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Notes - Jury—Trial—Appointment and Hearing by Master Does Not Affect Right to Jury Trial.—Creglar v. Hyde

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Recommended Citation

Frank W. Elliott, *Notes - Jury—Trial—Appointment and Hearing by Master Does Not Affect Right to Jury Trial.—Creglar v. Hyde*, #N/A!
#N/A! #N/A! (1955).

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NOTES

CONFLICT OF LAWS — WORKMEN'S COMPENSATION — CONSTITUTIONAL LAW — RECEIPT OF WORKMEN'S COMPENSATION BENEFITS IN DOMICILIARY STATE DOES NOT BAR A TORT ACTION IN STATE WHERE INJURY OCCURRED.—*Carroll v. Lanza*, 75 Sup. Ct. 804 (1955).

The plaintiff, a Missouri resident employed by a Missouri contractor, was injured while working in Arkansas. After receiving benefits under the Missouri workmen's compensation act, which provides exclusive mode of relief in that state for workmen electing to accept its provisions, he commenced a tort action in Arkansas for the same injury. The defendant removed to the federal court, where the plaintiff had judgment. *Affirmed*.

The court of appeals had reversed the trial court's judgment, relying on *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), which held that, after a Louisiana domiciliary had been injured while working temporarily in Texas and had received workmen's compensation there, the full faith and credit clause of the federal constitution precluded a supplemental award in Louisiana. In affirming the trial court's judgment the Supreme Court reasoned that Arkansas had a significant governmental interest which justified its allowing an additional remedy for an injury occurring within its borders; furthermore, the Court stated that the *Hunt* doctrine is not controlling unless compensation is initially awarded pursuant to a statute which expressly excludes a supplemental remedy. In thus distinguishing the *Hunt* case, the Court apparently adopted the reasoning utilized in *Industrial Comm'n v. McCartin*, 330 U.S. 622 (1947), that the full faith and credit clause does not preclude the granting of workmen's compensation supplemental to that awarded in another state under a statute which does not explicitly make its award exclusive. Although many commentators have contended that the *McCartin* case overruled the *Hunt* case, see 2 LARSON, WORKMEN'S COMPENSATION LAW § 85.40 (1952); Harper, *The Supreme Court and the Conflict of Laws*, 47 COLUM. L. REV. 883, 906 (1947); Horovitz, *The Meaning of "Disability" Under Workmen's Compensation Acts*, 1 NACCA L.J. 29 (1948); Wellen, *Workmen's Compensation, Conflict of Laws and the Constitution*, 55 W. VA. L. REV. 233, 240 (1953), courts have continued to treat it as a controlling precedent. *Gasch v. Britton*, 202 F.2d 356 (D.C. Civ. 1953); *Ohlhaber v. Narron*, 195 F.2d 676 (4th Cir. 1952). Moreover, the opinion in the principal case suggests that the *Hunt* case must still be reckoned with, but it can certainly be said that its import has been decisively narrowed.

Apart from the obstacle presented by the *Hunt* case, two questions call for consideration: (1) how should the choice of law be determined in compensation cases involving conflict of laws? (2) to what extent does the full faith and credit clause compel the extra-territorial application of a

state's compensation act? Originally, many courts followed the usual rule in tort cases that the law of the place of injury controls. GOODRICH, CONFLICT OF LAWS § 99 (3d. ed. 1949); *Alabama G.S. R.R. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892); *Black Diamond Lumber Co. v. Smith*, 190 Ark. 91, 76 S.W.2d 975 (1934); *In re Gould*, 215 Mass. 480, 102 N.E. 693 (1913). The predominant theory today permits an employee to recover under the workmen's compensation statute of the state where he has obtained a "status" as a workman. See *Texas Employers' Ins. Ass'n v. James*, 131 Tex. 605, 118 S.W.2d 293 (1938); *Salvation Army v. Industrial Comm'n*, 219 Wis. 343, 263 N.W. 349 (1935).

Five factors are important in deciding where an employee has achieved this "status," and what state has the "significant governmental interest" which justifies subjecting a controversy to its law: (1) the place where the employment contract is formed, see *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372 (1915); *Pensabene v. F. & J. Auditore Co.*, 155 App. Div. 368, 140 N.Y. Supp. 266 (2d Dep't 1913); (2) the place where the employer's principal activity is localized, see *Hughey v. Ware*, 34 N.M. 29, 276 Pac. 27 (1929); *Post v. Burger & Gohlke*, 216 N.Y. 544, 111 N.E. 351 (1916); *Anderson v. Miller Scrap Iron Co.*, 169 Wis. 106, 170 N.W. 275 (1919); (3) the place of injury, see *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493 (1939); (4) the place where the employee's principal work is performed, see *Ben Wolf Truck Lines v. Bailey*, 102 Ind. App. 208, 1 N.E.2d 660 (1936); *Perfect Seal Rock Wool Mfg. Co. v. Industrial Comm'n*, 257 Wis. 133, 42 N.W.2d 449 (1950); and (5) the employee's place of residence, see *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947); *Ritenour v. Creamery Service, Inc.*, 19 N.J. Misc. 82, 17 A.2d 283 (Dep't Lab. 1941). For a suggested solution of the choice-of-law problem see Comment, 33 TEXAS LAW REVIEW 917 (1955).

Justices Frankfurter, Burton, and Harlan, dissenting in the principal case, argued that *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932), was indistinguishable and that the majority were deciding contrary to it without expressly overruling it. In that case a Vermont resident, employed by a Vermont firm, was killed while working temporarily in New Hampshire. The Court said that because of the full faith and credit clause the New Hampshire court must apply Vermont law. In *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935) and *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, *supra*, the Court departed from that view. In the latter case the state where injury occurred was allowed to apply its own compensation law even though the place where the employment contract was formed, the locality of the employer's business, the employee's domicile, and the place where the employee's principal work was performed were all in another state; referring to the *Alaska Packers* case the Court said, "Decision was rested explicitly upon the grounds that the full faith and credit exacted for the statute of one state does not necessarily preclude another state from enforcing in its own courts its own conflicting statute having no extra-territorial operation forbidden by the Fourteenth Amendment. . . ." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, *supra* at 503. These cases thus establish the vital proposition that a state may apply its own compensation law if it has a significant governmental interest in the

injured employee, even though another state has a greater interest in his welfare. The dissent in the principal case points out that Arkansas had no interest in the case apart from the fact that the injury occurred within its borders. Has the majority implicitly recognized this as a "significant governmental interest?"

The majority's failure to declare the *Clapper* case overruled, the connotations of the dissent, and the emphasis in the *Alaska Packers* and *Pacific Employers* cases on *significant* governmental interest, present the possibility that if an employee who would otherwise be subject to the compensation statute of State *A* is sent to work merely for a few hours in State *B* and is injured there, State *B* might have to give full faith and credit to the compensation statute of State *A*—*i.e.*, it might be required to withhold any remedy other than that available in State *A*. If a person is injured in a state during a brief and fortuitous presence there—*e.g.*, in an airplane crash—the tendency is to hold that the law of the place of injury does not control the matter. See *Willingham v. Eastern Airlines*, 199 F.2d 623 (2d Cir. 1952); *Urda v. Pan American World Airways, Inc.*, 211 F.2d 713 (5th Cir. 1954).

The Supreme Court has not yet clearly delineated the inter-relation between the full faith and credit clause and the concept of "significant governmental interest." It could be argued that in the principal case the Court merely declared what the lower court could do—not what it should or must do—although it clearly decided that allowing a tort recovery was not a denial of full faith and credit. But where will the line be drawn? Should the Court hold, in the hypothetical situation posed above, that State *B* must give full faith and credit to the compensation statute of State *A* because State *B* has no interest in the injured employee which justifies its doing otherwise?

James H. Ammerman

CONSTITUTIONAL LAW — PROMISE OF IMMUNITY ABROGATES THE PRIVILEGE AGAINST SELF-INCRIMINATION.—*Regan v. New York*, 349 U.S. 58 (1955).

A New York statute requires that public employees testify regarding bribery and immunizes them against prosecution based on self-incriminating disclosures. The petitioner signed a waiver of this immunity pursuant to the New York City Charter imposing waiver as a condition of remaining in public employment. He subsequently refused to testify before a grand jury concerning his acceptance of bribes while he was on the police force, asserting the privilege against self-incrimination on the ground that the waiver of immunity was unconstitutional. He was convicted of criminal contempt in the state court. *Affirmed*; the supreme court reasoned that the immunity statute abrogated the privilege against self-incrimination, and although the petitioner could have asserted the validity of the waiver as a defense to prosecution based on the testimony, he could not interpose it as justification for his refusal to testify.

Several jurisdictions have recently enacted laws that public employees who refuse to waive statutory immunity to prosecution based on self-incriminating testimony will be discharged. N.Y. CONST., art. 1 § 6; LA.

CONST., art. XIV, § 15(P) (1); N.Y. CITY CH., § 903; PHILA. HOME RULE CH., § 10-110. The laws vary in scope, but all seem restricted to testimony on matters connected with state business. Furthermore, the employee is not required to waive his immunity until he is called to testify; thus it seems that a separate waiver would have to be executed for each investigation. The public employee is thereby forced into the dilemma of having to choose between his constitutional protection against self-incrimination and his job.

Conditioning a state privilege on the relinquishment of a federal constitutional right has frequently been condemned as denying the due process guaranteed by the fourteenth amendment. *Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583 (1926) (private carrier required to submit to burdens of common carriers in order to obtain privilege of using state highways). See 33 TEXAS LAW REVIEW 240 (1954). In the *Frost* case, the Court said, ". . . the state, having power to deny a privilege altogether, may grant it upon . . . conditions. . . . But . . . it may not impose conditions which require the relinquishment of [federal] constitutional rights." 271 U.S. at 593. Likewise, state statutes which demand that foreign corporations relinquish their right to enter the federal courts in exchange for the privilege of doing business in the state have been invalidated. *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922); *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445 (1874).

The Supreme Court has declared that the due process clause of the fourteenth amendment does not protect against compulsory self-incrimination in a state proceeding. *Adamson v. California*, 332 U.S. 46 (1947); *Twining v. New Jersey*, 211 U.S. 78 (1908). Cf. *Palko v. Connecticut*, 302 U.S. 319 (1937); *Snyder v. Massachusetts*, 291 U.S. 97 (1934). Chief Justice Warren and Justice Clark, concurring in the principal case, implicitly discredited that affirmation by stating, "This Court has never held that a State, in the absence of an adequate immunity statute, can punish a witness for refusing to answer self-incriminatory questions. A case involving such facts has never been presented here." 349 U.S. at 65.

Does this indicate that these justices are disposed to adopt, for certain purposes, the conviction of Justices Black and Douglas that the due process clause of the fourteenth amendment incorporates the terms of the fifth amendment prohibiting compulsory self-incrimination? Such protection may be felt necessary because of the apparent abuses of individual freedoms perpetrated by the increased number of investigating bodies, many of which utilize informal procedure. If the Court should repudiate the *Adamson*, *Twining*, *Palko*, and *Snyder* decisions in a proper case, a state acting as did New York here would necessarily be conditioning the privilege of public employment on the relinquishment of a federal constitutional right.

Notwithstanding the above, it is unlikely that the *Frost*, *Terral*, and *Morse* cases would govern the situation since numerous cases have allowed a wide range of legislative and executive power over public employment. For example, the Court has held that government employees were not wrongfully discharged even though the legislation involved restricted the exercise of rights protected by the first amendment. *United Public Workers, C.I.O. v. Mitchell*, 330 U.S. 75 (1947) (upholding the Hatch Act, which forbade certain political activities of federal

employees). More analagous to the present subject, the President was upheld when he denied an Army commission to one who refused to execute a loyalty questionnaire and sought protection under the fifth amendment. *Orloff v. Willoughby*, 345 U.S. 83 (1953). See also *Garner v. Board of Public Works*, 341 U.S. 716 (1951); *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892).

Whether the privilege against self-incrimination is a federal constitutional right protected by the fourteenth amendment, as the dissenting opinion in the principal case contends, or only, respecting state courts, a state-created right seems immaterial in light of the decisions recognizing extensive executive and legislative discretion in dealings with public employees. However, a reservation has been placed on this discretion: ". . . constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952). Seemingly, this standard would be violated only when an infringement of freedom is of such magnitude that it clearly outweighs the public benefit or when there is no reasonable connection between the regulation and the public good sought. Most waiver laws would withstand this test; thus their wholesale condemnation is not warranted.

The dissent in the principal case suggests that forcing the employee to choose between immunity and public employment is part of a scheme to coerce confessions. If this be coercion within the purview of *Rochin v. California*, 342 U.S. 165 (1952) and *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), the incriminating testimony would not be admissible in evidence. But the pressure contemplated by those cases probably is not sufficiently analagous to the influence exerted on the employee here.

In proper cases, waiver laws of the type involved in the principal case will probably be held constitutional. But to extend them beyond the field of public employment would invite constitutional objections not likely to be overcome.

Denny O. Ingram, Jr.

CONTRACTS — SALES — CCC LIABLE TO SELLER WHERE COST OF GOODS INCREASED BECAUSE OF CHANGE IN CCC BUYING POLICY.—*Rosenberg Bros. & Co. v. Commodity Credit Corp.*, 128 F. Supp. 764 (N.D. Calif. 1955).

The CCC announced a program for purchasing raisins only from processors and packers. The plaintiff, a processor, contracted for the sale of raisins to the CCC, basing his prices on the current market level. Subsequently, the CCC announced a program for purchasing additional raisins from producers and growers as well as from processors and packers. Because of the new program the price of raisins rose, making it impossible for the plaintiff to purchase raisins at the former market price. The plaintiff attempted to renegotiate his contracts with the CCC or, in the alternative, to cancel. Having failed in both attempts, the plaintiff fulfilled his contract obligations and sought damages, relying upon an implied agreement not to prevent or hinder his performance. *Held*, for the plaintiff.

A party to a contract has an implied obligation not to prevent or hinder the other party's performance. *Carns v. Bassick*, 187 App. Div. 280, 175 N.Y. Supp. 670 (1st Dep't 1919); *Patterson v. Meyerhofer*, 204 N.Y. 96, 97 N.E. 472 (1912); *Gay & Co. v. Blanchard*, 32 La. Ann. 497 (1880). Prevention is an excuse for nonperformance, *United States v. Peck*, 102 U.S. 64 (1880), and is also a breach of an implied promise, *United States v. Behan*, 110 U.S. 338 (1884). Acts which merely render performance more difficult and expensive may amount to a breach of the implied obligation. *Anvil Mining Co. v. Humble*, 153 U.S. 540 (1894); *Hattiesburg Lumber Co. v. Herrick*, 212 Fed. 834 (5th Cir. 1914); *George A. Fuller Co. v. United States*, 108 Ct. Cl. 70, 69 F. Supp. 409 (1947). Contra, *Smoot's Case*, 82 U.S. (15 Wall.) 36 (1872); *Iron Trade Products Co. v. Wilkoff Co.*, 272 Pa. 172, 116 Atl. 150 (1922); see *World's Fair Mining Co. v. Powers*, 224 U.S. 173 (1912); *Moore v. Whitty*, 299 Pa. 58, 149 Atl. 93 (1930).

If hindrance results from some action which the terms of the contract or the customs of the business permitted the promisor to take, the implied obligation is not breached. *Iron Trade Products Co. v. Wilkoff Co.*, *supra*; RESTATEMENT, CONTRACTS § 315 (b) (1932).

The government is not liable as a contractor for obstructing the performance of a particular contract through its public and general acts as a sovereign. *Horowitz v. United States*, 267 U.S. 458 (1925); *The Clemmer Constr. Co. v. United States*, 108 Ct. Cl. 718, 71 F. Supp. 917 (1947); *Standard Acc. Ins. Co. v. United States*, 103 Ct. Cl. 607, 59 F. Supp. 407 (1945), *cert. denied*, 326 U.S. 729 (1945). But the terms of a particular contract may have the effect of depriving the government of this immunity, *United States v. Bostwick*, 94 U.S. 53 (1877); *The Sunswick Corp. v. United States*, 109 Ct. Cl. 772, 75 F. Supp. 221 (1948); cf. *United States v. Smith*, 94 U.S. 214 (1877), and government-owned corporations have authority to make binding contracts and for that purpose will be treated as separate entities. *United States Shipping Board Merchant Fleet Corp. v. Harwood*, 281 U.S. 519 (1930); *United States v. Strang*, 254 U.S. 491 (1921); *Traders Compress Co. v. United States*, 109 Ct. Cl. 659, 74 F. Supp. 649 (1947).

It is important in discussing prevention and hindrance to observe the distinction between a promise and a condition. Breach of a promise constitutes a right of action, whereas nonperformance of a condition constitutes a defense. 3 WILLISTON, CONTRACTS § 665 (rev. ed. 1936); see also 5 WILLISTON, CONTRACTS § 1315 (rev. ed. 1937). It is suggested that prevention or hindrance should normally serve only to excuse performance. Therefore, it seems that the implied duty not to prevent or hinder should be treated as a condition rather than as a promise. Some courts appear to have recognized this distinction. See *Smoot's Case*, *supra*; *Amies v. Wesnofske*, 255 N.Y. 156, 174 N.E. 436 (1931). It seems that prevention or hindrance is not an actionable breach of the implied obligation unless it is conscious or intentional. See *United States v. Buettas*, 324 U.S. 768 (1945); *United States v. Behan*, *supra*; *York Engineering and Constr. Co. v. United States*, 103 Ct. Cl. 613, 62 F. Supp. 546 (1945), *cert. denied*, 327 U.S. 784 (1946); *Patterson v. Meyerhofer*, *supra*; *Carns v. Bassick*, *supra* at 288, 175 N.Y. Supp. at 676 (dissent).

Sunswick Corp. v. United States, *supra*, cited in the principal case,

allowed recovery of additional compensation by a contractor whose performance had been made more expensive by the act of the government in requiring payment of higher wages to his employees. It is believed that the *Sunswick* case represents a departure from generally-accepted principles. Cf. *Horowitz v. United States, supra*; *Clemmer Constr. Co. v. United States, supra*; *Standard Acc. Ins. Co. v. United States, supra*. It seems that the *Sunswick* decision could have been based solely upon the contract, which provided for equitable adjustment of the contract price in the event of a change in wage specifications by certain government agencies. Thus, the same result could have been reached without an attempt to expand the principles applicable to prevention and hindrance.

Conceding that the plaintiff in the principal case could not be held to have assumed the risk of the change in the CCC buying program and that the change in program was not a general act of the sovereign, it does not follow that the plaintiff should be allowed to recover the additional cost. He was aware of the so-called hindrance when he elected to continue performance, and knew that continued performance would result in increased costs. He might have been excused if he had ceased performance after the second CCC program was put into operation, but he should not be allowed to recover damages which were avoidable. See *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929); *Clark v. Marsiglia*, 1 Demio 317 (N.Y. 1845).

Persons contracting to sell goods to the CCC would be wise to insist upon a provision for an equitable adjustment in price or for renegotiation of the contract in the event the cost of procuring the necessary goods is increased solely by action of the CCC.

Nancy Paxton Moody

DAMAGES — TORTS — FRAUD — EXTENT OF LIABILITY FOR
FRAUDULENTLY INDUCING THE PURCHASE OF REALTY.—
Turner v. Carey, 87 S.E.2d 871 (S. C. 1955).

The buyer of realty discontinued mortgage payments and sued for damages, alleging that the seller had fraudulently induced the purchase. While this suit was pending the seller sued for foreclosure and obtained a deficiency judgment. The buyer recovered judgment for damages and an order vitiating the deficiency judgment. The seller appealed from this order. *Reversed*.

A party will be held responsible for another's economic loss only if his fraudulent act or omission was a material factor in producing it. *Wennerholm v. Stanford University School of Medicine*, 20 Cal.2d 713, 128 P.2d 522 (1942); *Schoen v. Lange*, 256 S.W.2d 277 (Mo. 1953); *Keith v. Wilder*, 241 N.C. 672, 86 S.E.2d 444 (1955). Ordinarily he will be responsible only where loss would not have occurred but for the alleged wrong. *Schnader v. Brooks*, 150 Md. 52, 132 Atl. 381 (1926); *Stuart v. Lester*, 1 N.Y. Supp. 699 (Sup. Ct. 1888); 14 TEXAS LAW REVIEW 555 (1936). In any event, there must be more than a traceable connection between the conduct and the loss, *McCORMICK, DAMAGES*, § 73 (1935), the rule being generally stated that the latter must proximately result from the fraudulent misrepresentations. *John T. Brown, Inc. v. Weber*

Implement & Automobile Co., 260 S.W.2d 751 (Mo. 1953); *Borbonus v. Daoud*, 34 N.J. Super. 54, 111 A.2d 443 (1955); *Salter v. Heiser*, 39 Wash.2d 826, 239 P.2d 327 (1951).

A vendor's fraud is ordinarily complete and its effect is exhausted at the time of sale. *Rochester Bridge Co. v. McNeill*, 188 Ind. 432, 122 N.E. 662 (1919); *Ebacher v. First State Bank*, 188 Minn. 268 246 N.W. 903 (1933); *Hotaling v. A.B. Leach & Co.*, 247 N.Y. 84, 159 N.E. 870 (1928). Recovery is generally restricted to the damages which might be foreseen or expected from the nature of the misrepresentation, *Automobile Underwriters, Inc. v. Rich*, 22 Ind. 384, 53 N.E.2d 775 (1944); *Smith v. Duffy*, 57 N.J.L. 679, 32 Atl. 371 (Ct. Err. & App. 1895); *Arroyo-Colorado Naval Dist. v. State Nat'l Bank*, 90 S.W.2d 881 (Tex.Civ.App. 1936, error dism'd), but special or consequential damages may be recovered if they flow naturally and directly from the fraud. *Landriani v. Lake Mohawk Country Club*, 26 N.J. Super. 157, 97 A.2d 511 (1953); *Selman v. Shirley*, 161 Ore. 582, 91 P.2d 312 (1939). The difficulty is to determine how far the courts will trace the consequences of a misrepresentation in extending liability.

The principal case typifies a group of decisions which attempt to limit liability within reasonable bounds by refusing to trace the effect of a misrepresentation to its conclusion. Just what these bounds are is difficult to say; they appear to rest primarily on judicial intuition. See *Boatmen's Nat'l Co. v. M.W. Elkins & Co.*, 63 F.2d 214 (8th Cir. 1933) (bond purchaser denied recovery for underwriter's fraud concerning bonds held void in an unrelated action). Accord, *Vest v. Goode*, 307 Ky. 52, 209 S.W.2d 833 (1948) (fraudulently concealing shift of collateral securing note held not the proximate cause of a loss due to bank's failure three months after the alleged fraud); *Hayden v. Dunlap*, 84 S.W.2d 306 (Tex. Civ.App. 1935) (fraud induced purchase of property, but loss held referable solely to buyer's inability to repay borrowed purchase money).

Jurisdictions extending responsibility for consequential losses often find it necessary to stretch the doctrine of proximate cause. In *Fottler v. Moseley*, 185 Mass. 563, 70 N.E. 1040 (1904) the plaintiff was fraudulently induced to retain stock which depreciated in value after a company officer embezzled funds. The court held that the risk of any depreciation whatever was a consequence of the fraud. The decision was followed in *David v. Belmont*, 291 Mass. 450, 197 N.E. 83 (1935), where the depreciation in value was caused by subsequent events seemingly without relation to the fraud. Similarly, in *Hotaling v. A.B. Leach & Co.*, *supra*, the plaintiff recovered his expectancy on a bond which the defendant represented would remain stable but which in fact declined in value when the oil business slumped. Cf. *Singleton v. Harriman*, 152 Misc. 323, 272 N.Y. Supp. 905 (Sup. Ct. 1933), *aff'd*, 241 App. Div. 857, 271 N.Y. Supp. 996 (1st Dep't 1934). One method of computing damages resulting from a fraudulently-induced purchase is to subtract the value of the thing sold at the time of the sale or exchange from its represented value. *Rochester Bridge Co. v. McNeill*, *supra*; *Ebacher v. First State Bank*, *supra*. But a strict application of this rule without consideration of subsequent developments might in effect deny relief in many cases. See *Dubinsky Realty Co. v. Lortz*, 129 F.2d 669 (8th Cir. 1942) (defrauder exchanged apartment building for one the plaintiff was induced to

purchase; held error to exclude from consideration the loss occurring from the exchange approximately one year after the fraudulently-induced purchase). Cf. *Horwitz v. Schaper*, 119 S.W.2d 474 (Mo. 1938) (necessary repairs); *Everett v. Gilliland*, 47 N.M. 269, 141 P.2d 326 (1943) (payment of encumbrance).

Imposing a standard of proximate cause as a means of limiting responsibility for consequential damages permits the exercise of judicial discretion in each case. It enables a court to consider additional factors in determining which party should bear a loss produced by extrinsic causes, such as an unforeseen and catastrophic change in economic conditions. A rule so indefinite in meaning obviously involves a danger that liability may be harshly imposed. A purchaser, even though influenced by misrepresentations, should assume the ordinary risks attending an investment. It seems undesirable to impose on the representor a guaranty against all subsequent changes in a represented value or in some other resultant of a set of circumstances. However, if the representations are fraudulent it is arguably justifiable to impose liability on him even for indirect and unforeseeable consequences.

Lois Watson

EVIDENCE — PROCEEDING TO PERPETUATE TESTIMONY. —
Ramsey v. Garner, 279 S.W.2d 584 (Tex. Sup. 1955).

The applicant filed a statement in the district court to perpetuate testimony as provided by TEX. RULES CIV. P. 187, setting forth the name of the witness; the name of the party supposed to be adversely interested; that the applicant anticipated filing a suit concerning unreported campaign expenditures under the provisions of the Texas Election Code; and that suit could be brought in the court in which the application was filed. A subpoena duces tecum and commission followed. The relator filed a motion for continuance and a motion to quash the subpoena and commission. The district court overruled the motions and the relator sought mandamus to compel a reversal of the rulings. *Denied*.

The bill to perpetuate testimony was originally an independent suit in equity to aid a future suit in the courts of law. *Sullivan v. Dimmit*, 34 Tex. 114 (1870). Such a proceeding was known in the civil law of France until 1667, 1 DOMAT, CIVIL LAW § 2036 (1853), and there are statutes establishing similar proceedings in almost every state. The present Texas rule dates from an 1846 statute, 2 GAMMEL, LAWS OF TEXAS 1688 (1893). In Texas, where law and equity are completely merged, the proceeding to perpetuate testimony does not have the standing of an independent suit, but is considered ancillary to the suit to be instituted. *Gonzales v. Rodriguez*, 250 S.W.2d 253 (Tex. Civ. App. 1952); *Lambert v. Texas Employers' Ins. Ass'n*, 121 S.W.2d 406 (Tex. Civ. App. 1938). An order suppressing a deposition taken under Rule 187 is interlocutory and can be appealed only upon determination of the main suit; a regular citation need not be served on the supposed adverse party. *Lambert v. Texas Employers' Ins. Ass'n*, *supra*. This ancillary label determined the issue of the motion for continuance in the principal case. The court reasoned that the continuance granted legislators by Tex.

RULES CIV. P. 254 was restricted to suits and trials and did not extend to ancillary proceedings.

The substance of this proceeding can best be understood when it is compared with its forerunner, the equitable bill to perpetuate testimony. Traditionally, the bill had to show: (1) the subject matter of the controversy and the petitioner's interest therein; (2) the reason for not suing immediately; (3) the proof proposed to be made with such testimony and its materiality to the anticipated suit; and (4) good faith. *Booker v. Booker*, 20 Ga. 777 (1856); 1 POMEROY, EQUITY JURISPRUDENCE § 211 (5th ed. 1941); 2 STORY, EQUITY JURISPRUDENCE §§ 1505-12 (12th ed. 1877). Relief was predicated on the danger that the delay resulting from the plaintiff's inability to bring suit immediately might render the testimony stale or unavailable, not on the danger that the witness might abscond or die before the trial. STORY, EQUITY PLEADINGS § 303 (10th ed. 1892).

This historic equity bill has influenced the drafting and application of its modern statutory counterpart. Some jurisdictions have restated the requirements developed in equity. FED. R. CIV. P. 27. Others have given the trial judge discretion, indicating that the equity bill is to be his guide. See N.Y. CIVIL PRACTICE ACT § 295 (1954). A third and most common type of rule or statute provides only that a written statement be filed in any court where suit could be brought, setting forth the desire to perpetuate the testimony of a named witness and the names of those supposed to be adversely interested, together with a statement of the general nature of the expected controversy. MONT. REV. STAT. ANN. tit. 93, c. 2301 (1947); TEX. RULES CIV. P. 187.

A statute similar to the Texas rule has been construed to mean that the applicant need only submit the statutory statement, without showing that he is unable to file suit immediately. *State ex rel. Holcomb v. District Court*, 54 Mont. 574, 172 Pac. 329 (1918). Other jurisdictions have reasoned that such statutes were not intended to abrogate the requirements of the equity bill, but were intended only to establish a simple procedure for getting the request before the court. *State ex rel. Phillips v. Elliott*, 75 Minn. 391, 77 N.W. 952 (1899); *In re Petition of Central Vermont Public Service Corp.*, 115 Vt. 204, 55 A.2d 201 (1947). Surprisingly, none of the previous Texas cases involved this issue. In the principal case the court followed its traditional policy of liberally interpreting the rules of civil procedure by holding that this equity bill requirement was not engrafted on Rule 187.

In *Guthrie v. Speck*, 53 S.W.2d 318 (Tex.Civ.App. 1932), the adverse party sought to enjoin the taking of a deposition under the proceeding to perpetuate testimony. The grounds alleged as a basis for relief were that the applicant was not acting in good faith because he was a party defendant in a pending suit between him and the petitioner, and that his statement gave insufficient information about the nature of the anticipated suit. The court held that the facts alleged in the undenied sworn petition were sufficient to show bad faith. In the principal case the contesting party moved to quash but did not allege any facts tending to show bad faith. The court held that good faith is to be presumed in the absence of evidence to the contrary, and unless bad faith is apparent on the face of the application it will be sustained against a motion to quash. These cases

indicate that the burden of pleading and proving facts that constitute bad faith is on the party contesting the proceeding. In stating the "general nature of the anticipated suit," the applicant in the principal case identified the transaction underlying his potential cause of action and the statute governing his remedy, although he did not specifically cite the section or theory on which he would rely. The court held this sufficient, using the standard relied on in the *Guthrie* case, where no information was given—*i.e.*, was the adverse party in a position to cross-examine the witness intelligently?

Some state courts, in construing the equivalent of Rule 187, have qualified previous rulings to the effect that mere compliance with the statute sufficiently warrants issuance of an order even when the constitutional prohibition of unreasonable search and seizure has been made an issue. In *State ex rel. Smith v. District Court*, 112 Mont. 506, 118 P.2d 141 (1941), the court held that if an applicant does not pray for the subpoena duces tecum and does not show the relevancy of the documents, compelling the production of the documents violates the constitutional guaranty. See also *Kutner-Goldstein Co. v. Superior Court*, 212 Cal. 341, 298 Pac. 1001 (1931). A "fair and reasonable" test is used for particularity in identifying the documents. *Demaree v. Superior Court*, 10 Cal.2d 99, 73 P.2d 605 (1937). The applicant's statement in the principal case did not mention any documents, yet the court issued a subpoena duces tecum. The issue might have been a proper one for adjudication.

Although the relator filed a plea of privilege, there was no hearing on it before the instant mandamus proceeding. The supreme court indicated, however, in ruling on the motion to quash, that unless the application itself shows as a matter of law that the anticipated suit will be in the adverse party's home county, it is sufficient. This implies that the phrase, "filed in any court where the anticipated suit could be brought" (Rule 187), concerns the jurisdiction of the proceeding rather than venue. Thus the venue of the main suit determines which tribunal has the power to conduct the ancillary proceeding. The mode of questioning the propriety of the applicant's chosen tribunal would be a plea to the jurisdiction; consequently the adverse party has the burden of getting the venue facts of the main suit before the court; whereas if the adverse party could use a plea of privilege, the applicant would have the burden of showing that he was in the right court. Further, the adverse party or a witness could never have the deposition taken in his home county unless the main suit would fall there under some provision of *TEX. CIV. STAT.* (Vernon 1948) art. 1995.

This rationale governs ancillary proceedings used *after* suit is filed. For instance, a party may bring garnishment proceedings only in the court in which the original suit is pending. *King & King v. Porter*, 113 Tex. 198, 252 S.W. 1022 (1923). Likewise, an injunction as ancillary relief issues only from the court hearing the main suit. See *Cleveland v. Ward*, 116 Tex. 1, 285 S.W. 1063 (1926); *Fielder v. Parker*, 119 S.W.2d 1089 (Tex.Civ.App. 1938). Specifically, the jurisdiction of two forms of direct attack, injunctions to stay proceedings and executions on judgments, is fixed by *TEX. CIV. STAT.* (Vernon 1948) art. 4656 in the court where the suit is pending or judgment has been rendered. *TEX. RULES CIV. P.* 329, which provides for a bill of review (formerly statutory) and

governs motions for new trials where citation is by publication, also has such provisions.

Although this approach appears sound, there would be no inherent difficulty in treating the ancillary proceeding as an independent suit for purposes of ascertaining the proper tribunal, since the principles governing ancillary proceedings have not been applied consistently for all purposes. A bill of discovery was called an ancillary proceeding in holding that an appeal concerning it must await final determination of the main suit. *Equitable Trust Co. v. Jackson*, 129 Tex. 2, 101 S.W.2d 552 (1937). But in holding that a plea of privilege would lie in such a proceeding, it was said to be an independent suit, not controlled by the court of the main suit. *B.F. Avery & Sons Plow Co. v. Mayfield*, 111 S.W.2d 1134 (Tex.Civ.App, 1937, error disn'd); *Blocker v. Commercial Nat'l Bank*, 295 S.W. 341 (Tex.Civ.App. 1927). For purposes of choosing a tribunal, it appears that the bill of discovery and the proceeding to perpetuate testimony should be treated alike, yet the courts apparently disagree.

The record of *In re Testimony of Vernon Sanford*, No. 99,985, 53d Jud. Court, (style of the proceeding in the trial court which prompted the instant mandamus action), shows that the trial court had not heard the plea of privilege after the supreme court ruled on the mandamus proceeding, a point not developed in the opinion.

There are two methods of attacking the proceeding besides the plea to the jurisdiction—the motion to quash the application and the injunction against the taking of the deposition. If the generality of the application prejudiced the adverse party in cross-examining the deposing witness, he could move to suppress the deposition at the trial. Further, by refusing to testify, the witness could question the jurisdiction of the court in habeas corpus proceedings upon being committed for contempt of court.

The decision in the principal case was necessary if Rule 187 is to broaden the scope of the proceeding to perpetuate testimony and not merely simplify the procedure of the old equity bill. However, the case makes it difficult to perceive just what effect, if any, good faith has on the proceeding. Traditionally and in the *Guthrie* case [see also *State ex rel. Pitcher v. District Court*, 114 Mont. 128, 133 P.2d 350 (1943)], an applicant in good faith is said to be one who files the statement to *preserve* testimony and not to enable him to frame his complaint for the anticipated suit or to inquire into trivial matters. The equity requirement that the applicant must be presently unable to sue is practically inseparable from the good faith requirement. How is the trial court to appraise the applicant's good faith if he can presently file suit? There being no answer in the opinion, it seems that the applicant can now go on a "fishing expedition" so long as he does not say so in his application. There is some doubt that the provisions of TEX. RULES CIV. P. 201, which enable the adverse party to require written interrogatories where the deposition is to be taken more than a hundred miles from the court where the *suit is pending*, govern a deposition taken under Rule 187. If the courts follow the interpretation used in connection with Rule 254, the proceeding to perpetuate testimony being merely "ancillary," no *suit* is pending and there would be no geographical limitation on taking oral depositions. A result more in line with the overall intent of the rules is obtained by

reasoning that since the proceeding must be in the court where the suit will be filed (no other court has jurisdiction), the anticipated suit should be considered "pending" for the purposes of Rule 201.

Elton M. Montgomery

EVIDENCE — RECITALS IN ANCIENT DOCUMENTS EXCLUDED AS SELF-SERVING DECLARATIONS. — *Slattery v. Adams*, 279 S.W.2d 445 (Tex.Civ.App.—Beaumont 1955).

In an action of trespass to try title the plaintiff offered recitals of heirship in an ancient instrument to cure a defect in his chain of title. *Held*, the recitals were "self-serving," thus inadmissible in the absences of confirmatory circumstances.

A document which is at least thirty years old, regular on its face, and produced from proper custody is admissible in evidence in many jurisdictions without direct proof of its execution. *Ammons v. Dwyer*, 78 Tex. 639, 15 S.W. 1049 (1890); McCORMICK, EVIDENCE § 190 (1954). Although recitals of heirship within such instruments are obviously hearsay, an increasing number of states, including Texas, admit them as an exception to the hearsay rule. *Magee v. Paul*, 110 Tex. 470, 221 S.W. 254 (1920); *Schultz v. Shatto*, 150 Tex. 130, 237 S.W.2d 609 (1951); McCORMICK & RAY, TEXAS EVIDENCE § 616 (1937); Wickes, *Ancient Documents and Hearsay*, 8 TEXAS LAW REVIEW 451 (1930).

Other courts reject this exception, reasoning that the age of the document is neither a guarantee of veracity nor an adequate substitute for cross-examination. Comment, 33 YALE L. J. 412 (1924). However, with reference to this and other hearsay exceptions, the relaxation of insistence upon reliability arguably may be justified by the dearth of available evidence due to the declarant's absence and the scarcity of other proof. *Auerbach v. Wylie*, 84 Tex. 615, 19 S.W. 856 (1892); *Gulf Oil Corp. v. Amazon Petroleum Corp.*, 152 S.W.2d 902 (Tex.Civ.App. 1941 error ref'd); MORGAN, EVIDENCE 38 (1927). Moreover, because of the age requirement the recital invariably antedates the controversy. *Kenley v. Robb*, 245 S.W. 68 (Tex.Comm.App. 1922); Wickes, *Ancient Documents and Hearsay*, 8 TEXAS LAW REVIEW 451, 472 (1930). In addition, courts generally exclude the statement unless it was founded upon the declarant's personal knowledge. McCORMICK, EVIDENCE § 298 (1954). The requirements of proper custody and regularity of appearance minimize the dangers of fabrication and mistransmission which attend oral hearsay. *Ammons v. Dwyer*, *supra*.

In excluding the recitals in the principal case the court relied upon a rule supposedly making inadmissible self-serving extra-judicial statements. The court assumed that the heirship declarations were self-serving—*i.e.*, favorable to the declarant when made—because they were made after descent to the declarant. But to classify recitals of heirship as self-serving solely for this reason would exclude all such declarations, for no heirship recital can possibly be made before the declarant knows that he is an heir. The great weight of authority is clearly adverse to such a result. 5 WIGMORE EVIDENCE § 1573 (3d ed. 1940).

Assuming, *arguendo*, that the declarations were self-serving, this fact should affect only their weight as evidence, not their admissibility. 6

WIGMORE, EVIDENCE § 1732 (3d ed. 1940); Hardman, *Hearsay: "Self-serving" Declarations*, 52 W. VA. L. REV. 81 (1950). Exclusion of such statements seems a vestige of the abandoned common-law rule that interest disqualifies a witness. McCORMICK, EVIDENCE § 275 (1954).

It is suggested that the cases rejecting self-serving declarations may be explained by reference to the hearsay rule. See, e.g., *Byers Bros. v. Wallace*, 87 Tex. 503, 29 S.W. 760 (1895); *Green v. Hagens*, 51 S.W.2d 771 (Tex.Civ.App. 1932, error dism'd). Moreover, some courts have admitted ancient recitals with the express recognition that they were self-serving. *Boulware v. Kempner*, 36 S.W.2d 527 (Tex.Civ.App. 1931). Most courts admit without discussion. E.g., *Magee v. Paul*, *supra*; *Clark v. Scott*, 212 S.W. 728 (Tex.Civ.App. 1919). The court's use of the vituperative epithet "self-serving" to justify exclusion of the heirship recitals seems inconsistent with the strongly-supported view that a declaration's "self-serving" character does not prevent its admission. *Boulware v. Kempner*, *supra*; *Worth v. Worth*, 48 Wyo. 441, 49 P.2d 649 (1935); McCORMICK & RAY, TEXAS EVIDENCE § 362 (1937).

In refusing to admit the recitals in the absence of confirmatory circumstances, the court invoked a precaution adopted in some Texas cases which recognize that the trustworthiness of ancient recitals is greatly enhanced by corroborative evidence. *Brewer v. Cochran*, 99 S.W. 1033 (Tex.Civ.App. 1907 error ref'd); *Maxson v. Jennings*, 48 S.W. 781 (Tex.Civ.App. 1898 error ref'd). But since the ancient document exception is justified by the lack of other evidence, it should not be rendered inoperative where it is most needed—i.e., where corroborative evidence is lacking. *Commonwealth v. Ball*, 277 Pa. 301, 121 Atl. 191 (1923). Apparently, therefore, the desirable view is represented by the more recent cases which do not require corroboration, *Auerbach v. Wylie*, *supra*; *Gulf Oil Corp. v. Amazon Petroleum Corp.*, *supra*, or give no significance to confirmatory circumstances even when they are shown. See, e.g., *Moses v. Chapman*, 280 S.W. 911 (Tev.Civ.App. 1926).

In the principal case the court asserted that to admit the statements of heirship as recitals in ancient documents would be inconsistent with their ruling that the recitals were incompetent under the pedigree exception. However the policies behind each hearsay exception are distinct, and the failure of a declaration as a statement of pedigree should not affect its admissibility as a recital in an ancient instrument, *Rollins v. Atlantic City R.R.*, 73 N.J.L. 64, 62 Atl. 929 (Sup. Ct. 1905); O'Neil, *Self-serving Declarations in Georgia*, 12 GA. B.J. 388 (1950), as the need for evidence is unaltered, and the reliability afforded ancient recitals by the requirements of age, personal knowledge, and authentication is intact. The court's controversial conclusion that the reliability of the heirship recitals was unpugned led them to restrict the ancient document exception by requiring confirmatory circumstances and declarations which were not self-serving.

The ancient document exception is desirable. Comment, 83 U. PA. L. REV. 247 (1934) (arguing that necessity justifies the exception); McCORMICK, EVIDENCE § 298 (1954) (contending that reliability, gauged by scarcity of other evidence, is sufficient); Wickes, *Ancient Documents and Hearsay*, 8 TEXAS LAW REVIEW 451 (1930) (concluding that there is a trend toward the recognition of this hearsay exception). Although

the court in the principal case recognized this exception to the hearsay rule, their restrictive interpretation effectively narrows its operation.

Jerry Buchmeyer

INSURANCE — REFORMATION — INSURED'S FAILURE TO READ POLICY DOES NOT BAR REFORMATION.—*Automobile Ins. Co. v. United Elec. Serv. Co.*, 275 S.W.2d 833 (Tex.Civ.App.—Fort Worth 1955).

In response to the plaintiff's request for an increase in fire insurance coverage, the defendant's general agent issued a renewal policy and through inadvertence included a co-insurance clause. The plaintiff failed to read the policy, relying on the agent to provide full coverage in accordance with the original policy and the intent of the parties. The trial court ordered that the contract be reformed and allowed recovery for the total fire loss. *Affirmed*.

An insurance policy may be reformed to express the parties' true agreement if it fails to do so because of a mutual mistake, or the mistake of one and the fraud or knowledge of the other. *Liberty Life Ins. Co. v. Woodward*, 12 S.W.2d 243 (Tex.Civ.App. 1928, error dismissed). But the insured must prove the mistake by clear and convincing evidence. *Merchants' & Manufacturers' Inter-Ins. Alliance v. Hansen*, 258 S.W. 257 (Tex.Civ.App. 1924, error dismissed). The prevailing rule is that the insured's failure to read the policy does not preclude reformation. *Carson v. Home Fire & Marine Ins. Co.*, 39 F.2d 50 (5th Cir. 1930); *Aetna Ins. Co. v. Brannon*, 99 Tex. 391, 89 S.W. 1057 (1905). Although some courts which approve this rule would deny reformation to a negligent party, they hold that the insured's laxness does not constitute negligence as a matter of law. *Salmon v. Farm Property Mut. Ins. Ass'n*, 168 Iowa 521, 150 N.W. 680 (1915). Contra, *Fidelity & Guaranty Fire Corp. v. Bilquist*, 108 F.2d 713 (9th Cir. 1940). At most, they say, it is only one factor to be considered. *Taff v. Atlas Assurance Co.*, 58 Cal. App. 2d 696, 137 P.2d 483 (1943). In any event, the failure to read a renewal policy is less likely to be considered negligence because the insured will normally presume that a renewal policy does not differ from the original. *Connecticut Fire Ins. Co. v. Oakley Improved Bldg. & Loan Co.*, 80 F.2d 717 (6th Cir. 1936).

Generally, a unilateral mistake by the insured is not a ground for reformation. *Syndicate Ins. Co. v. Bohn*, 65 Fed. 165 (8th Cir. 1894); *Aetna Ins. Co. v. Holcomb*, 89 Tex. 404, 34 S.W. 915 (1896); *Darnell v. Southwestern American Ins. Co.*, 240 S.W.2d 509 (Tex.Civ.App. 1951). However, some courts have used the doctrine of waiver to effect a "judicial reformation" where the agent of the insurer should have known that the insured might be mistaken about the terms of his policy. *Great Southern Fire Ins. Co. v. Burns & Billington*, 118 Ark. 22, 175 S.W. 1161 (1915); *Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 74 N.E. 964 (1907). Thus, an invalidating provision may be considered waived by the insurer if the agent fails to inquire concerning material facts that would void the policy. *Glens Falls Ins. Co. v. Michael*, *supra*.

Something of a paradox is presented by the cases dealing with policies issued by soliciting agents rather than by general agents. If the insured and the soliciting agent are mutually mistaken, the great weight of authority allows reformation although the mistake could have been discovered by inspection of the policy. *Peterson v. Commonwealth Casualty Co.*, 212 Mo.App. 434, 249 S.W. 148 (1923); *Merchants' & Manufacturers' Inter-Ins. Alliance v. Hansen*, *supra*. Contra, *Floars v. Aetna Life Ins. Co.*, 144 N.C. 232, 56 S.E. 915 (1907). However, since an insurer is bound only by a soliciting agent's acts, agreements, and representations within the scope of his authority, *Insurance Co. v. Wilkinson*, 80 U.S. (13 Wall.) 222 (1871); *Illinois Bankers' Life Ass'n v. Dodson*, 189 S.W. 992 (Tex.Civ.App. 1916), reformation is not allowed for his fraudulent representations that alter the terms of the policy. *Great Nat'l Life Ins. Co. v. Hulme*, 134 Tex. 539, 136 S.W.2d 602 (1940); *American Nat'l Ins. Co. v. Huey*, 66 S.W.2d 690 (Tex.Comm.App. 1933).

The liberal Texas view apparently recognizes that an insurance contract is not the product of a bargaining agreement but is drafted by insurance company experts and is accepted or rejected in whole by the applicant. Most laymen are unaware of the agent's limited authority; they probably do not read their policies and would not understand them if they did. To the ordinary policyholder a policy represents a purchase of protection, and he is likely to have not even vague notions of contractual obligations. In view of this one writer has suggested that the rule of implied warranty governing sales of chattels should extend to sales of protection, so that a policy would be warranted to furnish the protection sought. See Comment, 35 YALE L.J. 203 (1925). It seems that Texas courts would be justified in granting relief where it appears that the insurer *should* have known of the insured's unilateral mistake.

Sam G. Croom, Jr.

JURY — TRIAL — APPOINTMENT AND HEARING BY MASTER DOES NOT AFFECT RIGHT TO JURY TRIAL.—*Creclar v. Hyde*, 280 S.W.2d 783 (Tex.Civ.App.—Waco 1955, error ref'd n.r.e.).

The plaintiff sued to set aside a trustee's deed in favor of the defendant. After the case was set for trial on the jury docket, the court appointed a master in chancery. The plaintiff's objections to the appointment and to the master's report were overruled and he was not allowed to submit any evidence to the court, which adopted the master's findings. *Held*, reversed and remanded; the court is authorized to appoint a master only in exceptional cases and for good cause, and if the plaintiff objects to the report, he is entitled to a jury trial on the disputed issues.

Before the Texas Rules of Civil Procedure were adopted, a statute required that the court appoint a master in receivership proceedings. TEX. REV. CIV. STAT. (1925) art. 2320, *repealed* TEX. LAWS 1939, p. 201, § 1. Judicial construction of this rule has vacillated. For instance, *Shanklin v. Moseley*, 287 S.W. 121 (Tex.Civ.App. 1926), held that appointment of a master was not mandatory in every receivership case, but only in those where by the rules of equity his services were deemed necessary.

San Benito Cameron County Drainage Dist. v. Farmers' State Guaranty Bank, 192 S.W. 1145 (Tex.Civ.App. 1917, error ref'd), held that traditional rules of equity permitted the parties to consent to a master's appointment in other than receivership cases, and if they did so consent, they were thereafter bound by his report.

The present Texas rule permits the court to appoint a master in exceptional cases and for good cause, Tex. R. Civ. P. 171, but no Texas court has defined "exceptional case" or "good cause." Rule 53 of the Federal Rules of Civil Procedure, from which the Texas statute was in part derived, has been interpreted as allowing appointment of a master where help is needed in complicated litigation. *Tendler v. Jaffe*, 203 F.2d 14 (D.C. Cir. 1953); *Webster Eisenlohr, Inc. v. Kalodner*, 145 F.2d 316 (3d Cir. 1944); *Helper v. Corona Products*, 127 F.2d 612 (8th Cir. 1942).

It has been suggested that the Texas rule sanctions the appointment of a master in receiverships involving issues concerning the amount and priority of various claims; in liquidations where the holders of fractional interests are contesting their priorities; in divorce suits where the community property is to be divided and the separate property segregated; and in similar controversies which are complicated enough to justify the expense of a proceeding before a master. 3 McDONALD, TEXAS CIVIL PRACTICE § 10.17 (1950). Further, a master was appointed, where a jury was not required, to hear testimony regarding a request for a temporary injunction, but the appellate court did not authoritatively rule on that question. *Texas State Federation of Labor v. Brown & Root*, 246 S.W.2d 938 (Tex.Civ.App. 1952, error ref'd n.r.e.). Although usually it is not difficult on appeal to determine whether the proceedings below were complicated or not, the trial court should be free to exercise its discretion regarding a master's appointment and should be reversed only when discretion is obviously abused.

The master's report is not binding if a party properly specifies his objection. *St. Louis Union Trust Co. v. Texas Southern Ry.*, 126 S.W. 308 (Tex.Civ.App. 1910), at or before the time the court adopts the report, *Mason v. Prince*, 120 S.W.2d 1087 (Tex.Civ.App. 1938, error ref'd), but it is otherwise conclusive between the parties. *Mason v. Prince*, *supra*; *St. Louis Union Trust Co. v. Texas Southern Ry.*, *supra*; *Hamm v. J. Stone & Sons, Live-Stock Co.*, 45 S.W. 330 (Tex.Civ.App. 1898). To become binding, however, it must be vitalized by a judgment of the court, *Keystone Pipe & Supply Co. v. Liberty Refining Co.*, 260 S.W. 1018 (Tex.Comm.App. 1924), and the judge may confirm, modify, correct, reject, reverse, or recommit the report as he may deem proper. Tex. R. Civ. P. 171. If a party properly excepts to the report the issues of fact must be decided again by the court or by a jury if one is requested. *San Jacinto Oil Co. v. Culberson*, 100 Tex. 462, 101 S.W. 197 (1907); *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.*, 160 S.W. 1109 (Tex.Civ.App. 1913). And a demand for a jury trial must be granted even though it is made after the master receives the case and no exceptions are reserved before him, because the almost-unique Texas rule entitles the parties in equitable proceedings to have controverted issues of fact determined by a jury. Tex. CONST. art. I, § 15, art. V, § 10; *San Jacinto Oil Co. v. Culberson*, *supra*. Since a master's report is not

admissible in a jury trial because of its prejudicial effect, all the evidence must be resubmitted for the jury's consideration. *San Jacinto Oil Co. v. Culberson*, *supra*; *Arlington Heights Realty Co. v. Citizens' Ry. & Light Co.*, *supra*.

If a jury has not been demanded, the judge may consider the evidence stated in the report, but must admit additional evidence submitted by either party. *Citizens' State Bank v. Joplin*, 198 S.W. 370 (Tex.Civ.App. 1917).

In certain circumstances, such as an original proceeding before the supreme court, where there is no right to a jury and the court can prescribe its own rules, a master may be appointed without reference to Rule 171. *In re Laughlin*, 265 S.W.2d 805 (Tex.Sup. 1954).

The result in the principal case seems in accord with previous decisions and a correct interpretation of the rule. Although the device of submitting a case to a master is somewhat restricted in Texas, it is of considerable importance if a case involves complicated fact issues and there is no right to a jury trial.

Frank W. Elliott, Jr.

OIL AND GAS — MINES AND MINERALS — EXECUTION OF OIL AND GAS LEASE BEFORE LIFE ESTATE VESTS "OPENS THE MINES" FOR LIFE TENANT.—*Youngman v. Schular*, 281 S.W.2d 373 (Tex.Civ.App.—San Antonio 1955, error granted).

The defendant and her husband executed an oil and gas lease on their homestead. Upon the husband's death intestate the defendant acquired a right to use or occupy the homestead property, a right often referred to as a life estate. The lessee drilled its first wells after the husband's death and paid the royalties therefrom to the defendant. The remaindermen sued for an accounting by the lessee and for a declaratory judgment establishing their right to future royalties. The trial court rendered judgment for the defendant. *Affirmed*.

The open mines doctrine permits a life tenant to operate mines which were open when the life interest commenced, *Butler v. Butler*, 176 Ark. 126, 2 S.W.2d 63 (1928); *Billings v. Taylor*, 27 Mass. (10 Pick.)* 460 (1830); *Irwin v. Covode*, 24 Pa. 162 (1854); *Petrus v. Cage Bros.*, 128 S.W.2d 537 (Tex.Civ.App. 1939, error ref'd), but he may not open new mines. *Cherokee Constr. Co. v. Harris*, 92 Ark. 260, 122 S.W. 485 (1909); *Maher's Adm'r v. Maher*, 73 Vt. 243, 50 Atl. 1063 (1901); Annot., 36 L.R.A. (n.s.) 1099 (1912). The open mines doctrine applies to the production of oil and gas. See e.g., *Thompson v. Thompson*, 149 Tex. 632, 236 S.W.2d 779 (1951); *Swayne v. Lone Acre Oil Co.*, 98 Tex. 597, 86 S.W. 740 (1905); Annot., 43 A.L.R. 811 (1926).

Where the fee owner does not execute an oil and gas lease or produce oil before the inception of the life estate, the life tenant is entitled only to income from the investment of the royalties, and the principal is accumulated for the remainderman. *Davis v. Atlantic Oil Producing Co.*, 87 F.2d 75 (5th Cir. 1936); *Swayne v. Lone Acre Oil Co.*, *supra*. However, where oil has been produced by the fee holder or his lessee before the

life estate commences, the life tenant is solely entitled to the royalty from existing wells so long as the life estate endures. *Thompson v. Thompson*, *supra*; *Clayton v. Canida*, 223 S.W.2d 264 (Tex.Civ.App., 1949); *White v. Blackman*, 168 S.W.2d 531 (Tex.Civ.App. 1942, error ref'd want of merit). In line with the principal case, some courts have extended the doctrine to allow the life tenant royalties under a lease executed by the fee owner even though production did not commence before the life estate began. *Priddy v. Griffith*, 150 Ill., 560, 37 N.E. 999 (1894); *Benson v. Nyman*, 136 Kan. 455, 16 P.2d 963 (1932); *Minner v. Minner*, 84 W. Va. 679, 100 S.E. 509 (1919); *Koen v. Bartlett*, 41 W. Va. 559, 23 S.E. 664 (1895); Annot., 18 A.L.R.2d 98 (1951). These courts reason that the owner authorized development of the land by executing the lease; thus new wells may said to have been drilled, for practical purposes, at his direction. *Andrews v. Andrews*, 31 Ind. App. 189, 67 N.E. 461, 463 (1903). The open mines doctrine purports to effectuate the former owner's probable intent by granting the life tenant royalties from wells existing when his interest vested; it seems that the fee owner manifests the same intent by executing an oil and gas lease. Although the principal case is the first one in Texas squarely presenting this question, similar facts were before the court in *Barton v. Warner*, 142 S.W.2d 303 (Tex.Civ.App. 1940). In that case the court recognized *arguendo*, the rule of law expressed in the principal case, but based its holding on another ground.

If the fee owner executes a lease, the subsequent life tenant is apparently confined to the royalties from production under that particular lease. *Barton v. Warner*, *supra*. Assuming, however, that the owner drills wells himself, is the life tenant permitted to drill more wells or to execute a lease authorizing further development? A life tenant can work to exhaustion a mine previously operated by the fee holder, *Crouch v. Puryear*, 22 Va. (1 Rand.) *258 (1822); he can sink new shafts to reach the mine, *Clavering v. Clavering*, 2 P. Wms. 388, 24 Eng. Rep. 780 (Ch. 1726); and he may pierce a coal seam previously mined to reach an untapped seam at a lower level. *Crouch v. Puryear*, *supra*. There seems no direct decision that a life tenant may drill more wells, but, literally read, some opinions indicate that one well might be considered a mine so that no more wells could be drilled. *Ohio Oil Co. v. Daughetee*, 240 Ill. 361, 367, 88 N.E. 818, 820 (1909); *Cage v. Curtner*, 215 S.W.2d 411, 415 (Tex.Civ.App. 1948).

The open mines doctrine is again encountered when a will creates an equitable life estate and remainder, giving the trustee power to lease the land for mining purposes. It has been held that if the trustee exercises this power the life tenant is solely entitled to royalty payments while his estate endures unless the testator has expressed a contrary intent. *Shoemaker's Appeal*, 106 Pa. 392 (1884); *Eley's Appeal*, 103 Pa. 300 (1883). The same has been held where the trustee is merely given a general power to sell or lease. *Appeal of Wentz*, 106 Pa. 301 (1884). These courts reason that by granting such power to the trustee the owner contemplated later development, and this is sufficient to "open" subsequent mines or wells. However, if the trustee has only the power to sell, the courts might be reluctant to apply the doctrine. See *Avis v. First Nat'l Bank*, 141 Tex. 489,

174 S.W.2d 255 (1943). The Texas Trust Act now controls the apportionment of royalties between life tenant and remainderman under a trust instrument which does not specify an apportionment. TEX. CIV. STAT. (Vernon, 1948) art. 7425b, subd. 33. The act provides that 27½% of the gross royalties is to be treated as principal and invested for the remainderman, and the balance is to be disbursed to the life tenant as income.

In many cases the open mines doctrine will impose an undue hardship on the remainderman by allowing the life tenant to deplete the natural resources before the remainderman's interest becomes possessory. It seems that legislation is desirable effecting apportionment of royalties wherever a life estate, legal or conventional, is created and no expression of intent controls. But the UNIFORM PRINCIPAL AND INCOME ACT § 9, applicable to both trust and non-trust estates, seems extreme in prescribing that the life tenant shall receive only the income from royalties, and that the principal shall be accumulated for the remainderman. The apportionment stipulated in the Texas Trust Act seems an equitable solution. As an additional safeguard, the life tenant could be designated a statutory trustee to hold the remainderman's share during the life tenancy.

Robert S. Weatherall

OIL AND GAS — TENANCY IN COMMON — PRODUCTION BY HIS
CO-TENANT HELD TO CONTINUE LEASE FOR NON-DRILLING
LESSEE BEYOND PRIMARY TERM.—*Wilson v. Superior Oil
Co.*, 274 S.W.2d 947 (Tex.Civ.App. 1954, error ref'd n.r.e.).

In order to eliminate nonessential complexities of the fact situation considered in the principal case, the central problem may be stated hypothetically. *A*, owning an undivided half interest in the minerals underlying a tract of land, executed an oil and gas lease to *X*; *B*, owner of the other half interest, leased to *Y*. *X* and *Y* formed a joint operating agreement whereby *Y* was to arrange for drilling and the two were to share the costs equally whether production was secured or not. *Y* obtained production during *X*'s primary term. After the end of *X*'s primary term, *A* sued *X* in trespass to try title, contending that his leasehold had expired. Jury trial was waived and the trial court rendered judgment for *X*. *Affirmed*.

The habendum clause of an oil and gas lease usually provides that production or drilling must be by the lessee or his assigns to prevent termination of the lease upon the expiration of the primary term. 2 SUMMERS, OIL AND GAS § 294 (1938). In *Earp v. Mid-Continent Petroleum Corp.*, 167 Okla. 86, 27 P.2d 855 (1933), there is a dictum that if two cotenants separately lease their undivided interests, production secured by one lessee pursuant to an operating agreement with the other will enure to the benefit of both. The principal case approves this statement and suggests one type of agreement that will suffice; *i.e.*, an agreement to share in the drilling costs whether production is secured or not.

The minority rule is that in the absence of an operating agreement one cotenant's production of oil and gas without the other's consent constitutes waste. See 1 SUMMERS, OIL AND GAS § 37 (1938); KULP, OIL AND

GAS RIGHTS § 10.19 (1954). Texas and Oklahoma adhere to the majority view that a cotenant or his lessee is free to drill or produce. *Prairie Oil & Gas Co. v. Allen*, 2 F.2d 566 (8th Cir. 1924); *Burnham v. Hardy Oil Co.*, 108 Tex. 555, 195 S.W. 1139 (1917); 1 SUMMERS, OIL AND GAS § 36 (1938); Jones, *Problems Presented by Joint Ownership of Oil, Gas and Other Minerals*, 32 TEXAS LAW REVIEW 697 (1954). However, if one cotenant or his lessee drills without the other's consent, he assumes the risk of a dry hole, and if production is obtained, he must account to the non-consenting cotenant for his share of production in excess of the drilling and operating costs. *Prairie Oil & Gas Co. v. Allen*, *supra*; *Burnham v. Hardy Oil Co.*, *supra*.

Three problems are presented by the decision in the principal case: In what circumstances will one cotenant lessee's drilling serve to discharge the other's lease obligations? Will the drilling obviate the necessity of the non-drilling lessee's paying delay rentals? To whom and when are the royalty payments due?

The *Earp* case suggested that unless a lessee does more than passively acquiesce in his cotenant's drilling it will not perpetuate his lease. The court did not clearly delineate what type of agreement is necessary, but the principal case may mean that it must be more than a restatement of the cotenants' common-law reciprocal obligations.

If the lease does not specify that the lessee shall drill, it is uncertain that drilling by one of two cotenants holding under different lessors will be sufficient to keep the other's lease in force without payment of delay rentals; it probably will not unless there is an operating agreement between the lessees such that drilling by one will be considered the drilling of the other. See *Earp v. Mid-Continent Petroleum Corp.*, *supra*, at 96, 27 P.2d at 864; Jones, *Problems Presented by Joint Ownership of Oil, Gas and Other Minerals*, 32 TEXAS LAW REVIEW 697, 715 (1954.) The rationale is that a lease usually contemplates drilling by the lessee. Cf. 2 SUMMERS, OIL AND GAS § 294 (1938). But the *Earp* case holds that if a delay rental clause is ambiguous the court will give effect to a contemporary construction by the parties. Thus, if one lessor receives royalties from a well drilled by his cotenant's lessee, the non-drilling lessee's failure to pay delay rentals will not result in forfeiture of his lease. *Earl v. Mid-Continent Petroleum Corp.*, *supra*. If one lessee's production perpetuates his cotenant's lease, it seems consistent that drilling will satisfy the rental clause.

If cotenants execute separate oil and gas leases to different lessees, the lessees are tenants in common. *Earp v. Mid-Continent Petroleum Corp.*, *supra*; cf. *Burnham v. Hardy Oil Co.*, *supra*; *Prairie Oil & Gas Co. v. Allen*, *supra*. If one lessee secures production without the other's consent, the latter and his lessor, if equal cotenants, are entitled collectively to one-half of the total production less one-half of the costs after the total drilling costs are satisfied out of the production. *Earp v. Mid-Continent Petroleum Corp.*, *supra*. Concerning distribution between a non-drilling lessee and his lessor, the *Earp* case suggests that the lessor is entitled to his royalty free of costs on one-half of the total production; the lessee then shares in one-half of the production, bearing the costs. If this solution is followed, the amount of the lessor's royalties may ultimately be the same as if his lessee had drilled. However, his receipt of royalty

payments would be postponed until the drilling lessee had been reimbursed for drilling costs.

The suggested solution is unsatisfactory if production never exceeds costs. Literally read, the royalty clause might require payment of the royalty whenever any production is secured. If this interpretation is correct, the non-drilling lessee would be required to pay royalties as soon as the drilling lessee achieves production, even though he may never receive any revenue because the drilling lessee need not account to him unless the production exceeds costs. According to the majority rule the non-drilling lessee would be unable to avoid this undesirable predicament since he cannot prevent his cotenant's drilling. It is uncertain that the courts would read the royalty clause literally in this situation. If the non-drilling lessee did not agree to his cotenant's drilling, it would be inequitable to hold him liable for royalty unless he had recovered from the drilling lessee. On the same reasoning, in this situation production by the drilling lessee should not keep the non-drilling lessee's lease in effect nor satisfy his delay rental clause.

If the cotenant lessees execute an operating agreement providing for the immediate sharing of production and the costs of production, each should be under a duty to pay royalties to his lessor immediately. The lessor of the non-drilling lessee would then be receiving the consideration bargained for in the lease just as if his lessee had drilled. Cf. *Keystone Gas Co. v. Salisbury*, 192 Ky. 643, 234 S.W. 290 (1921). It seems proper under these circumstances to hold that the lease of the non-drilling lessee is perpetuated by the production of his cotenant.

J. Ronald Trost

STATUTES—STATUTE HELD TO TAKE EFFECT ELEVEN MONTHS BEFORE PASSAGE.—*City of Deer Park v. State ex rel. Shell Oil Co.*, 275 S.W.2d 77 (Tex. Sup. 1955).

The Shell Oil Company contested the city's attempt to annex an area which included one of its plants on the ground that the annexation proceedings were defective. The supreme court held that Shell had no cause of action because TEX. CIV. STAT. (Vernon Supp. 1954) art. 966(c) had validated all defects in annexation proceedings without providing a saving clause for pending suits. After this decision, the legislature passed TEX. LAWS, 1st Spec. Sess. 1954, c. 4, which amended the saving clause of the validating act to except from its provisions suits contesting annexation proceedings, the amendment to be effective from the date of the original act. On second motion for rehearing, the court reversed its previous decision and on the basis of the new act held for Shell.

The constitution prohibits retroactive laws, TEX. CONST. art. 1, § 16, but the courts have interpreted the prohibition as applying only to legislation that impairs vested rights. *Mellinger v. Houston*, 68 Tex. 37, 3 S.W. 249 (1887); *Purser v. Pool*, 145 S.W.2d 942 (Tex. Civ. App. 1940); *Smith, Retroactive Laws and Vested Rights*, 5 TEXAS LAW REVIEW 231 (1927), 6 TEXAS LAW REVIEW 409 (1928).

Even in the absence of constitutional objections, the courts presume that an act is not retroactive unless the legislature explicitly declares the

contrary. *Government Personnel Mut. Life Ins. Co. v. Wear*, 151 Tex. 454, 251 S.W.2d 525 (1952); *State v. Humble Oil & Refining Co.*, 141 Tex. 40, 169 S.W.2d 707 (1943); *Wichita Falls & So. R.R. v. Lindley*, 143 S.W.2d 428 (Tex.Civ.App. 1940, error dism'd judgm't correct); 2 SUTHERLAND, STATUTORY CONSTRUCTION § 2212 (3d ed. 1943); comment, 6 TEXAS LAW REVIEW 505 (1928). The intent that a statute be retroactive must be unmistakable; the courts will often disregard the fact that upon reasonable interpretation the purpose of an act evidences such an intent. See *State v. Humble Oil & Refining Co.*, *supra*; *Garrett v. Texas Employers Ins. Ass'n*, 226 S.W.2d 663 (Tex.Civ.App. 1949, error ref'd). But cf. *Freeman v. Terrell*, 115 Tex. 530, 284 S.W. 946 (1926). The presumption against retroactivity is based on the belief that retroactive laws are unfair. See Smith, *supra*, 6 TEXAS LAW REVIEW 409-13 (1928).

As validating acts are by definition retroactive, they are not subject to the presumption, *City of Mason v. West Texas Utilities Co.*, 150 Tex. 18, 237 S.W.2d 273 (1951); *Hunt County v. Rains County*, 7 S.W.2d 648 (Tex.Civ.App. 1925), and are usually held not to impair vested rights. *Charlotte Harbor & No. Ry. v. Welles*, 260 U.S. 8 (1922); *Arderson County Road Dist. v. Pollard*, 116 Tex. 547, 296 S.W. 1062 (1927); *Louisiana Ry. & Nav. Co. v. State*, 298 S.W. 462 (Tex.Civ.App. 1927), *aff'd*, 7 S.W.2d 71 (Tex.Comm.App. 1928). Although the act in the principal case amended a validating act, it is categorized as an amendatory act, and is therefore required to contain a clear expression of legislative intent that it be retroactive. *Garrett v. Texas Employers Ins. Ass'n*, *supra*; 1 SUTHERLAND, STATUTORY CONSTRUCTION § 1936 (3d ed. 1943). The court had no difficulty in finding that intent, since the caption warned that it saved suits pending at the time of the original act, and the body of the act stated parenthetically that its effective date was to be the same as that of the original act.

Though the words of this act are explicit, it is doubtful that any real legislative intent existed because probably not more than four or five legislators realized the effect of the act. The whole legislative process, from introduction of the bill to final passage by both houses, took only two days. The bill was passed near the end of the session while constitutional rules were suspended and bills were being run through by the score. It was not even printed when the House of Representatives considered it.

Cities are creatures of the legislature and have no vested rights; thus the legislature's supremacy allows it to change the law relating to cities at any time, even if a final judgment is upset by the change. *North Common School Dist. v. Live Oak County Bd. of Trustees*, 145 Tex. 251, 199 S.W.2d 764 (1946); *State v. Powell*, 134 S.W. 746 (Tex.Civ.App. 1910, error ref'd). Assuming a legislative intent to make the act retroactive, existing case authority supports the court's decision. However, it seems unlikely that many legislators would have wanted to pass this act, had they known the injustice they were doing the city.

The saving clause of the original validating act probably omitted annexation suits as the result of a drafting error. If so, the whole controversy could have been averted by a general savings statute. See Ruud, *The Savings Clause—Some Problems in Construction and Drafting*, 33

TEXAS LAW REVIEW 285, 296-300 (1955). The effect of such a statute is that all causes of action based on the law as it existed before a new act is passed are automatically excepted from the act's provisions.

Buford D. McKinney, Jr.

TORTS — LIBEL AND SLANDER — ORAL CHARGE THAT ONE IS A COMMUNIST NOT SLANDEROUS PER SE.—*Gurtler v. Union Parts Mfg. Co.*, 285 App. Div. 643, 140 N.Y.S.2d 254 (1st Dep't. 1955).

The plaintiff sued his employer, a corporation producing secret weapons for the government, for slander, alleging that the corporation's president had falsely accused the plaintiff of being a communist. The trial court denied the defendant's motion to dismiss the complaint. *Reversed*; complaint dismissed.

The early common-law courts of England considered the publication of false statements injuring the reputation of another a "spiritual crime" exclusively within the power of the ecclesiastical courts, which were allowed to punish the offender but could not award relief to the person defamed. The ecclesiastical courts were forbidden to punish one who falsely charged another with a crime triable in the common-law courts, and by 1535 the latter courts had begun to entertain civil actions for defamation of this kind. The "temporal" courts further encroached upon the jurisdiction of the "spiritual" courts by allowing recovery for disparagement of a professional man. A third category of words—imputations of certain diseases—also became actionable at law. Statements coming within one of these three categories were actionable without proof of actual damage, and were known as slander per se. The lay courts finally annexed the remaining jurisdiction of the church courts over defamation, by entertaining actions on statements not coming within the previously accepted categories of slander per se. In these actions, the "temporal" courts justified their innovation by requiring pleading and proof of actual economic damage. This "special damage" category, originally a device for expanding the common-law action of slander, eventually became the means of discouraging such actions when the courts began to construe it strictly in order to stem the flood of litigation which its adoption had caused. See PLUCKNETT, *CONCISE HISTORY OF THE COMMON LAW* 454-66 (4th ed. 1948).

It is generally stated that spoken words are not actionable unless they (1) charge the commission of a serious crime, (2) impute a communicable disease, (3) tend to injure another in his office, profession, or trade, or (4) cause actual economic damage. *Yavis v. Sullivan*, 137 Conn. 253, 76 A.2d 99 (1950) (charge that a physician was a "thief" with no practice because he was dishonest, held slander per se as imputing crime to the plaintiff and unfitness for his profession); *Walker v. Tucker*, 220 Ky. 363, 295 S.W. 138 (1927) (word "bastard" held not slanderous without proof of special damage because it did not charge crime, disease, or professional incompetence); *Billington v. Houston Fire & Casualty Ins. Co.*, 226 S.W.2d 494 (Tex.Civ.App. 1950) (words "liar" and "crook," applied to insurance agent, not slanderous per se because they

did not charge crime or unfitness for occupation); *West Texas Utilities Co. v. Wills*, 135 S.W.2d 138 (Tex.Civ.App. 1939) (charge that the plaintiff fraudulently obtained workmen's compensation held slanderous per se as tending to injure him in his occupation). However, a few courts apparently have held words actionable without proof of special damage on the theory that the alleged slander need only tend to expose the plaintiff to public aversion or to injure him in his social relations. See *Sharp v. Bussey*, 137 Fla. 96, 187 So. 779 (1939) (since words charged that plaintiff, a mayor, had danced with negro wenches, decision may have been reached on ground that words tended to injure plaintiff in his office); *Spotorno v. Fourichon*, 40 La. Ann. 423, 4 So. 71 (1888); *Findley v. Wilson*, 115 Okla. 280, 242 Pac. 565 (1925).

To bring his case within the category of words reflecting on his fitness to engage in his business or profession, the plaintiff must plead and prove that the words were spoken in reference to his business or profession and not merely in reference to his private life. *Bennett v. Seimiller*, 175 Kan. 764, 267 P.2d 926 (1954). The American Law Institute has rejected this particular requirement. RESTATEMENT, TORTS § 573, comment *d* (1938), and it has been abolished in England, where it originated. See Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66. The courts assert that words do not affect the plaintiff in "his business or profession," unless they ascribe to him conduct, characteristics, or a condition incompatible with the proper exercise of his lawful business or profession. RESTATEMENT, TORTS § 573 (1938).

By adhering to the strict rule that the allegedly slanderous statement must refer to the plaintiff's occupation, the court in the principal case followed the tendency of the New York courts to discourage defamation actions generally. For example, in New York there is only *one* cause of action for the multiple publication of a libel, and the short one-year limitation thereon begins with the release for sale of the *first* copy of the libelous publication, though copies are sold over a long period. *Gregoire v. G. P. Putnam's Sons*, 298 N.Y. 119, 81 N.E.2d 45 (1948). Moreover, if a publication is not libelous on its face, and extrinsic facts must be proved in order to demonstrate its libelous character, special damage must also be alleged and proved. *McNamara v. Goldan*, 194 N.Y. 315, 87 N.E. 440 (1909). See also *Sydney v. MacFadden Newspaper Publishing Corp.*, 242 N.Y. 208, 151 N.E. 209 (1926). On reasoning similar to that employed in the principal case, the lower New York courts have consistently denied that an oral accusation that one is a communist is slanderous. *Keefe v. O'Brien*, 203 Misc. 113, 116 N.Y.S.2d 286 (Sup. Ct. 1952); *Gross v. Mallamud*, 200 Misc. 5, 108 N.Y.S.2d 822 (Sup. Ct. 1951); *Krumholz v. Raffer*, 195 Misc. 788, 91 N.Y.S.2d 743 (Sup. Ct. 1949). Accord, *Pecyk v. Semoncheck*, 105 N.E.2d 61 (Ohio Ct. App. 1952).

However, other jurisdictions have found such charges slanderous per se. *Remington v. Bentley*, 88 F. Supp. 166 (S.D.N.Y. 1949) (charge imputed characteristics incompatible with proper exercise of plaintiff's profession as a government economist); *Joopanenko v. Gavagan*, 67 So.2d 434 (Fla. 1953) (by judicial notice, charge necessarily caused injury to plaintiff in his social, official, and business relations of life), *Lightfoot v. Jennings*, 363 Mo. 878, 254 S.W.2d 596 (1953) (charge was reasonably

capable of meaning that plaintiff advocated overthrow of government by force, a crime under the Smith Act).

Because of the constantly changing nature of public opinion, statements which are harmless at one place or time may be highly injurious at another. In 1889 it was actionable to write of a man as an anarchist; in 1915, as a socialist; and in 1926, as a "Red." See *Burrell v. Moran*, 82 N.E.2d 334 (Ohio C.P. 1948). In view of the prevailing public attitude toward communism in the United States, to be falsely branded a communist would be clearly harmful in most lawful occupations, probably more harmful than to be directly charged with unfitnes or incompetence in one's occupation; yet the latter charge is usually held actionable, and the former not. Though the established categories of slander should not be abolished, they should not be so inflexibly applied that the spirit of the times is wholly ignored. To maintain that a statement comes within the category of "words tending to injure the plaintiff in his business or profession" only when it refers to the particular business or profession seems arbitrary. Statements concerning a person's private life may be certain to injure him in his business. A more reasonable limitation on liability, if any is desired, would be to require evidence—in many instances judicial notice might be taken—that public opinion deems adherence to communist principles incompatible with the proper pursuit of the vocation in question. In Texas, this might readily be shown, for instance, if a public school teacher were charged with being a communist. See TEX. CIV. STAT. (Vernon, 1948) art. 2908a. Cf. *Schedler v. Brochstein*, 73 S.W.2d 907 (Tex.Civ.App. 1934). Since Congress has prohibited the employment of communists in any defense facility, the principal case seems to fall within this rule. See Internal Security Act, 1950, 64 STAT. 992, 50 U. S. C. § 784 (1952).

Walter E. Barnett

WATER AND WATER COURSES — LANDOWNERS SERVED BY WATER CARRIERS HOLD WATER RIGHT ONLY THROUGH CONTRACT OR BY CONTIGUOUS LOCATION OF LAND.—*Board of Water Engineers v. Wilfert*, 274 S.W.2d 881 (Tex.Civ.App. —Austin, 1955).

In 1942 the Board of Water Engineers amended the plaintiff's appropriative permit to include neighboring lands, thereby permitting their owners to use water supplied through the plaintiff's canals. The neighboring land owners contested the plaintiff's application for permission to change his place of use, which would exclude the adjoining tracts and terminate their water supply. The board denied the application, reasoning that the consumers, as beneficial users, had acquired a vested water right which would be impaired by the proposed change. The district court reversed and approved the application. The record on appeal did not stipulate that the neighboring consumers had contracted with the plaintiff regarding the water, or that their land was contiguous to the plaintiff's canals. *Reversed and remanded* for determination of these issues.

The principal case presents an unsettled problem: who owns an appropriative right which is held by permit in the name of one landowner

but is granted to serve, in part, the lands of others? Some of the western states have adhered to the historical concept that the water right vests in the diverting water carrier (the name appropriator), and that the consumer has only a contract right, protected by public regulation. E.g., *Leavitt v. Lassen Irrigation Co.*, 157 Cal. 82, 106 Pac. 404 (1909); *Nampa & Meridian Irrigation Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916 (1935); *Bailey v. Tintinger*, 45 Mont. 154, 122 Pac. 575 (1912); *In Re Waters of Walla Walla River*, 141 Ore. 492, 16 P.2d 939 (1932); *Butte County v. Lovinger*, 64 S.D. 200, 266 N.W. 127 (1936). Other states follow the "Colorado rule" that the actual user of the water owns the water right. E.g., *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 76 Pac. 598 (1904); *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 21 Pac. 1028 (1889); *Farmers Canal Co. v. Frank*, 72 Neb. 136, 100 N.W. 286 (1904); *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 140 Pac. 720 (1914); *Scherck v. Nichols*, 55 Wyo. 4, 95 P.2d 74 (1939). New Mexico and Utah apparently approve the latter position. See *Hagerman Irrigation Co. v. McMurry*, 16 N.M. 172, 113 Pac. 823 (1911); *Sowards v. Meagher*, 37 Utah 212, 108 Pac. 1112 (1910).

Texas decisions have rejected various incidents of the Colorado rule without specifically disapproving the rule itself. For instance, under the Colorado view, users of water from an irrigation ditch are supplied according to their priority of usage, there being no correlative sharing in time of shortage. *Farmers' High Line Canal & Reservoir Co. v. Southworth*, *supra*; *Prosole v. Steamboat Canal Co.*, *supra*. A Texas case repudiated this by holding that customers of an irrigation company are not to be treated as "appropriators" in determining priorities in time of shortage. *Willis v. Neches Canal Co.*, 16 S.W.2d 266 (Tex.Comm.App. 1929). Most jurisdictions adhering to the Colorado view will not recognize an appropriative right unless the applicant owns the land served, *Wyatt v. Larimer and Weld Irrigation Co.*, 18 Colo. 298, 33 Pac. 144 (1893); *Prosole v. Steamboat Canal Co.*, *supra*, but the statutory definition of "appropriator" in Texas does not include that element. TEX. CIV. STAT. (Vernon, 1948) art. 7473. A third incident of the Colorado view is that water rights once applied to a tract become appurtenant thereto, *Frank v. Hicks*, 4 Wyo. 502, 35 Pac. 475 (1894); consequently, in some jurisdictions the water rights are not saleable apart from the land, *Slosser v. Salt River Valley Canal Co.*, 7 Ariz. 376, 65 Pac. 332 (1901), or if severed by sale or by change in place of use lose their priority altogether, *Hughes v. Lincoln Land Co.*, 27 F. Supp. 972 (D. Wyo. 1939). Texas apparently abnegates this also since the board may allow a permittee to change his place of use. *Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674 (Tex.Civ.App. 1947). Further, one Texas court implicitly rejected the Colorado rule by allowing a receiver to attach the water and ditches of an irrigation company as its "property." *Mudge v. Hughes*, 212 S.W. 819 (Tex.Civ.App. 1919). In the principal case, the attorney general argued for the board in his appellate brief that users acquire an interest in the supplier's water rights because of their beneficial use of the water. The court's silence on this theory may imply a complete rejection of the Colorado rule.

This rejection would not leave the consumer at the mercy of his sup-

plier. Irrigation companies are subject to contract obligations and to rate control in the public interest, and they are under a statutory duty to furnish water to adjoining land owners upon reasonable demand. TEX. CIV. STAT. (Vernon, 1948) arts. 7555, 7559; *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.*, 208 S.W. 904 (Tex.Comm. App. 1919). Because of this duty the owners of land adjoining or contiguous to canals have a vested right to share in the available water supply. *Edinburg Irrigation Co. v. Ledbetter*, 286 S.W. 185 (Tex.Comm. App. 1926). Also, permanent water rights granted by contract pursuant to TEX. CIV. STAT. (Vernon, 1948) arts. 7546, 7547, and 7553, are viewed as covenants running with the land, appurtenant to the tract supplied. *Edinburg Irrigation Co. v. Paschen*, 235 S.W. 1088 (Tex.Comm.App. 1922). See Roberts, *Problems Connected with the Distribution of Irrigation Water in Texas*, 31 TEXAS LAW REVIEW 373 (1953). However, the supplier may be excused from these statutory duties. See *Knight v. Oldham*, 210 S.W. 567 (Tex.Civ.App. 1919, error ref'd); *Granger v. Kishi*, 139 S.W. 1002 (Tex.Civ.App. 1911).

In the principal case the board buttressed its position by urging two ideas—protection of the consumer, and efficient administrative practice. Concerning the former, two situations can be envisioned: (1) the supplier and the consumer informally agree respecting the permanency of the supply but do not draft a written contract; (2) there is no agreement and the supply is admittedly temporary. Postulation of consumer ownership seems unjustified in either instance. If there is a contractual arrangement, TEX. CIV. STAT. (Vernon, 1948) arts. 7546, 7547, and 7553 protect the consumer, and no sound reason is apparent for extending this protection when the underlying policy of requiring that contracts be in writing is equally appropriate here. If the consumer has acquiesced in the arrangement, it seems unjustified to afford him a windfall by declaring him part owner of the water right.

Respecting efficient administrative practice, the board has been operating on the assumption that water rights are appurtenant to and pass with conveyances of the land unless they are specifically reserved. Thus the board records transfers of a water right in accordance with conveyances of the land. This practice may result in inaccurate files, for it is believed that water rights, as the principal case indicates, may not be appurtenant to the land. Further, water rights are subject to mandatory recordation; hence this information can be adduced without resort to the records of land transfers.

The serious objection to a rule establishing consumer ownership of water rights is that its ramifications are undesirable. It seems best to avoid a system which freezes water rights to particular tracts even though there may be available land more suited to cultivation. See National Resources Planning Board, *State Water Law in the Development of the West* 45, 46 (1943). Even if the board could avoid this consequence by permitting a change of place of use, another problem is encountered. Only the owner of the fee would derive benefit from the doctrine of appurtenancy; the tenant or good faith trespasser, for no valid reason, could not acquire a water right. See *Tattersfield v. Putnam*, 45 Ariz. 156, 41 P.2d 228 (1935); *Avery v. Johnson*, 59 Wash. 332, 109 Pac. 1028

(1910); HUTCHINS, *SELECTED PROBLEM IN THE LAW OF WATER RIGHTS IN THE WEST* 311 (1942).

Had the court accepted the Colorado rule in the principal case, as urged on behalf of the board, it would have departed from a long-standing but never clearly expressed position of the Texas courts. Since existing consumer protection seems adequate, the decision is a sound corollary to the *Willis* and *Ledbetter* cases, and the court's implied rejection of the Colorado rule is to be commended.

Tom Rush Moody, Jr.

WILLS — EFFECT OF A JOINT WILL ON SURVIVOR'S RIGHT TO DEVISE AFTER-ACQUIRED PROPERTY.—*Murphy v. Slaton*, 273 S.W.2d 588 (Tex. Sup. 1954).

A husband and wife executed a joint will devising "all of the [property] which either or both of us may own at the time of our death" to the survivor for life with a power of sale and the remainder to their children for life. The wife executed a codicil devising, in a manner inconsistent with the will, property she acquired after her husband's death. In a declaratory judgment after the wife's death, the trial court declared that the codicils were repugnant to the will and were therefore void. The court of civil appeals reversed and rendered a judgment whereby the codicils were given the effect of altering the provisions of the original will. *Reversed and remanded*; the will was contractual in nature and although it controlled the property owned by the husband and wife at the time of the husband's death, it did not control property subsequently acquired by her since there was no clear expression that it should do so.

A joint will is a single testamentary instrument disposing of property owned by two or more persons individually, jointly, or in common. *Curry v. Cotton*, 356 Ill. 538, 191 N.E. 307 (1934); *In re Will of Cole*, 171 N.C. 74, 87 S.E. 962 (1916). Although technically the survivor may revoke the joint will, the beneficiaries may enforce it in equity if it was executed pursuant to an agreement contractual in nature. *Deseumeur v. Rondel*, 76 N.J. Eq. 394, 74 Atl. 703 (Ch. 1909); *In re Hawes' Estate*, 119 Misc. 359, 196 N.Y. Supp. 255 (Surr. Ct. 1922), *aff'd*, 212 App. Div. 861, 207 N.Y. Supp. 850 (1st Dep't 1925); Young, *The Doctrinal Relationships of Concerted Wills and Contracts*, 29 TEXAS LAW REVIEW 439 (1951).

There are three varieties of after-acquired property: (1) property acquired by the survivor from sources independent of the property owned at the death of the co-testator; (2) property acquired by the survivor with proceeds from the sale of property owned at the death of the co-testator; and (3) property derived from the income from such property. In the principal case the court declared that unless a contrary intent is plainly manifested, "after-acquired property owned by the survivor in his or her individual right does not pass." If any presumption concerning intent is to be established, this rule probably is consistent with what most testators contemplate in framing a joint testamentary scheme. Moreover, joint testators usually are spouses, and the rule sensibly preserves for the survivor freedom to distribute after-acquired property in accordance with their children's changing needs.

In a situation like that in the principal case, where the survivor has power to sell the property and use the proceeds, it may be necessary to consider the effect of the will on the proceeds of a sale or on property purchased therewith. The majority rule, approved in the principal case, is that if property is sold any proceeds not consumed are governed by the terms of the joint will. *Morgan v. Meacham*, 279 Ky. 526, 130 S.W.2d 992 (1938); *Trout v. Rominer*, 198 Pa. 91, 47 Atl. 960 (1901); *Edds v. Mitchell*, 143 Tex. 307, 184 S.W.2d 823 (1945). Presumably, the same result would obtain if the survivor used the proceeds to purchase other property; otherwise, a life tenant with a power of sale could convert his life estate into a fee simple.

The third class of property, that derived from income from the property held by the survivor for life, is not specifically discussed in the principal case although the court does say, ". . . as to all property acquired by [the wife] in her individual right after [the husband's] death, she had full right of ownership and power to dispose of the same by will or otherwise as she saw fit." Since the life tenant is entitled to the income from property in which he holds a life estate, *In re Hilliard's Will*, 164 Misc. 677, 299 N.Y.S. 788 (Surr. Ct. 1937), *aff'd*, 254 App. Div. 879, 5 N.Y.S.2d 92 (2d Dep't 1938); *Wagnon v. Wagnon*, 16 S.W.2d 366 (Tex. Civ.App. 1929, error ref'd), apparently any property the survivor acquires with the income from his life estate would be property acquired "in his individual right."

If the survivor does not exercise his power to dispose of after-acquired property the court would have to choose between two different rules of construction—the rule adopted in this case that after-acquired property is not governed by the will unless there is a clear expression of intent, and the rule of construction against partial intestacy. *Young Women's Christian Home v. French*, 187 U.S. 401 (1903); *Holmes v. Welch*, 314 Mass. 106, 49 N.E.2d 461 (1943); *Ferguson v. Ferguson*, 121 Tex. 119, 45 S.W.2d 1096 (1931). The choice will likely depend on the factual aspects of the particular case, particularly upon the testator's probable desires.

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