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 804 (Tex. 1974); *New Amsterdam Cas. Co. v. Texas Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967); *Coastal States Gas Producing Co. v. Pate*, 158 Tex. 171, 175, 309 S.W.2d 828, 831 (1958).

2. See, e.g., *Welborn v. Woolfolk*, 560 S.W.2d 189, 190 (Tex. Civ. App.—Fort Worth 1977, no writ); *Miller v. First State Bank*, 551 S.W.2d 89, 95 (Tex. Civ. App.—Fort Worth 1977), *aff'd as modified*, 563 S.W.2d 572 (Tex. 1978); *Walker v. Ross*, 548 S.W.2d 447, 450 (Tex. Civ. App.—Fort Worth), *writ ref'd n.r.e. per curiam*, 554 S.W.2d 189 (Tex. 1977).

3. See, e.g., *Texas Co. v. Grant*, 143 Tex. 145, 152, 182 S.W.2d 996, 1000 (1944); *Magnolia Petroleum Co. v. Walker*, 125 Tex. 430, 441, 83 S.W.2d 929, 934 (1935); *City of Waco v. Roberts*, 121 Tex. 217, 224, 48 S.W.2d 577, 580 (1932).

4. See cases note 2 *supra*. These cases cite to article 10, section 8, which is the current version of Tex. Civ. Stat. Final Title § 3 (1879).

5. TEX. REV. CIV. STAT. ANN. art. 10, § 8 (Vernon 1969). For purposes of this comment, references to article 10, section 8 will include references to all prior codifications of the statute, beginning with Tex. Civ. Stat. Final Title § 3 (1879).

6. See, e.g., *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 804 (Tex. 1974); *Johnson v. Darr*, 114 Tex. 516, 520, 272 S.W. 1098, 1099 (1925); *Farmers' & Mechanics' Nat'l Bank v. Hanks*, 104 Tex. 320, 325, 137 S.W. 1120, 1123 (1911). *But see* *Pittman v. Time Sec.*, 301 S.W.2d 521, 523 (Tex. Civ. App.—San Antonio 1957, no writ); *Sugg v. Smith*, 205 S.W. 363, 373 (Tex. Civ. App.—Austin 1918, writ ref'd); *International & G.N.R. Co. v. Boles*, 161 S.W. 914, 915 (Tex. Civ. App.—Austin 1913, writ ref'd).

## APPLICATION OF CANON OF STRICT CONSTRUCTION

At the outset, it must be noted that all statutes by their very nature are in derogation of the common law either directly or by entering an area previously free of common law regulation.<sup>7</sup> The doctrine of strict construction amounts only to the recognition of a presumption against any change in the common law.<sup>8</sup> According to one commentator, "it assumes that legislation is something to be deprecated."<sup>9</sup> Article 10, section 8 directs an extension of the statutory law through liberal construction of all statutes, an extension which is clearly antagonistic to the common law and the common law rule of strict construction.

The dissimilarity between a liberal and a strict construction can amount to a great difference in statutory application. A liberal construction expands the statute's purview to encompass more situations and circumstances.<sup>10</sup> A strict construction limits the application of the statute to only those circumstances encompassed by a narrow reading of the language used.<sup>11</sup> Accordingly, the problem of statutory construction is that contrary results may be reached in similar fact situations depending on whether the construction is liberal or strict.

*Historical Background*

The problem of assigning the intended meaning to the words of legislative enactments relates back several centuries to the early English common law.<sup>12</sup> Although the earliest of English statutes enjoyed a liberal construc-

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7. Horack, *The Disintegration of Statutory Construction*, 24 IND. L.J. 335, 345 (1949); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 387 (1908).

8. *Johnson v. Southern Pac. Co.*, 196 U.S. 1, 17 (1904).

9. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 387 (1908).

10. *See Industrial Accident Bd. v. Miers*, 227 S.W.2d 571, 577 (Tex. Civ. App.—Galveston), *aff'd in part, rev'd in part*, 149 Tex. 270, 232 S.W.2d 671 (1950); *Maryland Cas. Co. v. Smith*, 40 S.W.2d 913, 914 (Tex. Civ. App.—Dallas 1931, no writ); 2A J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 58.02, at 464 (4th ed. 1973).

11. *Christman v. Terminal R. Ass'n*, 157 S.W.2d 230, 234 (Mo. Ct. App. 1942); *see* Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381-84 (1907).

12. *See Heydon's Case*, 76 Eng. Rep. 637, 638 (K.B. 1584). In that case, Lord Coke reported some of the first rules of statutory construction:

[T]hat for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:—

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy,

tion,<sup>13</sup> by 1610 Lord Coke announced in *Bonham's Case*<sup>14</sup> that the common law would prevail over any act of Parliament repugnant to common right and reason, and that any such parliamentary act would be adjudged void.<sup>15</sup> By 1688, with the establishment of parliamentary supremacy, this policy had lost its vitality, yet the interpretation of statutes remained in the courts, and the judicial distaste for statutes in derogation of common right found itself in the restrictive interpretation of the statutes of that day.<sup>16</sup>

The English view was recognized early by American courts when the United States Supreme Court followed the doctrine in 1797.<sup>17</sup> By 1855, the Texas Supreme Court had adopted the rule in the early case of *DeWitt v. Dunn*,<sup>18</sup> stating that the rule of strict construction was imperative where the pertinent statute inflicted onerous and oppressive penalties.<sup>19</sup>

Determining why the canon has remained viable up to the present day despite the provisions of article 10, section 8 is a matter of conjecture. Certainly the doctrine of stare decisis has played an important role in the continuation of the rule.<sup>20</sup> Additionally, some commentators have suggested that the common law is the perfection of human reason and therefore is superior to any statutory law.<sup>21</sup> Associated with this contention is the idea that the common law is a better quality of law; being distilled from experience, it embodies broad principles of a durable quality as distinguished from statutes, which are rules devised merely to cope with

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according to the true intent of the makers of the Act, *pro bono publico*.  
*Id.* at 638 (footnotes of the court deleted).

13. II J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 325, at 630 (2d ed. 1904). The liberal construction was attributable to the brevity and lack of clarity in the statutes. The earliest of these English statutes were enacted in Latin and French prior to the reign of Edward III, which began in 1327. Judges devised them from the petitions and the King's answer; all those adopted at one session of Parliament were compiled to make so many chapters of one statute. *Id.* at 629-30.

14. 77 Eng. Rep. 646 (K.B. 1610).

15. *Id.* at 652.

16. One of the reasons the preference for strict construction arose is found in F. POLLACK, *ESSAY IN JURISPRUDENCE AND ETHICS* 85 (1882), where the author states: "Some of its rules cannot well be accounted for except on a theory that Parliament generally changes the law for the worse, and that the business of judges is to keep the mischief of its interference within the narrowest bounds." *Id.* at 85. See generally Fordham & Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 *VAND. L. REV.* 438, 440-41 (1950).

17. See *Brown v. Barry*, 3 U.S. (3 Dall.) 365, 367 (1797).

18. 15 Tex. 106 (1855).

19. *Id.* at 108. Despite the adoption of the doctrine of strict construction in this case, the court did not find it necessary to apply it to the statute involved. *Id.* at 108.

20. See *James v. Vernon Calhoun Packing Co.*, 498 S.W.2d 160, 162 (Tex. 1973); *Hanson Southwest Corp. v. Dal-Mac Constr. Co.*, 554 S.W.2d 712, 724 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.); *Fireman's Fund Ins. Co. v. McDaniel*, 327 S.W.2d 358, 366 (Tex. Civ. App.—Beaumont 1959, no writ).

21. See Fordham & Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 *VAND. L. REV.* 438, 441 (1950). But see Pound, *Common Law and Legislation*, 21 *HARV. L. REV.* 383, 404-06 (1908) (legislation truer foundation of common will).

problems as they might appear.<sup>22</sup> Regardless of the reason for its continued force, the canon has had a marked effect upon statutory construction in Texas despite contrary statutory law.<sup>23</sup>

### *Remedial Statutes*

Adherence to the strict construction canon has not been rigid, for Texas courts have selectively followed the liberal construction mandate of article 10, section 8.<sup>24</sup> Many courts dealing with a statute remedial in nature have rendered a more liberal construction and have seemed more inclined to follow article 10, section 8.<sup>25</sup> Courts in such cases have justified the use of a liberal construction as necessary for the full accomplishment of the remedial purposes for which the statutes involved were enacted.<sup>26</sup>

Classic examples of remedial statutes are the workmen's compensation laws.<sup>27</sup> Such laws are in derogation of the common law in that they have created new liabilities without reference to the negligent conduct of the party upon whom the burden of compensation is cast.<sup>28</sup> Despite this classification, they have been considered remedial in nature and therefore have been liberally construed by many courts.<sup>29</sup> Justification for the liberal con-

22. Fordham & Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 442 (1950).

23. See Johnson, *Article 2226 Revisited: Penetrating the Judicial Labyrinth*, 40 TEX. B.J. 395, 396 (1977).

24. Compare *Toyah Independent School Dist. v. Pecos-Barstow Independent School Dist.*, 466 S.W.2d 377, 379 (Tex. Civ. App.—San Antonio 1971, no writ) (liberally construing open meetings law) with *Ridout v. Mobile Hous., Inc.*, 497 S.W.2d 66, 68 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.) (strictly construing attorney's fees statute).

25. See, e.g., *Joaquin Independent School Dist. v. Fincher*, 510 S.W.2d 98, 102 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.) (school district consolidation statute); *Toyah Independent School Dist. v. Pecos-Barstow Independent School Dist.*, 466 S.W.2d 377, 379 (Tex. Civ. App.—San Antonio 1971, no writ) (open meetings law); *Hime v. City of Galveston*, 268 S.W.2d 543, 545 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.) (civil service sick leave statute). A statute which affords a remedy or facilitates remedies already existing for the redress of injuries is said to be remedial in nature. See *United Benefit Fire Ins. Co. v. Metropolitan Plumbing Co.*, 363 S.W.2d 843, 847 (Tex. Civ. App.—El Paso 1962, no writ).

26. *City of Mason v. West Texas Utils. Co.*, 150 Tex. 18, 29, 237 S.W.2d 273, 280 (1951); *United States Fidelity & Guar. Co. v. Parker Bros. & Co.*, 437 S.W.2d 880, 881 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.).

27. See *Goldman v. Torres*, 161 Tex. 437, 444, 341 S.W.2d 154, 158 (1960); *Texas Employers' Ins. Ass'n v. Holmes*, 145 Tex. 158, 164, 196 S.W.2d 390, 394 (1946).

28. *McDonald v. Texas Employers' Ins. Ass'n*, 267 S.W. 1074, 1075 (Tex. Civ. App.—Dallas 1924, writ ref'd).

29. See, e.g., *Huffman v. Southern Underwriters*, 133 Tex. 354, 359, 128 S.W.2d 4, 6 (1939); *Texas Employers' Ins. Ass'n v. Cummings*, 364 S.W.2d 255, 259 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.); *Industrial Accident Bd. v. Parker*, 348 S.W.2d 188, 191 (Tex. Civ. App.—Texarkana 1960, writ ref'd n.r.e.). But see *Poe v. Continental Oil & Cotton Co.*, 231 S.W. 717, 720 (Tex. Comm'n App. 1921, judgment adopted) (Workmen's Compensation Act deprives citizens of common law right and should be strictly construed); *Silurian Oil Co. v. White*, 252 S.W. 569, 570 (Tex. Civ. App.—Amarillo 1923, writ ref'd) (strictly construing law in derogation of common law right).

struction in such cases has been the view that these acts are highly responsive to important social and economic needs by providing a speedier and more efficient method of settling the claims of employees against their employers.<sup>30</sup>

Other cases involving the public welfare have prompted Texas courts to view the statutes concerned as remedial in nature, thus enabling a liberal construction. Some of these cases have involved the open meetings law,<sup>31</sup> a civil service statute,<sup>32</sup> a school district consolidation statute,<sup>33</sup> a statute defining libel defenses,<sup>34</sup> an appeal bond statute,<sup>35</sup> and a mechanic's lien statute.<sup>36</sup>

Although they cannot be considered strictly remedial, election statutes have generally been afforded a liberal construction.<sup>37</sup> When faced with the problem of construing an election statute, the Amarillo Court of Civil Appeals in 1947 held strongly in favor of a liberal construction.<sup>38</sup> It emphatically announced that statutory provisions concerning public functions which the law had committed to the people, such as general and special elections, should always be liberally construed so as to effectuate the will of the people.<sup>39</sup> To those ends, irregularities in the following of election procedure have been found immaterial where the public mandate was not defeated.<sup>40</sup>

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30. See *Texas Employers' Ins. Ass'n v. Holmes*, 145 Tex. 158, 164, 196 S.W.2d 390, 394 (1946). See generally Horowitz, *Modern Trends in Workmen's Compensation*, 21 IND. L.J. 473 (1946).

31. *Toyah Independent School Dist. v. Pecos-Barstow Independent School Dist.*, 466 S.W.2d 377, 380 (Tex. Civ. App.—San Antonio 1971, no writ) (assurance of public information concerning public business transactions).

32. *Hime v. City of Galveston*, 268 S.W.2d 543, 545 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.) (liberal construction allowed accumulated sick leave benefits to survive employee's death).

33. *Joaquin Independent School Dist. v. Fincher*, 510 S.W.2d 98, 102 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.) (liberally construing to allow consolidation).

34. *Taylor v. Iowa Park Gin Co.*, 199 S.W. 853, 856 (Tex. Civ. App.—Galveston 1917, no writ) (liberally construing to extend defenses).

35. *Ezell v. Knapp & Elliott*, 120 Tex. 503, 507, 39 S.W.2d 829, 831 (1931) (Comm'n App. decision) (appeal bond held applicable to appeal from justice court to county court).

36. *William Cameron & Co. v. Trueheart*, 165 S.W. 58, 60 (Tex. Civ. App.—Austin 1914, no writ) (statute liberally construed to secure wages for mechanics and materialmen).

37. *E.g.*, *Grizzaffi v. Lee*, 517 S.W.2d 885, 890 (Tex. Civ. App.—Fort Worth 1974, writ disp'd); *Little v. Alto Independent School Dist.*, 513 S.W.2d 886, 891 (Tex. Civ. App.—Tyler 1974, writ disp'd); *Britten v. Williams*, 293 S.W.2d 853, 855-57 (Tex. Civ. App.—Amarillo 1956, writ ref'd n.r.e.).

38. *Pollard v. Snodgrass*, 203 S.W.2d 641, 644 (Tex. Civ. App.—Amarillo 1947, writ disp'd).

39. *Id.* at 644. As a corollary, the court stated that election statutes should be strictly enforced to prevent fraud, but liberally construed to effectuate the will of the voters. *Id.* at 644.

40. See *Little v. Alto Independent School Dist.*, 513 S.W.2d 886, 890-91 (Tex. Civ. App.—Tyler 1974, writ disp'd).

The public will and welfare, therefore, seem to have been decisive factors for consideration in determining whether a statute is remedial. Guided by such principles of public policy, the courts, in order to perpetuate the beneficial purposes of remedial statutes, have granted and probably will continue to grant such statutes a liberal construction.

### *Penal Statutes*

When dealing with a statute penal in nature, Texas courts have rendered more restrictive interpretations than when dealing with remedial statutes.<sup>41</sup> Penal legislation, like most other statutes, is in derogation of the common law and generally has been strictly construed.<sup>42</sup> Texas courts have strictly construed penal statutes in order to provide reasonable certainty regarding exactly what conduct the statute proscribes.<sup>43</sup>

A statute that is enforceable by fine, imprisonment, or other punishment is a penal statute.<sup>44</sup> The penal character, however, does not depend upon the use of any narrowly limited class of methods by which punishment is administered.<sup>45</sup> Rather, it depends upon some sanction in the statute that compels obedience beyond mere redress to an individual or society for the injury received.<sup>46</sup>

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41. *E.g.*, *Tenneco Oil Co. v. Padre Drilling Co.*, 453 S.W.2d 814, 818 (Tex. 1970); *Townsend v. State*, 427 S.W.2d 55, 62 (Tex. Crim. App. 1968); *Ridout v. Mobile Hous., Inc.*, 497 S.W.2d 66, 68 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.). Although the Penal Code is certainly a penal statute, the term "penal statute" is not restricted to those provisions found in the Penal Code.

42. See Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749-50 (1935). Although closely related to the canon of strict construction of statutes in derogation of the common law, the canon of strict construction of penal statutes has a different history. It arose in 14th century England out of the "benefit of clergy"—the freedom from the usual death penalty for common law felonies. The benefit of clergy was claimed through a literacy test, and with the increase of successful claimants during the 15th century, a number of statutes abolishing the benefit of clergy in specified crimes were passed. Henry VIII passed several more statutes to exclude certain other felons from being eligible to claim the benefit of clergy. To combat this every increasing criminal liability, the canon of strict construction of penal statutes began. *Id.* at 749-50.

43. See *Missouri, K. & T. Ry. v. State*, 100 Tex. 420, 424, 100 S.W. 766, 767 (1907); *Ex parte Leslie*, 87 Tex. Crim. 476, 478, 223 S.W. 227, 228 (1920) (following Texas Supreme Court construction).

44. 3 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 59.01, at 1 (1974); see *Taylor v. United States*, 44 U.S. 197, 210 (1845); *City of San Marcos v. Lower Colorado River Auth.*, 508 S.W.2d 403, 407 (Tex. Civ. App.—Austin 1974), *modified*, 523 S.W.2d 641 (Tex. 1975).

45. See *Bowles v. Angelo*, 188 S.W.2d 691, 693-94 (Tex. Civ. App.—Galveston 1945, no writ) (wartime Emergency Price Control Act).

46. See *Missouri, K. & T. Ry. v. State*, 100 Tex. 420, 424, 100 S.W. 766, 767 (1907) (weekly penalty for railroad's failure to erect statutorily prescribed water-closets at all stations); *cf.* *Schild v. Busch*, 293 F. Supp. 1353, 1355 (S.D. Tex. 1968) (penalties imposed for planting in excess of acreage allotment under Agricultural Adjustment Act); *United States v. Four Hundred & Twenty Dollars*, 162 F. 803, 805 (S.D. Ala. 1908) (statute regulating immigration of aliens).

Article 2226 of the civil statutes,<sup>47</sup> which authorizes the recovery of attorney's fees in cases coming within its scope, has usually been found to be penal in character.<sup>48</sup> Texas courts, continually finding it to be in derogation of the common law and penal in nature, have felt compelled to render a strict construction when applying it.<sup>49</sup> In most of those cases, the courts have relied primarily upon the precept of *stare decisis*, with little more than a restatement of the canon of strict construction itself as the reason for strictly construing article 2226.<sup>50</sup> A few courts, when dealing with article 2226, have not so complacently permitted *stare decisis* to displace what is probably the more well-reasoned approach. In those instances, the courts have rendered a more liberal construction, in each case relying on the provisions of article 10, section 8.<sup>51</sup>

Oddly enough, the Penal Code, which of course is penal in nature, has an early history of liberal construction.<sup>52</sup> This tradition perhaps is attributable to the fact that since 1856 the penal code has contained a provision subverting the canon of strict construction.<sup>53</sup> Although not always strictly adhering to this legislative directive, the Texas Court of Criminal Appeals appears to have been more dutiful in following the Penal Code's construction article than the supreme court in following article 10, section 8.<sup>54</sup>

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47. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1978).

48. See *Tenneco Oil Co. v. Padre Drilling Co.*, 453 S.W.2d 814, 818 (Tex. 1970); *Van Zandt v. Fort Worth Press*, 359 S.W.2d 893, 895 (Tex. 1962); *Burke v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 363 S.W.2d 392, 395 (Tex. Civ. App.—Waco 1962, no writ). Suits within the scope of article 2226 are generally those for services rendered, labor performed, or material furnished. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1978).

49. See, e.g., *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 804 (Tex. 1974); *New Amsterdam Cas. Co. v. Texas Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967); *Davidson v. Suber*, 553 S.W.2d 430, 432 (Tex. Civ. App.—Austin 1977, no writ).

50. See *Ridout v. Mobile Hous., Inc.*, 497 S.W.2d 66, 68 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.); *Barnes v. Bituminous Cas. Corp.*, 495 S.W.2d 5, 10 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.); *Success Motivation Inst., Inc. v. Jamieson Film Co.*, 473 S.W.2d 275, 281 (Tex. Civ. App.—Waco 1971, no writ); *Mercantile Nat'l Bank v. Hudgens*, 412 S.W.2d 364, 366 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.).

51. *Welborn v. Woolfolk*, 560 S.W.2d 189, 190-91 (Tex. Civ. App.—Fort Worth 1977, no writ); *Wyche v. Wichita Eng'r Co.*, 374 S.W.2d 728, 732 (Tex. Civ. App.—Dallas 1964, no writ).

52. *State v. Elliot*, 34 Tex. 148, 150 (1870-71); *The Road Cases*, 30 Tex. 503, 505 (1867). In liberally construing the penal code, the court in *Elliot* said that the reason behind the rule of strict construction had become obsolete or had never existed in Texas. *State v. Elliot*, 34 Tex. 148, 150 (1870-71).

53. *Searcy & Patterson, Practice Commentary*, 1 TEX. PENAL CODE ANN. 26 (Vernon 1974). As the statute reads today, TEX. PENAL CODE ANN. § 1.05 (Vernon 1974) states: "The rule that a penal statute is to be strictly construed does not apply to this code. The provisions of this code shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code."

54. See, e.g., *Powell v. State*, 538 S.W.2d 617, 619 (Tex. Crim. App. 1976); *Ramirez v. State*, 518 S.W.2d 546, 547 (Tex. Crim. App. 1975). *But see* *Linley v. State*, 501 S.W.2d 121, 123 (Tex. Crim. App. 1973) (strictly construing penal statute).

Arguably, the reverse of this situation would seem more likely when it is considered that too liberal a construction of the Penal Code could lead to unconstitutional vagueness.<sup>55</sup> Nonetheless, a similar provision calling for abolition of the common law rule of strict construction was included in the 1974 Penal Code, and since that time the court of criminal appeals has complied with it.<sup>56</sup>

Since article 10, section 8 of the civil statutes and section 1.05 of the Penal Code are substantially similar in their apparent intent, a conclusion as to why the court of criminal appeals has chosen to follow section 1.05 of the Penal Code while the supreme court has largely ignored article 10, section 8 would be speculative. Perhaps the courts' divergent paths can be attributed to disagreement among the civil courts of Texas as to whether a liberal or a strict construction is proper. With so many civil courts, the canon of strict construction gained early, broad support in both appellate levels,<sup>57</sup> and article 10, section 8 may well have been forgotten as soon as it was enacted. The supreme court also afforded itself a degree of flexibility in not applying article 10, section 8. In the criminal courts, however, the legislative directive was quickly adopted by the court of criminal appeals and has been followed to this day.<sup>58</sup>

#### *Statutes Both Penal and Remedial*

Some statutes, because of the provisions they contain, are considered to be both penal and remedial in nature. Such would be the case where a statute introduces new regulations for the protection of public welfare and also imposes penalties to deter their violation.<sup>59</sup> Because the traditional distinctions are unclear, courts dealing with such statutes have become perplexed as whether to render a liberal or a strict construction. Some courts have ignored the remedial benefits that the statute may contain by focusing on only the penal provisions, and therefore have strictly construed the statute.<sup>60</sup> Conversely, a liberal construction has been rendered when

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55. See *Passmore v. State*, 544 S.W.2d 399, 401 (Tex. Crim. App. 1976); *Powell v. State*, 538 S.W.2d 617, 619 (Tex. Crim. App. 1976). See generally Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 756-68 (1935).

56. See *Powell v. State*, 538 S.W.2d 617, 619 (Tex. Crim. App. 1976); *Ramirez v. State*, 518 S.W.2d 546, 547-48 (Tex. Crim. App. 1975).

57. See *Schloss v. Atchison, T. & S.F. Ry.*, 85 Tex. 601, 604, 22 S.W. 1014, 1015 (1893); *DeWitt v. Dunn*, 15 Tex. 106, 108 (1855); *Texas & P.R. Co. v. Wood*, 23 S.W. 744, 745 (Tex. Civ. App. 1893, no writ).

58. *Powell v. State*, 538 S.W.2d 617, 619 (Tex. Crim. App. 1976); *Oliver v. State*, 65 Tex. Crim. 150, 165, 144 S.W. 604, 612 (1911).

59. *Board of Ins. Comm'rs v. Great S. Life Ins. Co.*, 150 Tex. 258, 266, 239 S.W.2d 803, 808-09 (1951).

60. See *Bruner v. State*, 463 S.W.2d 205, 215 (Tex. Crim. App. 1970); *Carney v. Sam Houston Underwriters*, 272 S.W.2d 942, 946 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.). But see *Howard v. Simons*, 285 S.W.2d 478, 480 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.) (liberally construing remedial provisions while strictly construing penal provisions).

only the remedial purposes of the statute have been considered.<sup>61</sup> Still another view has separated the penal portions from those that are remedial and given the penal provisions a strict construction and the remainder of the statute a broader, more liberal interpretation.<sup>62</sup> In light of such important, consumer-oriented legislation as the Texas Deceptive Trade Practices—Consumer Protection Act<sup>63</sup> (DTPA) and the Texas Consumer Credit Code,<sup>64</sup> both of which contain remedial as well as penal provisions, the problem of statutory construction becomes increasingly important.

The DTPA has received a mixed interpretation from the Texas judiciary.<sup>65</sup> At least a few courts, possibly recognizing only its penal provisions, have accorded the Act a strict construction;<sup>66</sup> other courts, in opposition, have argued for liberal construction.<sup>67</sup> The Texas Supreme Court settled the controversy, however, in *Woods v. Littleton*.<sup>68</sup> In requiring a liberal construction, the *Woods* court looked to section 17.44, which calls for a liberal construction of the entire Act.<sup>69</sup> This liberal construction is certainly consistent with the legislative intent of providing effective relief for the aggrieved consumer.<sup>70</sup>

Comparison of the application of article 10, section 8 with section 17.44 of the DTPA is instructive. The directive of liberal construction of the DTPA is in accord with the provisions of article 10, section 8. It is interesting to note that the supreme court has readily chosen to follow section 17.44 of the DTPA after so many years of ignoring similar provisions con-

61. See *McDaniel v. Dulworth*, 550 S.W.2d 395, 396 (Tex. Civ. App.—Dallas 1977, no writ); *Volkswagen of America, Inc. v. Licht*, 544 S.W.2d 442, 446 (Tex. Civ. App.—El Paso 1976, no writ).

62. *Board of Ins. Comm'rs v. Great S. Life Ins. Co.*, 150 Tex. 258, 266, 239 S.W.2d 803, 809 (1951).

63. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1978).

64. TEX. REV. CIV. STAT. ANN. art. 5069 (Vernon 1971 & Supp. 1978).

65. Compare *Spradling v. Williams*, 553 S.W.2d 143, 146 (Tex. Civ. App.—Beaumont 1977, writ granted) (construing act strictly to mean that "may" does not mean "mandatory") with *Volkswagen of America, Inc. v. Licht*, 544 S.W.2d 442, 446 (Tex. Civ. App.—El Paso 1976, no writ) (construing act liberally to allow for recovery of attorney's fees on appeal).

66. See *Mallory v. Custer*, 537 S.W.2d 141, 143 (Tex. Civ. App.—Austin 1976, no writ); *Cape Conroe Ltd. v. Specht*, 525 S.W.2d 215, 218-19 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ). See generally Comment, *Breach of Warranty and Treble Damages Under the Texas Deceptive Trade Practices and Consumer Protection Act*, 28 BAYLOR L. REV. 395, 398 (1976).

67. See *McDaniel v. Dulworth*, 550 S.W.2d 395, 396 (Tex. Civ. App.—Dallas 1977, no writ); *Doyle v. Grady*, 543 S.W.2d 893, 896 (Tex. Civ. App.—Texarkana 1976, no writ); *Crawford Chevrolet, Inc. v. McLarty*, 519 S.W.2d 656, 662 (Tex. Civ. App.—Amarillo 1975, no writ). See generally Comment, *The Texas Deceptive Trade Practices—Consumer Protection Act: Application to Professional Malpractice*, 8 ST. MARY'S L.J. 763, 764-65 (1977).

68. 554 S.W.2d 662 (Tex. 1977).

69. *Id.* at 667-69. TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon Supp. 1978) states: "This subchapter shall be liberally construed and applied to promote its underlying purposes . . . ."

70. *McDaniel v. Dulworth*, 550 S.W.2d 395, 396 (Tex. Civ. App.—Dallas 1977, no writ).

tained in article 10, section 8. To hold otherwise, however, would render ineffective the tools supplied the wronged consumer in seeking redress from unscrupulous sellers.<sup>71</sup> Seemingly, the only differences between the provision of section 17.44 and the similar directives of article 10, section 8 are the newness of 17.44, and the restrictive purposes for which it can be applied.<sup>72</sup> Unlike the broad application that article 10, section 8 could have if fully and effectively applied, section 17.44 applies only to the DTPA and the supreme court can exercise 17.44 without fear of losing the flexibility it enjoys in construing the many diversified statutes.

Another consumer legislation statute, the Texas Consumer Credit Code, has thrown Texas courts attempting to interpret it into a quagmire.<sup>73</sup> Because it contains penalties for various violations, some courts have found the Consumer Credit Code to be penal in nature and therefore, have strictly construed it.<sup>74</sup> Other courts, however, have looked beyond the penal character of the statute toward the legislative intent to protect the consumer.<sup>75</sup> This intent has been viewed as remedial, and, consequently, more courts have been willing to render a liberal construction.<sup>76</sup>

The remedial characterization of the statute has given rise to an interesting anomaly. In order to reach a liberal construction to further the Code's remedial purposes a court may have to read the statute rigidly to find a violation.<sup>77</sup> A rigid reading may be acceptable, however, in view of the clear

71. *Id.* at 396.

72. Section 17.44 specifically applies to the subchapter comprising the DTPA. TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon Supp. 1978).

73. Compare *Pinemont Bank v. DuCroz*, 528 S.W.2d 877, 879 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (usury statute penal in nature and to be strictly construed) with *Walker v. Ross*, 548 S.W.2d 447, 450 (Tex. Civ. App.—Fort Worth), writ ref'd n.r.e. per curiam, 554 S.W.2d 189 (Tex. 1977) (usury statute liberally construed).

74. See *Hight v. Jim Bass Ford, Inc.*, 552 S.W.2d 490, 491 (Tex. Civ. App.—Austin 1977; writ ref'd n.r.e.); *Micrea, Inc. v. Eureka Life Ins. Co.*, 534 S.W.2d 348, 354 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

75. *O.R. Mitchell Motors, Inc. v. Bell*, 528 S.W.2d 856, 860 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.); see *Miller v. First State Bank*, 551 S.W.2d 89, 100-01 (Tex. Civ. App.—Fort Worth 1977), *aff'd as modified*, 563 S.W.2d 572, 577 (Tex. 1978). In modifying the *Miller* decision the supreme court totally ignored article 10, section 8 in holding that the Consumer Credit Code was to be strictly construed. *First State Bank v. Miller*, 563 S.W.2d 571, 577 (Tex. 1978).

76. See *O.R. Mitchell Motors, Inc. v. Bell*, 528 S.W.2d 856, 859-60 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.); cf. *N.C. Freed Co. v. Board of Governors of Fed. Reserve Sys.*, 473 F.2d 1210, 1214 (2d Cir. 1973) (federal consumer credit legislation).

77. See *Chavez v. Aetna Fjn. Co.*, 553 S.W.2d 174, 176 (Tex. Civ. App.—San Antonio 1977), writ ref'd n.r.e. per curiam, 561 S.W.2d 799 (Tex. 1978); *Moore v. Sabine Nat'l Bank*, 527 S.W.2d 209, 212 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.). Still another paradoxical situation arose where a court found that there had been an insignificant usurious charge. In *Thornhill v. Sharpstown Dodge Sales, Inc.*, 546 S.W.2d 151, 152-53 (Tex. Civ. App.—Beaumont 1976, no writ) the court found that the defendant had charged interest in the amount of forty-two cents over the maximum permitted under the usury statute, but did

legislative intent that the Consumer Credit Code be granted a liberal construction in order to fulfill its remedial purposes.<sup>78</sup> Indeed, the Texas Supreme Court in *Southwestern Investment Co. v. Mannix*<sup>79</sup> recently viewed the remedial purposes as controlling in liberally construing the statute.<sup>80</sup> Only a few months later, however, the court reached a contrary result in *First State Bank v. Miller*.<sup>81</sup> Without mention of *Mannix*, the court concerned itself with the penal nature of the Code and determined that a strict construction was necessary.<sup>82</sup> The only distinction between the two cases was the different provisions of the Code involved and the differing line of support relied upon in each case. *Mannix* involved a disclosure violation under the Code and the supreme court relied notably upon the legislative intent in rendering a liberal construction.<sup>83</sup> Dealing with a usury violation under the Code, *Miller* found the provisions of the Code to be penal and quickly deemed a strict construction to be appropriate.<sup>84</sup> A strong dissent in the *Miller* case, however, turned to the legislative intent of the Consumer Credit Code and persuasively argued for an apparent liberal construction, and one certainly in agreement with the construction rendered in *Mannix*.<sup>85</sup> This position is also in accord with several other recent cases<sup>86</sup> and would seem to be the only way to guard the consumer from unscrupulous and predatory trade practices.

#### APPLICATION OF ARTICLE 10, SECTION 8

Many Texas courts have justified strict construction by finding a statute

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not allow recovery. *Id.* at 153. Whether this interpretation constitutes a liberal or strict construction presents an interesting contradiction in terms. It cannot be a liberal construction because it restricts, rather than extends, the applicability of the statute. Nor can it be a strict construction as it did not grant recovery for a clear violation of the statute. Such interpretation is in accord, however, with the doctrine of "de minimis non curat lex," which means that the law takes no notice of trifles.

78. See *Declaration of Legislative Intent*, 15 TEX. REV. CIV. STAT. ANN. 1-2 (Vernon 1971).

79. 557 S.W.2d 755 (Tex. 1977).

80. *Id.* at 768-69.

81. 563 S.W.2d 572 (Tex. 1978).

82. *Id.* at 577.

83. *Southwestern Inv. Co. v. Mannix*, 557 S.W.2d 755, 761 (Tex. 1977).

84. *First State Bank v. Miller*, 563 S.W.2d 572 (Tex. 1978).

85. *Id.* at 579-80. It is interesting to note that in the opinions of both the majority and the dissent no mention was made of article 10, section 8, although its influence was prominent in the opinion filed by the court of civil appeals. The dissent certainly could have supported its position by its use but chose not to, presumably so that the court as a whole could maintain flexibility in future statutory construction cases.

86. See *Windhorst v. Adcock Pipe & Supply*, 547 S.W.2d 260, 261 (Tex. 1977); *General Motors Acceptance Corp. v. Uresti*, 553 S.W.2d 660, 663 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.); *Moore v. Sabine Nat'l Bank*, 527 S.W.2d 209, 212 (Tex. Civ. App.—Austin 1975, no writ). *But see Crow v. Home Sav. Ass'n*, 522 S.W.2d 457, 460 (Tex. 1975) (strictly construing statute to find no violation).

to be in derogation of the common law or penal in nature.<sup>87</sup> As the court in *O.R. Mitchell Motors, Inc. v. Bell*<sup>88</sup> pointed out, however, none of the construction mandates which are embodied in article 10 even attempt to infer a requirement of strict construction.<sup>89</sup> Only section 8 of article 10 speaks of strict construction, and it expressly commands that the common law rule of strict construction "shall have no application" and further directs that statutes "shall be liberally construed with a view to effect their objects . . . ."<sup>90</sup> Texas courts have not embraced article 10, section 8 and the inescapable conclusion is that most have judicially avoided the statute.<sup>91</sup> In fact, although the supreme court has liberally construed many remedial statutes, the court has never effectively applied article 10, section 8 as a basis for liberally construing any statute.<sup>92</sup> Moreover, the supreme court and the courts of civil appeals have steadfastly adhered to the canon of strict construction except in cases involving statutes they have deemed remedial.

#### *Strict Compliance vs. Strict Construction*

More cautious courts have on occasion employed other means to avoid the liberal construction mandate of article 10, section 8. While labelling their action as in accordance with the liberal construction requirement, they have at the same time inappropriately extended the doctrine of strict compliance as a substitute for otherwise impermissible strict construction.<sup>93</sup> Strict compliance is often demanded in cases dealing with statutes in derogation of the common law where the courts have acknowledged that

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87. See, e.g., *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 804 (Tex. 1974); *Tenneco Oil Co. v. Padre Drilling Co.*, 453 S.W.2d 814, 818 (Tex. 1970); *New Amsterdam Cas. Co. v. Texas Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967).

88. 528 S.W.2d 856 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

89. *Id.* at 860.

90. TEX. REV. CIV. STAT. ANN. art. 10, § 8 (Vernon 1969).

91. This avoidance does not appear unusual, however, as some courts in other states that have similar statutes likewise refuse to follow them. R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 269-70 (1975).

92. See *Greer v. Franklin Life Ins. Co.*, 148 Tex. 166, 171, 221 S.W.2d 857, 859 (1949) (court suggests interpretation of statute in light of the common law, which statute expressly abrogates); *Massachusetts v. United N. & S. Dev. Co.*, 140 Tex. 417, 420-21, 168 S.W.2d 226, 228-29 (1942) (sets aside argument of liberal construction if additional application is not completely obvious); *Smith v. Wortham*, 106 Tex. 106, 111, 157 S.W. 740, 742 (1913) (Hawkins, J., dissenting) (arguing for liberal construction pursuant to article 10, section 8); *Farmers' & Mechanics' Nat'l Bank v. Hanks*, 104 Tex. 320, 325, 137 S.W. 1120, 1123 (1911) (prefers rule of "fair construction" over legislative rule of liberal construction). *But see* *Ezell v. Knapp & Elliot*, 120 Tex. 503, 507, 39 S.W.2d 829, 831 (1931) (Comm'n App. decision) (properly applying article 10, section 8); *Seley v. Howell*, 115 Tex. 583, 589, 285 S.W. 815, 817 (1926) (Comm'n App. decision) (properly applying article 10, section 8).

93. See *Toyah Independent School Dist. v. Pecos-Barstow Independent School Dist.*, 466 S.W.2d 377, 379 n.5 (Tex. Civ. App.—San Antonio 1971, no writ).

such statutes are to be liberally construed.<sup>94</sup> Liberal construction is given to arrive at the legislative intent with a view to effect the object and purpose of the enactment.<sup>95</sup> Strict compliance, however, is demanded to assure that those seeking to avail themselves of the benefit of a statute comply strictly with its terms,<sup>96</sup> and is a doctrine well settled in Texas courts.<sup>97</sup>

The demand for strict compliance has led some courts to take advantage of the similarity between impermissible strict construction and acceptable strict compliance.<sup>98</sup> By disguising strict construction as mere acquiescence to the requirement of strict compliance, the requirement of liberal construction can be circumvented.<sup>99</sup> An example of such tactic was the narrow interpretation of to whom the guest statute should apply in *Hickman v. Finlay*.<sup>100</sup> The court in that case found the automobile guest statute to be in derogation of the common law, yet recognized that the canon of strict construction no longer applied to such statutes.<sup>101</sup> To avoid having to construe the statute liberally, the court, in the name of strict compliance, narrowly construed who was a guest under the statute.<sup>102</sup> In effect, the court said it would give a liberal construction to a statute the scope of which it had restricted according to its own narrow interpretation. Closely scrutinized, such an approach appears to be no more than avoidance of the spirit, if not also the letter, of article 10, section 8.

### *Judicial Evasion*

In avoiding the application of article 10, section 8, many courts have dispensed with semantic subtleties in order to render a strict construction. The Dallas Court of Civil Appeals in *Hanson Southwest Corp. v. Dal-Mac Construction Co.*,<sup>103</sup> construing the recovery of attorney's fees under article 2226, admitted that many courts had overlooked the provisions of article

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94. See *Hickman v. Finlay*, 392 S.W.2d 147, 149 (Tex. Civ. App.—Austin 1965, writ ref'd); *Gregory v. Otts*, 329 S.W.2d 904, 906 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.).

95. *Smith v. Texas Co.*, 53 S.W.2d 774, 776 (Tex. Comm'n App. 1932, holding approved).

96. *Id.* at 776.

97. See *Buerger v. Wells*, 110 Tex. 566, 567, 222 S.W. 151, 151 (1920); *Scurlock & Rutledge v. Gulf, C. & S.F. Ry.*, 77 Tex. 478, 481, 14 S.W. 148, 148 (1890).

98. *Hickman v. Finlay*, 392 S.W.2d 147, 149 (Tex. Civ. App.—Austin 1965, writ ref'd); *Gregory v. Otts*, 329 S.W.2d 904, 906 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.).

99. *Hickman v. Finlay*, 392 S.W.2d 147, 149 (Tex. Civ. App.—Austin 1965, writ ref'd); *Gregory v. Otts*, 329 S.W.2d 904, 906 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.).

100. 392 S.W.2d 147 (Tex. Civ. App.—Austin 1965, writ ref'd).

101. *Id.* at 149.

102. *Id.* at 149. In *Hickman*, the court determined that a cousin entering a car for a ride home from a family reunion was not a guest, thereby denying automobile driver benefits of the guest statute. *Id.* at 149.

103. 554 S.W.2d 712 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

10, section 8 when strictly construing article 2226.<sup>104</sup> Acknowledging that article 2226 should receive a liberal construction pursuant to the provisions of article 10, section 8, the court blithely proceeded to render a strict construction,<sup>105</sup> justifying its result on the basis of prior supreme court decisions.<sup>106</sup>

In defense of this reasoning by the *Hanson* court, it should be noted that the principle of stare decisis is particularly applicable in matters of statutory construction.<sup>107</sup> Courts generally have adhered to an established construction on the theory that if a previous statutory construction had been improper, the legislature would have responded by amending the statute to clarify its intended meaning.<sup>108</sup> It can hardly be said, however, that this argument alone should provide support for totally ignoring article 10, section 8, particularly when the court itself, after a plain reading of the section, admitted that the previous constructions had been erroneous.<sup>109</sup>

Interestingly, the supreme court has not completely ignored article 10, section 8.<sup>110</sup> In 1969 it allowed that the rule of strict construction should not be followed, but quickly receded by also recognizing a rule that a statute creating liability unknown to the common law must be strictly construed not to extend beyond its plain meaning.<sup>111</sup> Again, such words are but judicial evasion of article 10, section 8. As the court in *O.R. Mitchell*

104. *Id.* at 724.

105. *Id.* at 724. In acknowledging that a liberal construction of article 2226 would be proper, the court cited to Johnson, *Article 2226 Revisited: Penetrating the Judicial Labyrinth*, 40 Tex. B.J. 395 (1977). In the article, the author strongly argued that article 2226 should receive a liberal construction pursuant to article 10, section 8. *Id.* at 396, 398.

106. *Hanson Southwest Corp. v. Dal-Mac Constr. Co.*, 554 S.W.2d 712, 724 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.). The case cited as controlling was *Tenneco Oil Co. v. Padre Drilling Co.*, 453 S.W.2d 814 (Tex. 1970). *Tenneco* has been frequently cited as controlling when applying a strict construction to the statute involved. See *Hight v. Jim Bass Ford, Inc.*, 552 S.W.2d 490, 491 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.) (Consumer Credit Code); *Ridout v. Mobile Hous., Inc.*, 497 S.W.2d 66, 68 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.) (attorney's fees statute).

107. *James v. Vernon Calhoun Packing Co.*, 498 S.W.2d 160, 162 (Tex. 1973); *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 186 (Tex. 1968).

108. See *United States v. South Buffalo Ry.*, 333 U.S. 771, 774-75 (1948); *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 186 (Tex. 1968).

109. See *Hanson Southwest Corp. v. Dal-Mac Constr. Co.*, 554 S.W.2d 712, 724 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.).

110. See *Smith v. Wortham*, 106 Tex. 106, 111, 157 S.W. 740, 742 (1913) (dissenting opinion) (liberal construction mandated by article 10, section 8); *Farmers' & Mechanics' Nat'l Bank v. Hanks*, 104 Tex. 320, 325, 137 S.W. 1120, 1123 (1911) (preferring a fair construction over a liberal construction).

111. *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969). Although it must be admitted that the court's construction of the guest statute in *Satterfield* was completely reasonable, use of the *Satterfield* language resulted in a strict construction in at least one other somewhat dissimilar case. See *Cafeterias, Inc. v. System-Master, Inc.*, 490 S.W.2d 253, 256 (Tex. Civ. App.—Austin 1973, no writ).

*Motors, Inc. v. Bell*<sup>112</sup> pointed out, nothing in article 10 speaks favorably of strict construction.<sup>113</sup>

### *Judicial Legislation*

In pointing out the reluctance of Texas courts to apply article 10, section 8, it must be questioned whether the courts have legislated excessively in avoiding its use. It has been suggested that judicial legislation is completely proper and often unavoidable.<sup>114</sup> In many instances that may be true, and there may perhaps be no reasonable objection to judicial legislation so long as the function is exercised in accordance with the constitutional safeguards intended to prevent abuse of discretion.<sup>115</sup> Conversely, it may be argued that the legislature has the primary function of lawmaking and that the courts ought to leave that responsibility to it,<sup>116</sup> especially where a plain reading of a statute such as article 10, section 8 can yield only one meaning.

The Texas Supreme Court, in addressing the question of judicial legislation through statutory construction, has ruled that it is the duty of the court to administer the law as it is written and not to make law.<sup>117</sup> That concept would seem to embody a strong distaste for judicial legislation. Ironically, the judicial evasion of article 10, section 8 is suggestive of judicial legislation. It is equivalent to a total disregard of a legislative enactment, and only adds confusion as to who makes the laws and what each particular statute's scope is. A sounder approach would be found in fully applying article 10, section 8, as some recent decisions have done,<sup>118</sup> so as to fully effectuate the section's underlying legislative intent.

### CONCLUSION

The explanation of the supreme court's long-standing avoidance of article 10, section 8 would be only conjecture. The legislature intended all of its legislation to be liberally construed and not to allow the courts the flexibility of strictly or liberally construing statutes as the courts might

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112. 528 S.W.2d 856 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

113. *Id.* at 859-60.

114. See *Guisseppi v. Walling*, 144 F.2d 608, 620 (2d Cir. 1944), *aff'd sub nom.*, *Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945).

115. See *Lenhoff, Extra-Legislational Progress of Law: The Place of the Judiciary in the Shaping of New Law*, 28 *NEB. L. REV.* 542, 549 (1949).

116. See *Wolf v. Young*, 277 S.W.2d 744, 746-47 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.).

117. See *Woolsey v. Panhandle Ref. Co.*, 131 Tex. 449, 456, 116 S.W.2d 675, 678 (1938); *Farmers' & Mechanics' Nat'l Bank v. Hanks*, 104 Tex. 320, 325, 137 S.W. 1120, 1123 (1911).

118. *Welborn v. Woolfolk*, 560 S.W.2d 189, 190 (Tex. Civ. App.—Fort Worth 1977, no writ); see *Walker v. Ross*, 548 S.W.2d 447, 450 (Tex. Civ. App.—Fort Worth), *writ ref'd n.r.e. per curiam*, 554 S.W.2d 189 (Tex. 1977).

deem appropriate in each case.<sup>119</sup> Perhaps the supreme court sees this directive as an invasion into its province by the legislature. Certainly, the possible repercussions that compliance with article 10, section 8 could have would be vast, for it would restrict the range for judicial interpretation of all the civil statutes.

The Fort Worth Court of Civil Appeals has taken a prudent step toward fulfilling the legislative directives of article 10, section 8 and one that should be followed. Although the Fort Worth court has relinquished the flexibility it had prior to its recognition of the validity of article 10, section 8, it grants to the laws of Texas a proper application, and one which is consistent with the intent of the legislature.

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119. See TEX. REV. CIV. STAT. ANN. art. 10, § 8 (Vernon 1969).