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Recent Case Notes

John Bailey

John M. McElhaney

Carroll Jarnagin

Geo. R. Alexander Jr.

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RECENT CASE NOTES

Bulk Sales Acts—Chattel Mortgages— Preferential Transfers

A buyer of a mercantile business executed a chattel mortgage on the stock of goods to the seller to secure payment of the purchase price. The mortgage was properly recorded. Neither party owed any debts. Subsequently the mortgagor, insolvent and indebted to several creditors, re-transferred the stock of merchandise to the mortgagee in satisfaction of the obligation for the purchase price. There was no effort to comply with the bulk sales law, ARK. STAT. ANN. §§ 68-1501 to 68-1504 (1947), which requires a transferee of a stock of goods in bulk to give creditors of the transferor notice of the impending transfer. *Held*: The bulk sales statute applies to a transfer in satisfaction of a pre-existing debt, even where the transfer is made to the one from whom the goods were purchased. The purchase money mortgage on the stock of goods is invalid. *Ritchie Grocer Co. v. Sanders*,—Ark.—, 294 S.W.2d 54 (1956).

The evil which bulk sales legislation sought to remedy was a type of fraudulent conveyance which became popular following the panic of 1893. A merchant in debt would sell his stock of merchandise in bulk and abscond, or would sell his business to a friend at a low price intending to re-enter the business in the future. The common law concerning fraudulent conveyances did not prevent the passage of title to the purchaser unless he had notice of the seller's fraud, so courts attempted to find mutual fraud in colorable transfers. *Beels v. Flynn*, 28 Neb. 575, 44 N.W. 732 (1890); *cf. Romeo v. Martucci*, 72 Conn. 504, 45 Atl. 1 (1900). The common law also did not prevent an insolvent debtor from preferring one creditor over others. Williston, *Transfers of After-Acquired Personal Property*, 19 HARV.L.REV. 557, 572 (1906). A preference was made an act of bankruptcy by the National Bankruptcy Act of 1898, but it was not voidable by the other creditors unless the preferred creditor had reasonable cause to believe that the debtor was insolvent. The remedies before the enactment of bulk sales laws were not only otherwise inadequate, they were not available until after the harm had been done. Between 1896 and 1910 all the states enacted bulk sales laws, which in general require that, prior to a sale of goods in bulk and not in the ordinary course of business, the purchaser obtain a list of the seller's creditors and give them notice of the impending sale. See, *e.g.* TEX. REV. CIV. STAT. ANN. art. 4001 (1945). This enables the creditors

to take cognizance of the price and other circumstances *before* the sale and to decide whether or not to try to prevent it. See Billig, *Bulk Sales Laws*, 77 U. OF PA.L.REV. 72 (1928); Larson, *Bulk Sales: Texas Law and the Uniform Commercial Code*, 6 SW.L.J. 417, 418 (1952). An insolvent debtor can still prefer one creditor over others, *provided* the bulk sales law is not violated. *Sampson v. Brandon Grocery Co.*, 127 Ga. 454, 56 S.E. 488 (1907).

The principal case applied the Arkansas bulk sales statute literally, holding that the return of the stock of goods to the seller was a "transfer," and therefore within the statute. The Court relied on a law review article which states that a majority of courts apply bulk sales laws to preferential transfers, including a transfer of goods back to the seller in satisfaction of the transferor's obligation for the purchase price. Billig and Branch, *The Problem of Transfers under Bulk Sales Laws*, 35 MICH.L.REV. 732, 748-49 (1936-37). The statement in the article, however, is followed by another to the effect that bulk sales laws should likewise apply to a sale where there is a contemporaneous agreement that the seller might retake the goods upon the buyer's inability to pay, *unless* the agreement constitutes a *valid lien* on the goods. If there is a valid lien, a transfer in satisfaction of the debt would not be a preference and therefore should not be within the bulk sales statutes even in the jurisdictions which hold the statutes applicable to transfers in satisfaction of pre-existing debts. Since a secured creditor is already a preferred creditor by virtue of his lien, inferior creditors would not be injured by such a transfer, except to the extent that the value of the property transferred exceeded the amount of the secured indebtedness. *Gorman v. Hellberg*, 190 Iowa 728, 180 N.W. 732 (1921); *cf. Settegast v. Second National Bank*, 126 Tex. 330, 87 S.W.2d 1070 (1935). Since such transfers merely accomplish voluntarily that which the courts would do upon suit for foreclosure, they have been held not within the scope of the bulk sales statutes. *Mayfield Co. v. Harlan & Harlan*, 184 S.W. 313 (Tex. Civ. App. 1916) (on rehearing); *Gorman v. Hellberg*, *supra*; *cf. Englewood State Bank v. Tegtman*, 85 Colo. 340, 275 Pac. 935 (1929). See PROPOSED UNIFORM COMMERCIAL CODE (1952), § 6-103 (3), excluding "[t]ransfers in settlement or realization of a lien or other security interests" from operation of the bulk sales article.

If the mortgage in the principal case was invalid, the subsequent transfer was preferential. Since the mortgage was held invalid the decision appears to be in accord with the cases which hold that bulk sales

laws apply to preferential transfers. However, it is not clear why the Court declared the mortgage invalid. The Arkansas bulk sales statute, though applicable to mortgages, could not have applied to the mortgage in question because it was given when the mortgagor owed no debts, hence there were no creditors to inform. Even if the mortgagor had been insolvent, the fact that the mortgage was a purchase money mortgage might well have taken it out of the bulk sales statute. *In re Rosom Utilities Inc.*, 105 F.2d 132 (2d Cir. 1939). The mortgage may be invalid because of the general rule that, unless the mortgagor is bound to apply the proceeds of sales to the payment of the mortgage debt, a mortgage (even though recorded) on goods exposed for sale in the ordinary course of the mortgagor's business is void as to creditors of the mortgagor. *Lund v. Fletcher*, 39 Ark. 325 (1882); *Pabst Brewing Co. v. Butchart*, 67 Minn. 191, 69 N.W. 809 (1897); *Twyne's Case*, 3 Co.Rep. 80a, 76 Eng.Rep. 809 (1601). Arkansas cases, however, have held that a chattel mortgage on a stock of goods including after-acquired property is valid except as to subsequent purchasers and lien creditors, and that the mortgagee may enforce his lien by taking possession of the goods before the creditors of the mortgagor obtain a lien on the property or contest the validity of the mortgage. *Soule v. First Nat. Bank of Fort Smith*, 202 Ark. 330, 150 S.W.2d 204 (1941); *Little v. National Bank of Mena*, 97 Ark. 57, 133 S.W. 166 (1910). Such repossession is not a preference. *Little v. National Bank of Mena*, *supra*. Furthermore, some courts have held that the general rule is not applicable to purchase money mortgages, reasoning that creditors are not harmed by their debtor's acquisition of property subject to a lien. *Adkins v. Bynum*, 109 Ala. 281, 19 So. 400 (1896); *Bowen v. Lansing Wagon Works*, 91 Tex. 385, 43 S.W. 872 (1898). In Texas this exception now exists in statutory form by an amendment in 1949 to TEX. REV. STAT. ANN. art. 4000 (Supp. 1956).

If the mortgage in the principal case was erroneously declared invalid, the transfer was not a preference and the decision is probably incorrect, because the bulk sales law should not apply if the transfer was not preferential. In such circumstances, to apply the statute literally and hold the transfer in satisfaction of the lien to be a "transfer" within the act would be to extend it beyond the reason for the rule. Since the facts in the present case suggest strong grounds for upholding the mortgage, it is to be expected that there will be other cases which, on similar facts, will reach a contrary result.

John Bailey

Constitutional Law—Freedom of Association— Compulsory Union Membership

Non-union railway employees brought action to enjoin the railroad and local unions from entering into a union shop contract pursuant to the 1951 amendment to the Railway Labor Act, which permits such contracts even when in conflict with state right-to-work laws. *Held*: Union membership may be required of all railway employees as a condition of continued employment notwithstanding TEX. REV. CIV. STAT. ANN. art. 5207a (1947). *Sandsberry v. International Ass'n of Machinists*, —Tex.—, 295 S.W.2d 412 (1956).

The United States Supreme Court has upheld the union shop provision of the Railway Labor Act, 44 STAT. 577 (1926), as amended, 45 U.S.C. § 152 (11) (1951), as a valid exercise of the congressional power to regulate commerce to the extent that all employees may be required to contribute financial support to the collective bargaining agency. *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), 11 Sw. L.J. 88 (1957). The *Hanson* decision is, of course, binding in Texas, but the *Sandsberry* requirement of full union membership raises the issue of the constitutionality of forced membership in a private association.

The Federal Constitution makes no specific reference to freedom of association or the right to pursue a lawful occupation. However, these rights have been considered fundamental and embodied within the meaning of the First Amendment. PFEFFER, *THE LIBERTIES OF AN AMERICAN* 110 (1956); *Truax v. Raich*, 239 U.S. 33 (1915). The right to work has been protected where an individual has sought to run a laundry, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), be a train conductor, *Smith v. Texas*, 233 U.S. 630 (1914), and teach in a university, *Slochower v. Board of Educ. of City of New York*, 350 U.S. 551 (1956). Freedom of association has been extended to guarantee association for the purpose of collective bargaining, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and, conversely, freedom to refuse to enter into such an alliance has been upheld. *Pappas v. Stacey*, 151 Me. 36, 116 A.2d 497 (1955). The question which awaits determination is: How substantial are these rights in view of the power of Congress to regulate interstate commerce?

The congressional power to free commerce from obstruction is plenary except where it conflicts with other constitutional guarantees. *United States v. CIO*, 335 U.S. 106 (1948); *Curran v. Wallace*, 306 U.S. 1 (1939). This power has been applied to reduce industrial un-

rest by requiring employers to bargain collectively, *Virginia Ry. v. System Federation*, 300 U.S. 515 (1937), to authorize deduction of union dues from wages, *Brotherhood of Railway Shop Crafts v. Lowden*, 86 F.2d 458 (10th Cir. 1936), and to restrict union activity of Communists, *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950). However, the fundamental rights of a citizen, such as those guaranteed in the First Amendment, have enjoyed a preferred position and may not be infringed without the showing of a "clear and present danger" of a substantive evil. See Justice Holmes' dissent in *Gitlow v. New York*, 268 U.S. 652 (1925); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Thus union organizers may conduct meetings without obtaining state permission. *Thomas v. Collins*, 323 U.S. 516 (1945).

Federal intervention in union affairs may be justified if unions are treated as a mere economic device. Therefore, the consequences of employment relations may be regulated in the economic interests of society. *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948). However, full union membership involves more than economic considerations because unions do not confine themselves to mere economic activity. The modern union serves political and fraternal ends as well as acting as a collective bargaining agent.

The dissent of Justice McCall in the principal case draws an analogy between religious liberty and freedom from forced membership in groups which advocate economic and political theories. While the majority of workers probably do not view the trade union as an ideological movement, unions certainly would not want to give up their political and fraternal activities. The *Hanson* case has held it reasonable to require all who benefit from union bargaining to contribute financial support, but it may be unreasonable to require employees to pledge support to union political objectives and submit to group discipline. If unions demand compulsory membership, they must limit their activity in order not to infringe upon individual freedom of speech, thought and association. To what extent forced membership will be allowed to abridge individual freedom has been left to future litigation.

John H. McElhanev

Constitutional Law—Privilege Against Self-Incrimination —Dismissal of Teacher for Invoking Privilege

A public school teacher, when called before a Congressional Committee, refused to answer questions in regard to Communist Party membership, invoking the 5th Amendment privilege against self-incrimination. Several years previously the teacher had made full disclosure of his discontinued Communist Party membership to his school board. Pursuant to a state statute which provided that a teacher refusing to answer such questions before a Congressional Committee "shall be suspended and dismissed from his employment in the manner provided by law," the trial court found the fact of refusal to answer and concluded that this alone was grounds for dismissal. The teacher was denied an opportunity to fulfill his offer to answer any questions put to him by the school board or to explain why he had not answered the Committee's questions; nor was he permitted to explain to the trial court that the school board had been given full information in regard to his past Communist Party membership. *Held*: Prior to dismissing a teacher for invoking the 5th Amendment privilege against self-incrimination, the teacher should be allowed a full hearing with an opportunity to go into all matters germane to the charge that his actions have been sufficient to constitute grounds for dismissal. *Board of Educ. of San Francisco v. Mass.*, —Cal.2d—, 304 P.2d 1015 (1956).

Because state employment per se is not a constitutional right, state employees do not have a right to work for the state school system upon their own terms, and a state may set reasonable requirements for continued employment. *Adler v. Board of Educ. of City of New York*, 342 U.S. 485 (1952). Where the state as employer asks questions in regard to the employee's fitness for the job, refusal to answer is ground for dismissal, *Steinmetz v. California Board of Educ.*, 44 Cal.2d 816, 285 P.2d 617 (1955); and such dismissal has been held not to be an unfair labor practice. *Black v. Cutter Laboratories*, 43 Cal.2d 788, 278 P.2d 905 (1955). A state may presume that an employee's membership in certain subversive organizations is prime facie evidence of unfitness to teach. *Adler v. Board of Educ. of City of New York*, *supra*. *But see* GRISWOLD, THE 5TH AMENDMENT TODAY 60-70 (1955). A state may require an oath of loyalty to the state and national government as a condition of employment, *Pockman v. Leonard*, 39 Cal.2d 676, 249 P.2d 667 (1952), and an oath denying membership in organizations advocating the overthrow of the gov-

ernment by force, *Wieman v. Updegraff*, 344 U.S. 183 (1952); however, such statutes are constitutional only if scienter is expressly or by interpretation read into the statute. *Garner v. Board of Pub. Works*, 341 U.S. 716 (1951). See collection of cases, 100 L.Ed. 661 (1955).

In the majority opinion of the principal case three justices reasoned that the statute should be construed as constitutional if possible, and since a summary dismissal of the teacher without a full hearing would be unconstitutional, *Slochower v. Board of Educ. of City of New York*, 350 U.S. 551 (1956), the statute should be construed to allow the teacher to present all matters relating to the charge that his actions had been grounds for dismissal. A concurring justice concluded that the statute intended a dismissal upon the bare fact of refusal to answer, and that such a statute was unconstitutional under the *Slochower* case. The three dissenting justices reasoned that since a state may compel state employees to meet certain reasonable requirements, and since the compulsion to testify fully before a Congressional Committee in regard to Communist Party membership is a reasonable requirement, the employee could be dismissed following a simple hearing in which proof of refusal to answer is made; the employee is held to elect between continuing his employment and meeting the requirements of his job or refusing to answer.

The statute, as interpreted by the majority, gives the school board discretion to conclude that no grounds for dismissal exist under all of the circumstances of the teacher's actions. However, the trial court may conclude from a full hearing that the teacher's actions have given grounds for dismissal notwithstanding the fact that the school board possessed full information about the teacher's past Communist Party membership. The holding of the principal case leaves the underlying constitutional question still to be answered: May a state constitutionally condition state employment upon the non-exercise of the privilege against self-incrimination of the 5th Amendment? Although three dissenting justices answered in the affirmative, the three justice majority did not reach the question. It has been held that *federal* employment can be conditioned upon restrictions which otherwise would be unconstitutional, the employee being free to leave the employment if he desires to escape from the restrictions. *United Pub. Works v. Mitchell*, 330 U.S. 75 (1947) (Upholding as constitutional restrictions on political activities under the Hatch Act). However, such restrictions must be reasonably calculated to promote the efficiency of the public service. *United Pub. Workers v. Mitchel*, *supra*.

In Texas, employment as a teacher by the state is conditioned upon taking an oath of loyalty to the state and national government, and upon non-membership in organizations which seek to overthrow the government by force, with rights to a full hearing to establish the facts. TEX. REV. CIV. STAT. ANN. art. 2908a, 6889-3, 6252-7 (1948). Texas has no statute calling for dismissal of a teacher who invokes the 5th Amendment in regard to Communist Party membership.

The underlying constitutional question, as stated earlier, was not answered by the majority opinion. If the dissent's reasoning were applied to the 5th Amendment clause which requires reasonable compensation for property taken for public purposes, and state employment were conditional upon the non-exercise of this Constitutional right, much indignation would arise from a decision holding such a condition constitutional.

It is the writer's opinion that if the statute were allowed to stand as construed by the dissent, federal constitutional rights could become impaired by the states' conditioning of certain privileges, such as continued employment, upon the non-exercise of constitutional rights. Many citizens would thus be forced into the dilemma of forfeiting either state employment or their federal constitutional rights. In reversing the decision and ordering a full hearing the Court did justice in the individual case. However, this just result appears to have been founded upon a timidity in asserting the vitality of the United States Constitution.

Carroll Jarnagin

Criminal Law—Statutes—Construction of Word "Stolen"

D lawfully obtained possession of an automobile from its owner for the purpose of driving some friends home. Instead of returning the automobile, D took it across state lines and sold it. The Federal District Court dismissed an information against D for transporting stolen goods in interstate commerce in violation of the Dyer Act on the grounds that the word "stolen," as used in the act, referred only to takings which would constitute common law larceny. The government appealed directly to the Supreme Court. *Held*: The word "stolen" has no common law meaning and as used in the Dyer Act is not limited to common law larceny, but includes other felonious takings. *United States v. Turley*, 352 U.S. 407 (1957) (6-3 decision).

The general rule in the construction of criminal statutes is that they will be strictly construed in favor of the accused. *Krichman v.*

United States, 256 U.S. 363 (1921), and will not be extended to cases not covered by the exact words used in the statute. *Fasulo v. United States*, 272 U.S. 620 (1926). When a word having a common law meaning is used in a criminal statute without definition, the courts will apply that meaning unless the context indicates a contrary intent on the part of the legislature. *Hite v. United States*, 168 F.2d 973 (10th Cir. 1948). There are many words with common law meanings in use in statutes and the courts have given them their common law meaning when construing the statutes. *Dunaway v. United States*, 170 F.2d 11 (10th Cir. 1948); *State v. Hutter*, 145 Neb. 798, 18 N.W.2d 203 (1945); *State v. Patriarca*, 71 R.I. 151, 43 A.2d 54 (1945).

The Court in the principal case was faced with the problem of resolving a conflict which had arisen in the Circuits as to the proper construction to give the word "stolen" as used in 18 U.S.C. § 2312 (1919), commonly called the Dyer Act, providing punishment for ". . . Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen. . . ." The Fifth, Eighth, and Tenth Circuits had held that "stolen" had the same meaning as larceny at common law. *Murphy v. United States*, 206 F.2d 571 (5th Cir. 1953); *Ackerson v. United States*, 185 F.2d 485 (8th Cir. 1950), *Hite v. United States*, 168 F.2d 973 (10th Cir. 1948). By contrast, the Second, Fourth, Sixth and Ninth Circuits had held that "stolen" has never had a common law meaning. *United States v. Sicurella*, 187 F.2d 533 (2nd Cir. 1951); *Boone v. United States*, 235 F.2d 939 (4th Cir. 1956); *Collier v. United States*, 190 F.2d 473 (6th Cir. 1951); *Smith v. United States*, 233 F.2d 744 (9th Cir. 1956). The latter cases cite Blackstone as authority, yet it appears that Blackstone actually used "steal" interchangeably with larceny; for example, he defined grand larceny as the ". . . stealing of goods . . ." IV BL. COMM. Chap. XVII. Furthermore, the only case law, outside the Circuits, directly in point supports the view that "stolen" does have a common law meaning. *State v. Richmond*, 228 Mo. 362, 128 S.W. 744 (1910); *Gardner v. State*, 55 N.J.L. 17, 26 Atl. 30 (1892); *Hughes v. Territory*, 8 Okla. 32, 56 Pac. 708 (1899).

The Supreme Court in the principal case relied on the reasoning of the Courts of Appeals which hold that "stolen" has no common law meaning, then proceeded to a determination of the legislative intent. The Court cited the Committee Report as the basis for holding that Congress intended that "stolen" be given a broad meaning, rather than being limited to common law larceny, because the Committee

in its report made no effort to distinguish between the different forms of theft. What the Court seems to overlook is that the Act was using the term "stolen," not theft, and there was no need for distinguishing since "stolen" meant common law larceny. The fact that Congress intended larceny is further evidenced by the fact that in Committee and on the floor of the House, Congressman Dyer continually referred to "larceny of automobiles," using the term interchangeably with "stolen." 58 CONG. REC. 5472 (1919). Even those who opposed the passage of the section used "larceny," not even questioning the meaning of "stolen." 58 CONG. REC. 5473 (1919). If they had intended it to have a broader meaning, they would have used other words in conjunction with it as they have done in other statutes. 18 U.S.C. § 659 (1948). Parenthetically, it is interesting to note that Congress only intended the Dyer Act to apply when there could be no prosecution under state law. 58 CONG. REC. 5474 (1919).

It is submitted that the principal case erred in holding that "stolen" has no common law meaning because in so doing the Court is ignoring the existing authority indicating that "stolen" does have a common law meaning, and instead is following the faulty reasoning of some of the Circuits. It appears that the principal case also erred in interpreting the Congressional intent since it appears reasonably clear from the Record that the author of the statute and his colleagues were using "stolen" to connote larceny. It would be highly desirable if the meaning of the word "stolen" could be broadened, but it is suggested that this is in the province of Congress, not the Supreme Court.

Geo. R. Alexander, Jr.

Master and Servant—Respondeat Superior— Joinder In Same Action

D1, while operating an automobile in the course of his employment as the servant of *D2*, negligently injured *P*. *D2* neither adopted nor ratified *D1*'s negligent act. *P* sued both *D1* and *D2* in the same action. *Held*: A joint action may be maintained against a master and his servant for injuries resulting from the servant's negligence for which the master is liable only under the doctrine of respondeat superior. *Daniels v. Parker*, —Vt.—, 126 A.2d 85 (1956).

Although it is well established in this country that a master is liable under the doctrine of respondeat superior, without reference to his own fault, for the torts of his servant, the collateral question regard-

ing joinder of these parties in the same action is still not uniformly treated. The vast majority of American jurisdictions permit the master and servant to be joined even though the master is liable only under the doctrine of respondeat superior. MECHAM, AGENCY 273 (1952). A restricted minority refuse such joinder and require that the plaintiff elect to sue either the master or the servant severally. *Shaver v. Shirks Mtr. Exp.*, 163 Ohio St. 484, 127 N.E.2d 355 (1955); *Young v. Featherston Motors, Inc.*, 124 N.E.2d 158 (Ohio App. 1954). In the principal case, the Supreme Court of Vermont joined the ranks of the majority by overruling a prior Vermont case, *Raymond v. Capobianco*, 107 Vt. 295, 178 Atl. 896 (1935), which had followed the minority view.

A case often cited by those courts applying the minority rule, *Parsons v. Winchell*, 5 Cush. 592 (Mass. 1850), placed great emphasis on the fact that analytically there is no concurrent fault since the cause of action against the master and that against the servant arise from separate origins. At common law, trespass lay against the servant and trespass on the case against the master and these two forms of action could not be joined; however, modern pleading practices should preclude this impediment today. *Sherwood v. Huber & Huber Mtr. Exp. Co.*, 286 Ky. 775, 151 S.W.2d 1007 (1941); *H. L. Butler & Son v. Walpole*, 239 S.W.2d 653 (Tex. Civ. App. 1951) *error ref. n.r.e.* Another argument frequently advanced against joinder is based on *Merryweather v. Nixan*, [1799] 8 Term. Rep. 186, a case which is often *miscited* for the proposition that there may be no contribution among joint tortfeasors. The courts, in applying the latter proposition to cases involving master and servant, hold that if joinder were allowed the master would lose his right of indemnity against the servant. It is interesting to note that the *Merryweather* case, and the English cases following it, have never applied the doctrine of no contribution among joint tortfeasors to torts arising out of the master-servant relationship or, for that matter, to any unintentional torts. *Adamson v. Jarvis*, [1827] 4 Bing. 66. Furthermore, the states in ever-increasing numbers are discarding the prohibition against such contribution. Hodges, *Contribution and Idemnity Among Tortfeasors*, 26 TEXAS L. REV. 150 (1947). As pointed out in the principal case, the states allowing joinder have had no difficulty in permitting contribution in appropriate cases. *Southern Ry. Co. v. Carson*, 194 U.S. 136 (1903); *Humble Oil and Refining Co. v. Martin*, 222 S.W.2d 995 (Tex. Civ. App. 1949).

It would appear that any theory of several liability which forces

the plaintiff to an election is clearly inconsistent with the public policy behind the doctrine of respondeat superior. Certainly the latter doctrine, originated for the benefit of innocent third parties, never contemplated depriving these third parties of the opportunity of finding the "deepest pocket" in one action. In adopting the majority view, the Supreme Court of Vermont has wisely followed the rule which most jurisdictions have long recognized to be logical and just.

George B. Davis

Oil and Gas—Implied Covenants—Further Exploration

P brought suit against *D* to cancel an oil and gas lease, or in the alternative to require further exploration under penalty of cancellation. At the time of trial only one well was still producing and *D* had drilled no additional wells on the lease. The trial court found that a reasonably prudent operator in the expectation of profitable production would drill an additional well to test deeper formations. *Held*: A breach of the implied covenant of further development was established upon the lessee's failure to test deeper formations in the reasonable expectation of profit; further, there was a breach of the implied covenant of further *exploration* which justified cancellation of the lease without the lessor, *P*, having to prove that additional drilling would probably result in profit. *Willingham v. Bryson*, 294 S.W.2d 421 (Tex. Civ. App. 1956).

It is well settled that there is an implied covenant to further develop a lease once production is obtained, and for a breach of this covenant cancellation may be decreed. *W. T. Waggoner Estate v. Sigler Oil Co.*, 118 Tex. 509, 19 S.W.2d 27 (1929). The court in these circumstances invokes the prudent operator rule, *i.e.*, a lessee is not required to undertake additional development unless a prudent operator would do so; the latter is determined by whether there is a reasonable expectation of profitable production upon drilling additional wells. *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801 (8th Cir. 1905); *Ramsey Petroleum Corp. v. Davis*, 184 Okla. 155, 85 P.2d 427 (1938); *Fort Worth Nat'l Bank v. McLean*, 245 S.W.2d 309 (Tex. Civ. App. 1951) *error ref. n.r.e.*

The implied covenant to further explore, where it has been recognized, has been treated as being separate and apart from the implied covenant to further develop. *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272 (1934); *Gregg v. Harper-Turner Oil Co.*, 199 F.2d 1 (10th Cir. 1952); *Doss Oil Royalty Co. v. Texas*

Co., 192 Okla. 359, 137 P.2d 262 (1954). The leading case is the *Sauder* case, in which the United States Supreme Court held that where a lessee unreasonably delayed in drilling additional wells, there was a breach of the duty to diligently explore and develop the lease. Furthermore, the Court did not require the lessor to prove that the drilling of additional wells would probably result in profit. In *Doss Oil Royalty Co. v. Texas Co.*, *supra*, the Oklahoma Supreme Court followed the *Sauder* case by granting cancellation of the undeveloped portion of an oil and gas lease without the lessor having to prove that additional wells could be drilled with a reasonable expectation of profit. Subsequent to the *Doss* case other elements have been considered along with unreasonable delay in order to find breach of an implied covenant to further explore, such as the lessee's present intent not to further develop the lease, *Trust Co. v. Samedan Oil Corp.*, 192 F.2d 282 (10th Cir. 1951); whether notice of the breach and demand for performance has been made by the lessor, *Neff v. Jones*, —Okla.—, 288 P.2d 712 (1955); *Gibson & Jennings, Inc., v. Amos Drilling Co.*, 196 Okla. 143, 162 P.2d 1002 (1945); and whether another operator is willing to drill a well on the lease. *Humble Oil & Refining Co., v. Romero*, 194 F.2d 383, (5th Cir. 1952). As a result, in cases where there is an unreasonable delay in further development, the prudent operator rule is not considered as an element in determining whether or not there was a breach of an implied covenant to further explore. A majority of the Oklahoma cases have followed this reasoning. *Gregg v. Harper-Turner Oil Co.*, and *Trust Co. v. Samedan Oil Corp.*, *supra*; *Colpitt v. Tull*, 204 Okla. 289, 228 P.2d 1000 (1950); *McKenna v. Nicholos*, 193 Okla. 526, 145 P.2d 957 (1944). However, compare the Oklahoma Supreme Court in *Texas Consolidated Oils v. Vann*, 208 Okla. 689, 258 P.2d 679 (1953), which specifically held that the reasonable prudent operator rule applied.

In indicating that there was an implied covenant to further explore under an oil and gas lease, the principal case was one of first impression in Texas. The implied covenant to further develop has been the rule consistently followed in Texas, *see, e.g. W. T. Waggoner Estate v. Sigler Oil Co.*, *supra*; *Senter v. Shanafelt*, 233 S.W.2d 202 (Tex. Civ. App. 1950), until the instant case apparently removed the requirement of proof by the lessor that additional drilling would be profitable. Thus, if this opinion is followed, an ordinary prudent operator could be compelled to do an imprudent thing in order to prevent cancellation of the undeveloped portion of his lease.

The Court was undoubtedly seeking to bring Texas into line with the authority of other jurisdictions as above indicated, and in its opinion apparently relied heavily on the reasoning of a recent law review article. Meyers, *The Implied Covenant of Further Exploration*, 34 TEXAS L. REV. 553 (1956). The article referred to *Perkins v. Mitchell*, 153 Tex. 368, 268 S.W.2d 907 (1954) and *Fort Worth Nat'l Bank v. McLean*, *supra*, as though they involved an implied covenant to further explore, whereas those courts actually spoke in terms of an implied covenant to further develop. Although great weight was given to the *Perkins* case as a basis for sustaining an implied covenant to further explore in Texas, the trial court in that case actually applied the prudent operator rule and the jury found that the lessee had breached the implied covenant to reasonably develop the lease; nevertheless, the present Court was of the opinion that the *Perkins* case sustained the proposition that a lessee impliedly covenants to further explore a lease after production is once obtained. See Masterson, *Discussion Note*, 6 OIL AND GAS REP. 1099 (1957).

It seems that the Court has not changed Texas law as regards the implied covenant or further development, but has created new law concerning the implied covenant to further explore, which would abrogate the requirement of proof by the lessor that additional wells could be drilled at a profit. If the principal case is followed as authority for an implied covenant to further explore, such a rule will very likely be used as an abusive lease-breaking device.

B. J. Barton

Procedure—Amicus Curiae—Appearance

P, the former wife of *D*, filed a motion to reduce child support arrearage to judgment. *D*, a nonresident who was served out of state, employed an attorney who, appearing as amicus curiae with the consent of the trial court, filed a suggestion of want of jurisdiction. *Held*: Appearance as amicus curiae by an attorney who has been paid by a defendant constitutes a general appearance by the defendant and gives the court jurisdiction over his person. *Burger v. Burger*, —Tex.—; 298 S.W.2d 119 (1957).

An amicus curiae is "a friend of the court," *i.e.*, a disinterested bystander acting for the benefit of the court, *Thomas v. Driver*, 55 S.W.2d 187 (Tex. Civ. App. 1932). Furthermore, there is authority for the proposition that recognition of amicus curiae by the court is purely discretionary. *Flinn v. Krotz*, 293 S.W. 625 (Tex. Civ. App.

1927). In Texas a great many cases have involved "amici curiae" appearing to suggest want of jurisdiction due to insufficiency of service and the courts, in the exercise of their discretion, have usually chosen to hear them. *Chicago, R. I. & P. Ry. v. Anderson*, 105 Tex. 1, 141 S.W. 513 (1911); *Pettaway v. Pettaway*, 177 S.W.2d 285 (Tex. Civ. App. 1944); *International & G.N. R.R. v. Moore*, 32 S.W. 379 (Tex. Civ. App. 1895) *error disp.* The frequency of these cases may be attributed to the Texas rules regarding appearance, for in Texas the filing of any defensive pleading, though it be only to question the court's jurisdiction over the defendant, constitutes a general appearance and submission to the court's jurisdiction. TEX. RULES CIV. PROC. ANN. rules 120-124 (1955); *York v. Texas*, 137 U.S. 15 (1899); *St. Louis & S.F. Ry. v. Hale*, 109 Tex. 251, 206 S.W. 75 (1918); *Waco Hilton Hotel Co. v. Waco Development Co.*, 75 S.W.2d 968 (Tex. Civ. App. 1934) *error disp.* Although Mississippi has a like rule, MISS. CODE ANN. § 1881 (1942), the courts of that jurisdiction have apparently paid it little more than lip service. Comment, 19 Miss. L.J. 59 (1947).

Formerly, once the court had fixed an attorney's status as that of amicus curiae it was held that it was of no consequence that he was paid by the defendant. *Chicago, R. I. & P. Ry. v. Anderson*, *supra*; *Int'l & G.N. R.R. v. Moore*, *supra*; *Elliot v. Standard Wheel and Tire and Armour Co.*, 173 S.W. 616 (Tex. Civ. App. 1915). Where the attorney has questioned the jurisdiction of the court, styling himself as amicus curiae without first having his status fixed as such, Texas courts have held that the attorney's appearance constituted a general appearance by the defendant. *Thomas v. Driver*, *supra*; *Broome v. Smith*, 265 S.W.2d 897 (Tex. Civ. App. 1954). Both the *Broome* and the *Thomas* cases mentioned that had the attorney had his status fixed by the court, he could have appeared as amicus curiae; however, not having done so and being an interested party rather than a bystander acting for the benefit of the court, his acts must be attributed to his client. The principal case would appear to reverse these previous holdings since the Court, after reciting the usual definition of an amicus curiae, refused to class an attorney who has been paid by the defendant as a disinterested bystander even though the court below had granted him permission to act as amicus curiae in filing a suggestion.

It is interesting to note that the Court considered itself controlled by a statute establishing civil contempt proceedings as the only method for enforcing child support payments. TEX. REV. CIV. STAT. ANN.

art. 4639a (1925). Since the plaintiff was attempting to reduce the payments to judgment, the Court indicated that it had no jurisdiction over the subject matter. If this were so, all reference to jurisdiction over the person would be dicta, albeit strong dicta. However an amicus curiae has no standing to appeal, *Greathouse v. Ft. Worth & D.C. Ry.*, 65 S.W.2d 762 (Tex. Comm. App. 1933), and since the case was appealed by the defendant that alone, assuming jurisdiction over the subject matter, should have subjected him to the jurisdiction of the court. TEX. RULES CIV. PROC. ANN. rule 123 (1955).

Dicta or not, it appears that the nonresident who is unable to find a gratuitous amicus curiae will henceforth be required to answer and defend, or at best, suffer judgment which may be injurious, although void. It is surprising that Texas courts have allowed the fiction of the "paid amicus curiae" to linger as long as it has.

In spite of earlier authority to the contrary, the Supreme Court's interpretation of amicus curiae was clearly correct; if there is to be a special appearance in Texas, it lies with the legislature to provide it.

George B. Davis

Real Property—Executory Land Contracts—Passage of Equitable Title

P was in possession of a plot of land under an executory purchase contract; he had made valuable improvements and was growing crops. The contract provided for the execution of an absolute deed upon payment of the entire purchase price, but P had paid only a minor portion of the amount. This action was brought to recover damages for depreciation of the market value of the property caused by offensive odors and pollution of the surrounding atmosphere emanating from D's sewage disposal plant. *Held*: Under an executory contract to purchase land, the purchaser acquires an equitable title to the realty with the exclusive right to sue for damages to the freehold. *City of Garland v. Wentzel*, 294 S.W.2d 145 (Tex. Civ. App. 1956) *error ref. n.r.e.*

Under the generally accepted rule in the United States a purchaser acquires equitable title to land immediately on entering into a valid executory contract of sale. See Comment, 5 Sw. L.J. 107 (1951). Early Texas Supreme Court cases made a distinction, however, between equitable rights and equitable title with regard to land contracts. *Stitzle v. Evans*, 74 Tex. 596, 12 S.W.326 (1889). It was held that a purchaser under such contract had only an equitable *right* so

long as the purchase price remained unpaid and he could not resist his seller's action for possession. *Browning v. Estes*, 3 Tex. 462 (1848). On the other hand, when the purchaser had fully performed he obtained equitable title and could demand a conveyance from his vendor. *Hemming v. Zimmerschitte*, 4 Tex. 159 (1849). Having acquired equitable title, this formed a sufficient basis to either prosecute or defend an action in trespass to try title. *Easterling v. Blythe*, 7 Tex. 210 (1851); *Neil v. Keese*, 5 Tex. 23 (1849).

Subsequent cases have not always followed this early distinction. The Commission of Appeals held in 1922 that "the vendee under . . . contract of purchase, especially where he goes into possession of the property, is invested with the equitable title from the date of the contract, or in any event from the date he takes possession" *Leeson v. City of Houston*, 243 S.W. 485 (Tex. Comm. App. 1922). A person who possessed the right to have the legal title transferred to him upon performance of specified conditions was held to have equitable title even before performance of those conditions. *Alworth v. Ellison*, 27 S.W.2d 639 (Tex. Civ. App. 1930) *error ref.* However, the same justice who wrote the *Alworth* decision later wrote an opinion holding that so long as the purchaser has not performed by paying the purchase price he has only an equitable right, but that upon full payment this right ". . . ripened into an equitable title." *Johnson v. Wood*, 138 Tex. 106, 157 S.W.2d 146 (1941).

Whether speaking in terms of equitable right or equitable title, the Texas cases have generally given to the purchaser all the rights and incidents of title usually accorded to the holder of full equitable title in other states. Thus, a purchaser under a land contract in Texas receives the benefit from any increment, advantage, or enhancement to the property and must bear any detriment, depreciation, or damage thereto occurring without the fault of the seller or the purchaser. *Leeson v. City of Houston, supra*; *Rives v. James*, 3 S.W.2d 932 (Tex. Civ. App. 1928) *error ref.* For example, he is entitled to any crops growing on the land which are not reserved by the contract. *Armstrong v. Gifford*, 196 S.W. 723 (Tex. Civ. App. 1917); *Dimmitt Elevator Co. v. Carter*, 70 S.W.2d 615 (Tex. Civ. App. 1934). All rents accruing subsequent to the contract, not reserved to the seller, inure to the benefit of the purchaser. *Rives v. James, supra*. Though the vendor may have both title and possession, a purchaser is entitled to sue for any permanent damage done to the realty by a third party after entering into the contract but before the deed is delivered. *Tex. & P. Ry. Co. v. Bullard*, 127 S.W. 1152 (Tex. Civ.

App. 1909). A purchaser is entitled to establish a homestead based upon his equitable interest, *Hughes v. Grosbart*, 150 S.W.2d 827 (Tex. Civ. App. 1941), and is liable for all taxes accruing after the contract. *Leonard v. Kendall*, 5 S.W.2d 197 (Tex. Civ. App. 1928) *error disp.* From the date of his possession, the purchaser is charged with the paying of paving assessments. *Ingram v. Central Bitulithic Co.*, 51 S.W.2d 1067 (Tex. Civ. App. 1932) *error ref.*; *Lesson v. City of Houston*, *supra*. The purchaser's interest in the land is subject to execution. *Taylor v. Herrin*, 127 S.W.2d 945 (Tex. Civ. App. 1939); *Matula v. Lane*, 56 S.W. 112 (Tex. Civ. App. 1900).

The distinction between equitable title and equitable right is, however, decisive in one situation, for only after the purchase price has been paid and equitable title acquired may the purchaser bring trespass to try title against his vendor. *Johnson v. Wood*, 138 Tex. 106, 157 S.W.2d 146 (Tex. Comm. App. 1941). An action for specific performance is not a prerequisite in such a situation. *Pickle v. Whitaker*, 224 S.W.2d 741 (Tex. Civ. App. 1949) *error ref.* However, either equitable title or equitable right is sufficient to support or defend an action in trespass to try title involving one *not* a party to a contract. *American Nat'l Ins. Co. v. Bass*, 111 S.W.2d 771 (Tex. Civ. App. 1937).

Perhaps the Texas courts have drawn the distinction between equitable title and equitable right in an effort to correlate the theory of executory land contracts with the doctrine of superior title. Under a deed with an express vendor's lien, it is held in Texas that a superior legal title, for security purposes, remains with the vendor, giving him the right to rescind the contract upon default by the purchaser. The vendee on the other hand gets full equitable title. *Humphreys-Mexia Co. v. Gammon*, 113 Tex. 247, 254 S.W. 296 (1923). The distinction drawn in some cases between equitable title and equitable right may be based upon the belief that the more formal instrument (a deed with an express vendor's lien) should convey a more substantial interest to the purchaser (full equitable title) while a less formal instrument (an executory sales contract) should convey a less substantial interest (an in personam equitable right).

It would appear that the principal case is but an extension of the earlier decisions which held that equitable title passes immediately upon entering into a land contract. The confusion existing between the two lines of decisions seems to be the result of indiscriminate use of terminology by the Texas courts. Apparently the only situation in which the distinction between equitable title and equitable right

would produce contrary results is when a vendor and the purchaser are aligned against each other in a trespass to try title suit. In all other situations the distinction is apparently meaningless.

Don M. Dean

Taxation—Capital Gain—Non-Interest Bearing Notes

A land company sold ore lands to a mining company. The sale price was determined by multiplying the estimated number of producible tons of ore by the value of the ore per ton. Payment was by non-interest bearing notes due at regular intervals over a thirty-five year period. The face value of the notes exactly equaled the estimated value of the land used as the basis for the sale price. All the notes were to become due at the election of the obligee, immediately upon default either of the payment of the face value of any one of the notes when due or of the 25 cents per ton accelerated payments due for excessive production of ore. The land company immediately placed the notes on its books at 5% discount for each year until the various notes were to become due. Several of the notes passed in a partial distribution to a stockholder who placed them in trust; their bases apparently remained unchanged. Taxpayer, the beneficiary of the trust which held the notes, received the proceeds when the trustee sold the notes ten days prior to maturity. *Held*: In a 2-1 decision, where non-interest bearing notes are given in exchange for land and the face value of the notes becomes due immediately upon default, and the face value is exactly equal to the objectively determined price of the land, the sale of the notes results in capital gain equal to the difference between the sales price and the taxpayer's basis. *Paine v. Commissioner*, 236 F.2d 398 (8th Cir. 1956).

Section 117(a)(4) of the 1939 Internal Revenue Code, 53 Stat. 50 (1939), defines long term capital gain as gain from sale or exchange of a capital asset held for more than six months. Beginning in 1921 the Bureau contended that redemption of an obligation did not constitute such a sale or exchange, and the Board of Tax Appeals upheld that contention. *Watson v. Commissioner*, 27 B.T.A. 463 (1932). Although Congress in 1934 enacted Section 117(f), 48 Stat. 680 (1934), which made any gain on the retirement of certain bonds taxable as capital gain, the notes in the principal case did not come within the class to which that section pertained. In order to bring the income from the disposal of the notes within the definition of capital gain, the trustee sold the notes ten days prior to maturity.

The Tax Court had concluded that the value of the notes as discounted by the land company was the purchase price and that the remainder of the face value of the notes was interest. 23 T.C. 391 (1954). In support of its contrary opinion, the Court of Appeals cited cases holding that where there was a purchase price named in the sales contract, the purchaser could not later claim that part of the figures was deductible interest expense even though payment was over an extended period of time. *McDonald v. Commissioner*, 76 F.2d 513 (2nd Cir. 1935); *Henrietta Mills v. Commissioner*, 52 F.2d 931 (4th Cir. 1931); and *Daniel Bros. v. Commissioner*, 28 F.2d 761 (5th Cir. 1928). On their faces these cases seem in point, but they may well be distinguishable on two grounds.

First, in the cited cases a party to the contract was attempting to change the effect of the contractual recitations, while in the principal case a stranger to the contract, the Commissioner, was trying to make the change. The contractual language of the parties should be binding on them when they are attempting to disregard it in order to avoid taxes, but there is no reason to make it binding on the Commissioner.

As to the second possible distinction, there were not facts in the cited cases to show that the purchase price was actually less than the figure stated, whereas in the instant case there were such facts. The parties agreed on a value of 25 cents per ton for determining the purchase price of the ore lands. Evidence that this was an estimate of the value of the ore, and not an adjusted price with a time factor included, is the fact that the 25 cents price was used also in the lease under which the parties had been operating, a contract in which the time of removal of the ore would not have been a factor in determining the price of the ore. If without reference to time the land was worth a figure equal to 25 cents times the number of tons of ore, it is obvious that the value of the land at the time of the sale would be considerably less in view of the extended period of time required to convert the unmined ore into income. This was recognized by the same Circuit in connection with a similar fact situation in *Ruth Iron Co. v. Commissioner*, 26 F.2d 30 (8th Cir. 1928). If the value at the time of the sale was less than the value of the notes, the difference is realistically explainable only as interest, not purchase price. Then the only problem is: How much of the face value of the notes represents interest? The logical assumption in the absence of any evidence is that the mining company received value for value; therefore, only the discounted value of the bonds as of the date of the sale (computed

at the prevailing interest rate) represented interest. Thus in this case the very nature of the facts controlling the transaction shows that the face value of the notes was not wholly purchase price, but partially interest.

The Court in the principal case seems to base its opinion on the manifest intent of the parties, which is a departure from the more sophisticated practice of looking to the economic realities of the situation. *Helvering v. Clifford*, 309 U.S. 331 (1940); *Merchant's Loan & Trust Co. v. Smietanka*, 255 U.S. 509 (1921). Also, its ruling that the stipulation of the purchase price by the litigants precluded any finding that part of the figure was interest is contrary to the general rule that a stipulation will not be construed so as to give it effect as an admission of a fact obviously intended to be controverted. *Groves v. Burton*, 125 Ind. App. 302, 123 N.E.2d 705 (1955); *Palmer v. City of Long Beach*, 33 Cal.App.2d 134, 199 P.2d 952 (1948). In any event it seems that the Commissioner should have been more careful in making his stipulations.

The strongest fact in favor of the Court's holding is that, under the contract, prepayments at the full rate of 25 cents per ton were to be made for all production in excess of an agreed schedule. The lack of discount for accelerated payments suggests that the contracting parties genuinely intended to include no interest in the deferred payment which would be due without excess production.

The decision seems unsound in allowing the manifest intent of the parties to bring about an unrealistic tax result; in failing to distinguish the case from the prior authority, it gives unnecessary judicial recognition to a simple scheme of tax avoidance and does little to clear up an uncertain area of the law. There is also some doubt that the Court followed the legislative intent since it does not appear that Congress intended to make increases in value taxable as capital gain when they arise only from a passage of time. For an excellent discussion of this area of taxation, see Zafft, *Discount Bonds—Ordinary Income or Capital Gain?*, 11 Tax. L. Rev. 51 (1955).

The holding in this case might at first glance seem to be precluded in the future by Section 1232 of the 1954 Code which makes gain from original issue discount taxable as ordinary income, when bonds or notes are issued by a government or corporation. However, original issue discount is defined (if there is no SEC registration) in terms of price paid by the buyer of the obligation. When payment is in property, the price is presumably the fair market value of the property. Therefore Section 1232 does not answer the problem of the

principal case: whether a non-interest bearing obligation is issued at a discount when issued in exchange for property of a recited value equal to the redemption value of the obligation?

William T. Blackburn