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Recent Case Notes

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RECENT CASE NOTES

Chattel Mortgages — Fixtures — Constructive Notice

Plaintiff sold a water heater to an occupant of realty and properly registered the chattel mortgage pursuant to article 5498. TEX. REV. CIV. STAT. ANN. (1941). Occupant then vacated the premises and defaulted on the chattel mortgage payments. Thereafter, the fee owner, who was not a party to the original transaction and was unaware of it, sold the realty to a purchaser who had no actual knowledge of the plaintiff's lien on the heater. Plaintiff contended that the vendee of the realty took title subject to the lien. The statute cited provides in part that registration of a lien on a manufactured article which becomes a fixture shall be notice of the rights of the seller to subsequent purchasers of the realty ". . . just as if recorded at length in the deed records or records of mortgages upon realty." *Held*: The purchaser of realty is charged with constructive notice of a properly registered chattel mortgage on a fixture even though the mortgage is indexed only under the names of the seller of the chattel and an occupant who was not in the chain of title to the realty. *Lone Star Gas Co. v. Sheaner*, —Tex.—, 305 S.W.2d 150 (1957).

According to the general rule, the filing of a mortgage in the chattel mortgage records is not constructive notice to a subsequent purchaser of the realty where the chattel is attached to real property so as to become a fixture. *Oakland Bank v. California Pressed Brick Co.*, 183 Cal. 295, 191 Pac. 524 (1920); JONES, CHATEL MORTGAGES § 134 (2d ed. 1883). The reason is that a prospective purchaser should not be compelled to search records not dealing directly with the realty. *Abramson v. Penn & Co.*, 156 Md. 186, 143 Atl. 795 (1928); BROWN, PERSONAL PROPERTY § 157 (2d ed. 1955). Texas cases were in accord with this prevailing rule. *Phillips v. Newsome*, 179 S.W. 1123 (Tex. Civ. App. 1915); *Ice, Light & Water Co. v. Lone Star Engine & Boiler Works*, 15 Tex. Civ. App. 694, 41 S.W. 835 (1897).

The statute in question effected a change in the previously existing rule; it is effective to charge a fee purchaser (from the chattel mortgagor who also owned the fee) with notice of the existing encumbrance. *South Tex. Implement & Mach. Co. v. Anahuac Canal Co.*, 280 S.W. 521 (Tex. Comm. App. 1926); *Texas Power & Light Co. v. Malone*, 42 S.W.2d 845 (Tex. Civ. App. 1931) (*dictum*) *error disp.* The principal case is the first application of the

statute where the mortgagor was not also holder of the record title to the realty. It is at once apparent that the competing interests to be reconciled were (1) protection for the chattel mortgagee and (2) protection for prospective purchasers of realty.

It is well established that the recordation of an instrument outside the purchaser's chain of title imports no constructive notice to him. *White v. McGregor*, 92 Tex. 556, 50 S.W. 564 (1899); 5 TIFFANY, REAL PROPERTY § 1293 (3d ed. 1939). In rejecting plaintiff's argument based upon this rule, the Court relied upon the provision of article 5498 providing that registration shall be notice "... to all persons thereafter dealing with or acquiring . . . the realty." Although the statute does not specifically embrace this situation, its language is broad enough to include it. But in Texas a chattel mortgage must be indexed according to the names of the mortgagor and mortgagee, and there is no tract index whereby such an instrument can be located by the description of the land on which the chattel is installed. The dissent in the instant case emphasized that the majority holding imposes upon the prospective purchaser the unreasonable burden of searching the chattel mortgage records page by page in order to discover any such outstanding lien. An alternative but also burdensome precaution would be for the prospective purchaser to secure a list of all previous tenants and to check their names in the chattel mortgage records. Despite the burdens imposed upon the purchaser of the realty, the Court felt compelled to extend operation of the statute to this situation in order to effectuate the policy of protecting mortgagees of manufactured articles.

It is believed that carefully drawn legislation could protect the interests of chattel mortgagees and provide adequate constructive notice to prospective purchasers of land. Such a solution is possible merely by requiring a copy (or other notice) of the chattel mortgage to be filed under the name of the *record owner* of the realty, thus being discoverable upon the customary search for encumbrances on the title to realty. This requirement would be easily adapted to the present system and would be practical in operation. Nor would a new set of records be required. Not only would the chattel mortgagee be as well protected as now without materially complicating the recording procedure, but a desired policy of the law and justice would be advanced by protecting innocent purchasers of realty who presently have no way to discover such encumbrances made by non-owners of the land.

James Alfred Stockard

Constitutional Law — Due Process — Police Conduct in Obtaining Evidence

P's truck was involved in a collision. Following the collision and while unconscious P was taken to a hospital, where an attending physician withdrew a blood sample through a hypodermic needle. Upon trial for involuntary manslaughter testimony regarding an analysis of the blood, which had revealed substantial alcoholic content, was admitted into evidence over P's objection that the evidence was inadmissible because obtained through police methods violating the due process clause of the fourteenth amendment. *Held*: Where proper medical precautions are observed, the taking of a blood sample from one who is unconscious is not a method of obtaining evidence which violates due process. *Breithaupt v. Abram*, 352 U.S. 432 (1957).

The due process clause of the fourteenth amendment provides that no state shall "... deprive any person of life, liberty, or property without due process of law. . . ." U.S. CONST. amend. XIV, § 1. The Supreme Court has construed the broad language of this clause as a limitation on discretion allowed the several states regarding matters of criminal procedure. *Watts v. Indiana*, 338 U.S. 49 (1949); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Snyder v. Massachusetts*, 291 U.S. 97 (1934). Various definitions have been formulated in applying the due process limitation to state criminal proceedings. For instance, it has been said that state action which "... offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental . . ." violates due process. *Snyder v. Massachusetts*, *supra* at 105. Due process has also been regarded as a "fair trial," *Mooney v. Holohan*, 294 U.S. 103 (1935), and as "what is implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319 (1937). A suggested definition—that the true content of the due process clause should be determined by the safeguards afforded under the Bill of Rights—was cogently rejected in *Adamson v. California*, 332 U.S. 46, 59 (1947) (concurring opinion). *Cf. Wolf v. Colorado*, 338 U.S. 25 (1949). Thus, due process is traditionally defined in broad terms, leaving room for interpretation as individual cases arise.

The long established rule that coerced confessions violate due process is based principally (although not solely) on condemnation of brutal or cunning police methods used in obtaining such confessions. *Asbcraft v. Tennessee*, 322 U.S. 143 (1944); *Brown v.*

Mississippi, supra. P contended that the instant case should be decided under the rule of *Rochin v. California*, 342 U.S. 165 (1952), where officers saw the suspect place an unidentified object in his mouth and attempted by force to retrieve the object. At the officers' direction, a stomach pump was forcibly used and morphine pills were found in the matter emptied from the suspect's stomach. The Supreme Court, drawing an analogy to the coerced confession cases, termed this conduct "brutal" and "offensive" and set the conviction aside. Justice Frankfurter's majority opinion in the *Rochin* case, *supra* at 173, points up the anomaly which would result if the Court were to hold that police officers could not forcibly extract what is in the mind (coerced confession cases), but could so extract what is in the stomach (*Rochin*).

The Court grounds its holding in the instant case on the distinction that the *Rochin* case involved the use of "brutal" or "offensive" force, whereas the instant case did not, and on the conclusion that the absence of consent "without more" is of no significance. As to the *type* of evidence, *i.e.*, physical matter, P's contention that the instant case fell within the rule of the *Rochin* case was unassailable. However, the reasoning of the Court, although not fully articulated, would seem to be that the absence of consent in the instant case was not attributable to the use of force as in *Rochin*, but was to be inferred from the fact that P was unconscious and could neither consent nor resist. Thus, as there was neither force nor consent, the instant case presented to the Court a fact situation lying between *Rochin* and the coerced confession cases on one side (where there is both force and the absence of consent), and those instances where consent is present.

Therefore, under the rule of the instant case it appears that if officers' conduct meets the brutality test, an inquiry into the question of consent becomes immaterial; if such force is not present, the absence of consent in and of itself does not violate due process. The Court, in distinguishing between the elements of force and consent, has clarified the existing law on police conduct as a violation of due process, while retaining the vitality of and defining the limits of the *Rochin* case. Granted that taking the blood was a technical assault, it is believed that the sanctioning of police methods not involving physical abuse and providing scientifically accurate means of ascertaining alcoholic blood content correctly balances society's need for safer public highways with a citizen's right to freedom from police abuse.

Jerry Moss

Corporations — Stockholder's Derivative Suit — Diversity Jurisdiction

P, a citizen of New York and shareholder in a Delaware corporation, brought a stockholder's derivative suit in federal district court. *P* named the corporation as nominal defendant and joined two of its directors, *inter alia*, as real defendants. The defense moved for dismissal contending that since the corporation was not shown to be dominated and controlled by the real defendants, it was not antagonistic to *P*, and therefore must be realigned as plaintiff, which would then destroy diversity jurisdiction. *Held*: There is the necessary antagonism whenever corporate management opposes the plaintiff stockholder and defends the course of conduct which is the cause of the suit, and such a situation is evident when management refuses to undo the business transaction or so solidly approves it that any demand would be futile; in such a case the corporation is properly aligned as defendant. *Smith v. Sperling*, 354 U.S. 91 (1957) (5-4 decision).

The stockholder's derivative suit is an invention of equity to supply the want of an adequate remedy at law to redress breaches of fiduciary duty by corporate managers. *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1946) (dictum). Early English cases granted equitable relief only when those in control of the corporation, *i.e.*, the majority of directors or shareholders, were "not fit persons to determine" if an action should be brought. *MacDougall v. Gardiner*, 1 Ch. D. 13, 22 (1875). See also *Mozley v. Alston*, 1 Ph. 790, 41 Eng. Rep. 833 (Ch. 1847); *Foss v. Harbottle*, 2 Hare 461, 67 Eng. Rep. 189 (Ch. 1843). A derivative suit in federal court in this country was initially permitted in *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855), where the Supreme Court sustained jurisdiction on the basis of diversity of citizenship, largely to enable it to hear a federal question which it did not then have statutory authority to entertain. *Hawes v. Oakland*, 104 U.S. 450, 458-59 (1881) (dictum). To discourage collusive suits brought solely for the purpose of invoking federal jurisdiction, the Court in *Hawes v. Oakland* enumerated certain requirements for complainants to satisfy to maintain their suits which in 1882 became Equity Rule 94, later Equity Rule 27, and are now found in Federal Rules of Civil Procedure, Rule 23(b). 13 FLETCHER, PRIVATE CORPORATIONS § 5981 (perm. ed. rev. repl. 1943); see 15 CYCLOPEDIA OF FEDERAL PROCEDURE § 78.04 (3d

ed. 1953). One such requirement was a request on the corporation to sue, or proof of why such request would have been futile. *Hawes v. Oakland*, *supra*.

Theoretically the shareholder's suit is said to be derived from a cause of action rightfully belonging to the corporation in which the corporation rather than the shareholder receives any judgment recovered, *i.e.*, it is a suit by the corporation conducted by the shareholder as its representative. BALLANTINE, CORPORATIONS § 145 (rev. ed. 1946); 13 FLETCHER, PRIVATE CORPORATIONS §§ 5939-47 (perm. ed. rev. repl. 1943); STEVENS, PRIVATE CORPORATIONS §§ 162-63 (1936). Before 1875, the parties' position in the pleadings determined whether there was diversity of citizenship, 3 MOORE, FEDERAL PRACTICE § 23.21 (2d ed. 1948), *i.e.*, whether the citizenship of all the plaintiffs was different from that of all the defendants, *Strawbridge v. Curtiss*, 1 U.S. (3 Cranch) 575 (1806); 1 CYCLOPEDIA OF FEDERAL PROCEDURE § 2.294 (3d ed. 1951), but in 1880 the Supreme Court abandoned this practice and construed the Judiciary Act of 1875, c. 137, § 1-2, 18 STAT. 470, as empowering the federal courts to realign parties to a suit according to their *real interest* in the controversy. *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63 (1941); *Pacific R.R. v. Ketchum*, 101 U.S. 289 (1879); *In re Removal Cases*, 100 U.S. 457 (1879). Although the corporation is a necessary party defendant in the shareholder's complaint, 1 CYCLOPEDIA OF FEDERAL PROCEDURE § 2.340 (3d ed. 1951), the court is faced with the question of whether the corporation, whose cause of action is being litigated and who alone will directly benefit from the judgment, should be realigned as a plaintiff for the purpose of testing diversity, 3 MOORE, FEDERAL PRACTICE § 23.21 (2d ed. 1948). The Supreme Court has recognized that the ultimate interest of the corporation may be the same as that of the shareholder, but said "the corporation may be under a control antagonistic to him [the shareholder] and made to act in a way detrimental to his rights," in which case the corporation will not be realigned as plaintiff. *Doctor v. Harrington*, 196 U.S. 579, 587 (1905).

The Supreme Court has since followed *Doctor v. Harrington* in several instances but has failed to discuss the scope and limitations on the degree of antagonism required to prevent the corporation's being realigned as a plaintiff. *Koster v. (American) Lumbermens Mut. Cas. Co.*, *supra*; *Delaware and Hudson Co. v. Albany & S.R.R.*, 213 U.S. 435 (1909); *Venner v. Great Northern Ry.*, 209 U.S. 24

(1908). For this reason there has been much confusion among the text writers, see BREWSTER, FEDERAL PROCEDURE § 382 (1940); 1 CYCLOPEDIA OF FEDERAL PROCEDURE § 2.340 (3d ed. 1951); 3 MOORE, FEDERAL PRACTICE § 23.21 (2d ed. 1948), and among the judges, as evidenced by the cases, see Annot., 132 A.L.R. 193 (1941); 27 N.C.L. REV. 558 (1949), concerning if and when the corporation should be realigned as plaintiff. Adding to this confusion has been the fact that a majority of federal courts have not followed any consistent jurisdictional theory, but rather have tended to refuse realignment when to do so would *defeat* their jurisdiction, 3 MOORE, FEDERAL PRACTICE § 23.21 (2d ed. 1948); when they have realigned, the factual issue usually centered on collusion. See 38 MINN. L. REV. 877 (1954). This confusion, along with state legislative and judicial limitations on the derivative suit, has led to the suggestions that the stockholder's derivative suit has nearly reached impotence, and as a derivative suit is the stockholder's only judicial remedy protecting himself and the corporation for mismanagement, it is one of national importance properly heard in a federal forum. See Note, *Stockholders' Derivative Suits: A Federal Question?* 27 IND. L. J. 231 (1952). The Court in the instant case clarifies the conflicting decisions by stating that antagonism exists whenever management defends that which the shareholder attacks, and is evident when management refuses the shareholder's demands to undo a business transaction. 354 U.S. at 95-97.

It would seem that under this decision there will *always* be antagonism, thus aligning the corporation as defendant, whenever the shareholder has fulfilled the preliminary equity requirements of Rule 23(b) to maintain suit, inasmuch as one such requirement is that the shareholder first request that the corporation sue, or show why such request would have been futile. This is sound historically, as it reflects the earlier view of the derivative suit which presupposed that those in control of the corporation were antagonistic to the shareholder, as otherwise the action could have been brought by the corporation only. The decision in the instant case is particularly significant in that it will undoubtedly enlarge federal diversity jurisdiction, but at the same time it will frustrate some common defensive dilatory tactics such as motions to realign, to remand to state courts, or to dismiss for want of jurisdiction.

Under the *present* theoretical basis of derivative suits the corporation, viewed as a separate entity, can only be logically aligned as a plaintiff, thus it is no easier to justify the corporation's being

aligned as defendant in any one case than in *all* such cases. It would seem only proper that equity should look through this legal fiction of the corporation being a separate entity, and recognize that, even so, it cannot act independently of its management. Perhaps in view of the language in the principal case the standard theoretical explanations of the stockholder's suit should be re-examined, for in recognizing that the corporation is antagonistic to the suit, the Court impliedly sanctions the suggested thesis, Koessler, *The Stockholder's Suit: A Comparative View*, 46 COLUM. L. R. 238 (1946), that the shareholder sues also in his own right, and that his cause of action is directed against both the real defendants and the corporation itself. This case will for the first time enable counsel to know in advance whether they have the requisite diversity of citizenship to invoke federal jurisdiction in a derivative suit.

Marshall J. Doke, Jr.

Labor Law — Collective Bargaining Contracts — Specific Performance

Plaintiff union entered into a collective bargaining agreement with defendant employer providing that there would be no strikes or work stoppages and that grievances would be handled pursuant to a specified procedure, the last step of which was arbitration. Disputes arose and were processed according to the prescribed grievance procedure until the union's demands were finally denied by the employer. The union then requested arbitration, which defendant refused, and the union brought this action in federal district court to compel arbitration. *Held*: Specific performance of arbitration contracts may be decreed in federal court because section 301 of the Labor Management Relations Act of 1947 authorizes federal courts to fashion a body of federal law for enforcement of collective bargaining agreements. *Textile Workers Union, C.I.O. v. Lincoln Mills*, 353 U.S. 448 (1957).

Prior to passage of the Labor Management Relations Act (Taft-Hartley Act) 61 STAT. 136, 29 U.S.C. § 141 (1947), suits concerning collective bargaining agreements could be brought in most state courts. TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 163 (1940). Some states required personal service on each member of a labor union, but the expense, difficulty and impracticability of such service caused legislators to seek a more workable procedure. In solution of this problem section 301 of the Taft-Hart-

ley Act was passed providing: "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. (b) . . . such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . ." This section created a remedy in causes arising under collective bargaining agreements where, as a practical matter, none existed before and expressly provided the forum in which such action was to be maintained. *Shirley-Herman Co. v. International Hod Carriers Union*, 182 F.2d 806 (2d Cir. 1950).

The particular problem which has arisen under section 301 is whether it merely confers jurisdiction on federal courts to entertain an action for money damages or whether it also authorizes specific performance of collective bargaining agreements. To answer both affirmatively, it must be concluded that section 301 was a direction to develop a federal common law in regard to the rights of the parties under collective bargaining contracts. *Textile Workers Union, CIO v. American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953). The congressional committee which considered section 301 concluded that the difficulty prior to the Taft-Hartley Act was the lack of federal laws giving either an employer or the government itself any right of action against a union for breach of contract. Thus there was no "substantive right" which was enforceable against unions in federal courts. H.R. REP. NO. 245, 80th Cong., 1st Sess. 46 (1947). From this language it must be supposed that the committee intended the legislation to supply this substantive remedy. Those opposed to such reasoning contend that if Congress desired the creation of federal common law, an express statement to this effect would have been made. *International Ladies' Garment Union, AFL v. Jay-Ann Co.*, 228 F.2d 632 (5th Cir. 1956). However, it would seem that to the extent Congress has not prescribed the rules to be applied in a section 301 case, it intended to allow federal courts to formulate and declare the rules by federal decisions. *International Brotherhood of Teamsters, AFL, v. W.L. Mead, Inc.*, 230 F.2d 576 (1st Cir. 1956); *Shirley-Herman Co. v. International Hod Carriers Union*, *supra*. The unreasonable situation of a plaintiff in federal court without a federal cause of action points up the strong likelihood that Congress intended section 301 to serve as a

procedural method of creating federal substantive rights. 57 YALE L.J. 630 (1948). Unless this view is accepted, a system exists where there are two possible forums in which to bring the same cause of action, *viz.*, state and federal courts. In many instances there would be a race to different courts by the parties in an attempt to preclude each other from action in the court where more, or less, effective relief could be had. Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley Section 301*, 66 YALE L.J. 167 (1956).

So far as actions by employers against unions are concerned, there is no doubt that money damages are recoverable under section 301, for subsection (b) specifically provides that a money judgment may be entered against the union as an entity. *Shirley-Herman Co. v. International Hod Carriers Union*, *supra*. In the principal case *specific performance* of an agreement to arbitrate was granted; disregarding constitutional considerations, this appears correct, for such remedy goes to the very heart of the collective bargaining agreement, to the benefit of employer and union alike. "The native forces of competing economic pressures are held in leash by it." *Lincoln Mills v. Textile Workers Union, CIO*, 230 F.2d 81, 96 (5th Cir. 1956) (dissent). Repudiation by either party presents a dilemma which section 301 was designed to answer. If specific performance is not available, then section 301 is reduced to a mere right to sue for money damages. Had that been the narrow hope of Congress, it would have been expressly so stated. Such an interpretation was applied in *Textile Workers Union, CIO, v. Aleo Mfg. Co.*, 94 F. Supp. 626 (M.D.N.C. 1950).

Application of this developing federal substantive law seems destined to exclude, as a practical matter, state court jurisdiction in actions regarding collective bargaining agreements, especially where specific performance is sought. Application of state law should be allowed in federal courts, if not contrary to federal policy, with the result that when such law is used it becomes federal common law. This analysis avoids the incongruity of conflict between federal and state court interpretations and provides uniformity of regulation. Many problems are left unanswered by section 301, *e.g.*, the standing of an individual union member to bring suit when injured by a violation of a collective bargaining contract, but despite such shortcomings, industrial peace can be better obtained by adhering to the result reached in the principal case.

George Milner

Labor Relations — Right-To-Work-Laws — Public Employees' Right To Organize

P, a fireman for the City of Bryan, Texas, was discharged for becoming a leader in the organization of a local branch of the Fire Fighters Union. At the time of his discharge he had signed an application for union membership and had paid the fee. *P* sought a mandatory injunction compelling his reinstatement under the Texas "right-to-work" statutes. In upholding the discharge the trial court found that he was not yet a union member and therefore not within the scope of the statute. *Held*: A fireman discharged because of his application for membership in a union is protected by the Texas "right-to-work" statutes even though not a union member at the time of the discharge, for it is the employer's motive which controls rather than the technical status of the employee. *Lunsford v. City of Bryan*, —Tex.—, 297 S.W.2d 115 (1957).

In 1935 with the passage of the Wagner Act (*National Labor Relations Act*), 49 STAT. 449, 29 U.S.C. § 151-88 (1952), employees were given the right to organize and bargain collectively. After a decade of growing and often abused union power, section 158 of the Taft-Hartley Act of 1947 (*Labor-Management Relations Act*), 61 STAT. 136, 29 U.S.C. § 141-88 (1952), outlawed the closed shop (in industries affecting interstate commerce), thus weakening union influence. Since 1947 seventeen states, including Texas, have enacted "right-to-work" laws aimed at further restricting organized labor by usually providing that no person may be denied employment because of membership or non-membership in a labor union, thereby making the closed and union shop illegal. Swindler, *Right to Work Laws*, 36 NEB. L. REV. 276 (1957).

The right of the public employee to organize has always been more restricted than that of the private employee, but has been increasingly recognized in the past few years. Vogel, *Rights of the Public Employee*, 1 LAB. L.J. 604 (1950). The Taft-Hartley Act, *supra*, in section 152 excludes public employees from its operation, thereby leaving control to the states, which have treated the problem disparately. The legislation ranges from statutes denying public employees the right to join a union, *e.g.*, GA. CODE ANN. § 54-901 (1947), to the laws of Utah, UTAH CODE ANN. § 34-16-1 (1953), and Texas, TEX. REV. CIV. STAT. ANN. art. 5154c (1947), which specifically include public workers in their "right-to-work" laws. Between these two extremes lie the great majority of states, either

taking no legislative stand or following a moderate course such as phrasing their "right-to-work" statutes in broad terms which apparently make no distinction between public and private employees. See e.g., NEB. REV. STAT. § 48-217 (1952). It should be emphasized that such laws seemingly permit civic employees to join a union.

From this trend toward greater rights for public employees, there have always been exceptions, firemen, policemen and, in some states, public teachers. Discharges for union activity have always been upheld in cases of firemen and policemen, because of a desire to leave all discretion with local officials as to the requirements they think necessary for the maintenance of public safety. *Jackson v. McLeod*, 199 Miss. 676, 24 So. 2d 319 (1945), cert. denied, 328 U.S. 863 (1946); *King v. Priest*, 357 Mo. 68, 206 S.W.2d 547 (1946), appeal dismd. 333 U.S. 878 (1947); *San Antonio Fire Fighters Union v. Bell*, 223 S.W. 506 (Tex. Civ. App. 1920) error ref.; Annot., 31 A.L.R.2d 1142 (1953). The theory is that firemen and policemen should owe but a single duty, viz., their undivided allegiance to the public, subject to the power in the city of complete control for preservation of the public order, and should owe no other duty such as membership in a union would require. *Carter v. Thompson*, 164 Va. 312, 180 S.E. 410 (1935).

In 1947, the article interpreted in the principal case, article 5154c, *supra*, was passed as a result of the same movement which prompted the other portions of the "right-to-work" laws. Included in section four of that article is the provision that ". . . no person shall be denied public employment by reason of membership or nonmembership in a labor organization." (Emphasis added.) When article 5154c was enacted there was speculation, Holt, *Labor Rights of the Public Employee*, 2 Sw. L.J. 226, 232 (1948), whether the courts would read into it the three traditional exceptions (firemen, policemen and sometimes teachers) in spite of the broad language of the act.

In the instant case, which is the first interpretation of article 5154c and the first involving public employees of this type under any of the "right-to-work" laws, the Court did not mention the exception traditionally made for firemen. Evidently it felt that in the face of such clear language there was no need to mention the point and that the public policy arguments had been settled prior to passage. Other sections of article 5154c prohibit municipal authorities from entering into collective bargaining contracts (section 1), recognition of a union as a bargaining agent (section 2) and strikes and work stoppages (section 3). Apparently the reason-

ing of the Court was that under such restrictions the public was adequately protected. With such restrictions, the only apparent methods left to the unions for improvement of working conditions are the presentation of representations and statements to municipal authorities (with no attempt to bargain), and the indirect method of campaigns directed at the public to educate concerning any existing inequities.

If there were any doubts as to the all-inclusiveness of the statute or the intent of the legislature in allowing increased unionization of public employees, the Court has given notice of a liberal attitude toward the statute, seemingly inviting policemen and teachers to organize without fear of discharge. Although the modern trend is undoubtedly toward greater organizational privileges for the public employee, because of the strong common law precedent refusing this right to firemen and policemen it is believed that for the present the instant Texas decision will be impressive authority only in those states (such as Utah) with statutes dealing specifically with public employees and recognizing the right to join unions in clear terms. With the tendency of courts to narrowly interpret statutes in derogation of the common law, the remaining "right-to-work" states, and others with statutes less inclusive than the "right-to-work" laws, may expect their courts to distinguish the principal case by discovering a lack of sufficient declaration of legislative intent to contravene the common law as to firemen and policemen.

Durwood D. Crawford

Regulation of Business — Clayton Act — Vertical Stock Acquisitions

From 1917 to 1919 the Du Pont Co., a supplier of automobile finishes and fabrics, acquired a 23% stock interest in General Motors Corporation. At the time of these acquisitions General Motors' product purchases from Du Pont were insignificant; also its automobile production was slight when compared with the industry's total. In 1949 the government instituted civil proceedings against the two corporations, charging that the close intercompany relationship created by this stock interest, together with General Motors' present leadership in automobile production, induced preferential treatment of Du Pont over its competitors when supplying General Motors' product requirements in violation of both the Clayton Act and

the Sherman Act. *Held*: A vertical stock interest in another corporation violates the Clayton Act if it appears at the time of the suit that competition will be substantially lessened within the area of effective competition if the holdings are permitted to stand. (A possible violation of the Sherman Act was not considered.) *United States v. E.I. Du Pont De Nemours Co.*, 353 U.S. 586 (1957) (4-2 decision).

By 1914 the Supreme Court had recognized many of the complexities involved in business regulation and had formulated a basic test for determining Sherman Act violations, *viz.*, an "actual," unreasonable restraint on trade either intended as a restraint by the defendant or of such a nature that the intent could be inferred from the defendant's conduct. *United States v. Patten*, 226 U.S. 525 (1913); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); 2 TOULMIN, ANTI-TRUST LAWS § 1.2 (1949). Congress, feeling that certain enumerated trade practices should be eliminated before "actual" restraints resulted, passed the Clayton Act ". . . to supplement the existing anti-trust laws . . . [by arresting] the creation of trusts, conspiracies and monopolies in their incipency and before consummation." S. REP. NO. 698, 63d Cong., 2d Sess. 1 (1914). See *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356 (1922). Accordingly, section 7 made stock acquisitions illegal where the effect "might" be (a) to lessen competition between the acquired and the acquiring corporations, (b) to restrain commerce, or (c) to create a monopoly. 38 STAT. 730 (1914) later amended to include asset acquisitions by 64 STAT. 1125 (1950), 15 U.S.C. § 18 (1952).

The *Du Pont* case was the first in which the Supreme Court applied section 7 where the stock of a corporate customer was acquired by a corporate supplier, *i.e.*, vertical rather than horizontal acquisition. While only one court had previously applied section 7 to a vertical acquisition case, *Ronald Fabrics Co. v. Verney Brunswick Mills, Inc.*, CCH TRADE REG. REP. (1946-47 Trade Cas.) § 57514 (S.D.N.Y. 1946), many courts in horizontal acquisition cases (useful as precedent by analogy) have found violations where commerce has been adversely affected in ways other than the destruction of competition between the acquired and the acquiring firms, illustrating that section 7 is not limited just to the effects such acquisition might have on the corporations involved in the stock transaction. *United States v. Western Meat Co.*, 272 U.S. 554 (1926); *Aluminum Co. v. FTC*, 284 Fed. 401 (3d Cir. 1922);

United States v. New England Fish Exchange, 258 Fed. 732 (D.C. Mass. 1919). *But see Arrow-Hart v. FTC*, 291 U.S. 597, 599 (1934); FTC, REPORT ON CORPORATE MERGERS AND ACQUISITIONS, 168 (1955). This new application of section 7 should not be surprising and seems fully justified since it conforms to the modern realization that vertical integration may create monopoly power inconsistent with genuine competition. See, e.g., *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948); *United States v. New York Great A & P Tea Co.*, 173 F.2d 79 (7th Cir. 1949); cf. *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

The *Du Pont* decision, in another unprecedented application of the Clayton Act established the rule that the legality of corporate relationships will be tested at the time of the suit even though the intercompany relationship may have been legal when the stock was originally acquired. This aspect of the decision (although not made clear by the majority opinion) seems to result from the many cases which hold that the purpose of section 7 is to arrest a possible monopoly of market power before it becomes an actual restraint on trade and which indicate that the factual determination required is the prediction of the probable effects of a "permanent" stock acquisition on the relevant market. See, e.g., *Corn Products v. FTC*, 324 U.S. 726 (1945); *International Shoe Co. v. FTC*, 280 U.S. 291 (1930); *United States Shoe Mach. Corp. v. United States*, 258 U.S. 451, 460 (1922). This resulting shift in emphasis from the acquisition to the *continued holding* of the stock creates a patent weakness in the Court's conclusion because it apparently overrules *sub silentio* the long established requirement of substantial pre-existing competition at the time of the stock purchase and replaces it with a test which regards mere corporate growth in itself as a violation of section 7. See *International Shoe Co. v. FTC*, *supra*; *Transamerica Corp. v. Board of Governors*, 206 F.2d 163 (3d Cir. 1953). [For discussion of internal and external growth as a violation under the *Du Pont* decision, see 66 YALE L.J. 1251 (1957)]. This facet of the *Du Pont* case seems difficult to justify for two important reasons: first, the government admittedly was attempting to prove the acquisitions of General Motors stock illegal *ab initio*, (Reply Brief for Appellant, p. 34), and second, since the only standard which parties to a proposed stock transaction are capable of applying is one addressed to present circumstances, it would seem that the government should apply the same standard to determine alleged

violations. Neal, *The Clayton Act and the Transamerica Case*, 5 STAN. L. REV. 179, 219 (1953).

Since vertical acquisitions are now within the scope of section 7 important questions arise regarding the remedy needed to alleviate adverse situations created by proven violations. Prior to the principal case the government usually requested divestiture of all or part of the illegally acquired stock, reasoning that separation of control between otherwise competitive corporations would tend to encourage genuine competition between them. *Aluminum Co. v. FTC*, *supra*; *United States v. New England Fish Exchange*, *supra*; *cf. National Supply Co. v. Hillman*, 57 F. Supp. 4 (W.D. Pa. 1944). But logically these cases should not be precedent for divestiture in the *Du Pont* case because there the alleged violation had the sole effect of giving *Du Pont* an unequal opportunity to "supply" General Motors' product requirements; hence the only purpose of the litigation is to provide *Du Pont's* competitors with access to a *potential* market. Possibly *Du Pont* has attained a present quality leadership in its field, but whether this leadership was the result of the General Motors stock interest or for other reasons is largely immaterial in seeking a remedy, for if the Justice Department requests divestiture (which is likely according to recent publications, Time, Oct. 7, 1957, p. 89) General Motors may, and probably will, continue to buy from *Du Pont*, the reason being the high quality of *Du Pont* goods rather than intercompany coercions; hence, even if section 7 has been violated, stock divestiture will prove an inappropriate remedy in practice, for *Du Pont's* competitors probably will not be in any better bargaining position for General Motors' business than before. Especially is this result likely when the government, by failing to bring suit until long after the stock purchase, has allowed other economic factors to enter into the relationship between the two corporations. *Cf. KAYSEN, UNITED STATES V. UNITED STATES SHOE CO.* 340 (1956); Neal, *The Clayton Act and the Transamerica Case*, *supra*.

Perhaps the most adequate remedy in the *Du Pont* case would be a decree enjoining increased purchases by General Motors of *Du Pont* products together with a provision enjoining the exercise of the voting rights in the stock so held. *Cf. United States v. Paramount Pictures*, 334 U.S. 131 (1948); *Schine Chain Theaters v. United States*, 334 U.S. 110 (1948); *United States v. Griffith*, 334 U.S. 100 (1948). Remaining aware of the fact that under the Clayton Act we are not attempting to relieve the market from the burdens

of an actual restraint on trade, but only a "tendency" toward actual restraint, there could exist no logical reason for divestiture if the above provisions were adopted because only those means absolutely necessary for enforcement of the act should be decreed; a fortiori, such a decree must not operate as a penalty. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 602 (1951); *Standard Oil v. United States*, 337 U.S. 293, 322 (1949).

Surely, however, purchase controls would invite criticism due to the resulting interference by the federal courts in the realm of private business. But careful analysis will demonstrate that a purchase control plan merely does directly what divestiture is designed to do indirectly, *viz.*, create equal opportunity for *Du Pont's* competitors. And, if it is the policy of Congress to insure such equal opportunity, it seems that the courts should give effect to that policy and thus provide a means by which the offended competitors will realize favorable consequences from the lawsuit.

Elton R. Hutchison

Taxation — Alimony and Child Support — Deductions

Under a separation agreement incident to divorce *H* became obligated to make certain periodic payments to the wife for support of their children and her, the exact amount dependent upon his net income for the preceding year. The total amount due could fluctuate from year to year, but the agreement fixed \$9,600 per year as the basic amount *H* was obligated to pay, which amount could be adjusted upwards to a maximum of \$12,000 or down to not less than \$5,000 per year. If the wife remarried, *H* was relieved of payments for her support, but was obligated to continue the support of his minor children in the amount of \$4,800 per year. The Tax Court disallowed *H's* deduction of amounts paid for support of the minor children. *Held*: If a separation agreement fails to provide a specific amount for the support of minor children, no part of the total payments is excludable under the statute that exempts sums payable for the support of minor children under a divorce decree from gross income. *Weil v. Commissioner*, 240 F.2d 584 (2d Cir.), *cert. denied*, 353 U.S. 958 (1957).

Prior to the Revenue Act of 1942, 56 STAT. 798, alimony was not treated as part of the wife's taxable income. The amounts paid the divorced wife were considered payments in discharge of the husband's general obligation of support. *Helvering v. Fitch*, 309 U.S.

149 (1950); *Gould v. Gould*, 245 U.S. 151 (1917). Under the 1939 Code certain alimony payments were included in the wife's gross income and the husband was allowed an equivalent deduction, but payments made *specifically* for the support of minor children under the terms of a decree, instrument or agreement, and identifiable as such, were neither taxable to the wife nor deductible by the husband. INT. REV. CODE OF 1939, § 22(k), added by 56 STAT. 816 (1942) (now INT. REV. CODE OF 1954, § 71). Thus the problem for decision in such cases is whether the particular separation agreement fixes a sum "payable for the support of minor children."

Where the husband makes periodic payments to his divorced wife as alimony and child support, and the decree, instrument or agreement under which the payments are made does not segregate a known part as alimony and the balance for child support (or the portion of the payments for the support of the minor children is not identifiable), then the *entire* sum of payments received are taxable to the wife and deductible by the husband. *Henrietta S. Seltzer*, 22 T.C. 203 (1954); *Dora H. Moitoret*, 7 T.C. 640 (1946). *Accord*, *Robert Wood Johnson*, 10 T.C. 647 (1948). The opposite result is reached if the separation agreement specifically provides that a certain portion of the alimony payment is for the support of minor children, for then such portion is not includible in the wife's gross income and is not deductible by the husband. *Jo Eisinger*, 15 CCH TAX CT. MEM. 208 (1956). A more troublesome type of situation arises when there is no specific stipulation of the amount paid for child support, but the separation agreement provides that upon the minor child's majority or death, the amount for the wife is to be reduced by an agreed sum. In these situations it is apparent that a certain portion of the payment is meant for child support. Logically therefore, the courts have applied an "identification doctrine" where the amounts to be paid for the wife alone can be deduced from the separation agreement, taxing the wife on that sum only, and the husband is allowed no deduction for the amount identified as being for the minor child. *Alpheus M. Bell*, 14 CCH TAX CT. MEM. 277 (1955); *Harold M. Felming*, 14 T.C. 1308 (1950); *Warren Leslie, Jr.*, 10 T.C. 807 (1948); *Robert W. Budd*, 7 T.C. 413 (1946), *aff'd*, 177 F.2d 198 (6th Cir. 1947). The Tax Court applied that rationale in the principal case, (22 T.C. 612 (1954), *Supplemental opinion*, 23 T.C. 630 (1955), but was reversed by the court of appeals on the interpretation of the agreement.

The holding of the principal case when compared to the back-

ground of contra decisions seems to be a departure from the so-called "identification doctrine." The separation agreement in the principal case was very similar to those in the *Ball* and *Budd* cases, *supra*, yet the court construed the agreement as expressing the husband's intent to make the total payments to the wife absolutely and leave to her the obligation of support of the children. The court did not read the instrument with "a fine-tooth comb to discover a figure" that might be used as a basis for a division of the tax burden. Cf. *Dorothy Newcombe*, 10 CCH TAX CT. MEM. 152 (1951), which seems to support the holding in the principal case. See also, *Raoul Walsh*, 21 T.C. 1063 (1954). The court said that section 22(k), *supra*, taxes to the wife amounts available for her own use or benefit—regardless of whether or not she has actually supported the minor children—and does not tax the wife on sums she is *required* to devote exclusively to the support of the children. Thus the Tax Court's decision in this case was considered defective in its holding that sums may be "payable for the support of minor children" even though the wife could use them for other purposes if she was so disposed.

The rule as formulated by the *Weil* case seems to be that amounts are "payable for the support of minor children" when they are to be used *exclusively* for that purpose, their use must be restricted to that purpose by the instrument, and the wife cannot have any independent beneficial interest therein. Such a rule seems to place a harsh burden on the wife in these cases where she in fact has supported the minor children, which is a moral obligation of both the husband and wife; however, the statute (section 22(k)) only relieves the wife of tax liability for those amounts fixed by the terms of the agreement as "payable for the support of minor children." Thus the present decision leaves little room for dissent where the agreement does not fix a specific amount to be used for support of minor children.

B. J. Barton

Texas Inheritance Tax — Valuation of Securities — Blockage Rule

Decedent's estate included 31,350 shares of Humble Oil & Refining Co. common stock. For inheritance tax purposes the state comptroller valued the stock by the "unit" rule, *i.e.*, he multiplied

the number of shares by the listed value per share on the stock exchange at the date of decedent's death. The executrix contended that the assessment did not reflect the value which could actually be realized, and the trial court sustained this position. *Held*: In valuing stock it is not error to apply the "blockage" rule. The tax authorities should take into account the size of the block of stock owned by the decedent and its probable effect on the market value if an actual sale were made. *Calvert v. Kattar*, 301 S.W.2d 318 (Tex. Civ. App. 1957) *error ref.*

Federal courts were the first to enunciate the proposition that the size of a block of stock could be considered in determining value. *Helvering v. Safe Deposit & Trust Co.*, 95 F.2d 806 (4th Cir. 1938). Broadly stated, the blockage rule recognizes that a large block of shares cannot be converted into cash as readily as a few shares. *Citizens Fidelity Bank & Trust Co. v. Reeves*, 259 S.W.2d 432 (Ky. 1953); 2 PAUL, FEDERAL ESTATE AND GIFT TAXATION § 18.27 (1942). Basically, the question is whether market quotations are accurate proof of value when large numbers of shares are left in the estate. *Montclair Trust Co. v. Zink*, 141 N.J. Eq. 401, 57 A.2d 372 (Prerog. Ct. 1948); 2 PAUL, *op. cit. supra*, § 18.27. Although tax administrators ordinarily prefer a rule that would value each share of stock at its listed price with the number of shares not being considered, see *Montclair Trust Co. v. Zink, supra*, federal tax regulations recognize that the size of the block might influence the valuation. T.D. 4902, 1939-1 CUM. BULL. 325; U.S. Treas. Proposed Est. Tax Reg. § 20.231-2 (1954). Similarly, numerous state decisions have sustained the "blockage" theory. *Newberry v. Walsh*, 20 N.J. 484, 120 A.2d 242 (1956); *Citizens Fidelity Bank & Trust Co. v. Reeves, supra*; Annot. 23 A.L.R.2d 775 (1952). It is still said, however, that the most persuasive evidence of stock value is its market quotation, *Richardson v. Commissioner*, 151 F.2d 102 (2d Cir. 1945), *cert. denied*, 326 U.S. 796 (1946); *Jenkins v. Smith*, 21 F. Supp. 251 (D.C. Conn. 1937), and there is no presumption that a large block is worth less per share than a small block. 2 PAUL, *op. cit. supra*, § 18.27. To justify use of the blockage rule, it is necessary in each case to produce affirmative evidence that the large number of shares will sell for less than the listed price, *Richardson v. Commissioner, supra*, and often expert testimony alone is not sufficient to establish such fact. *Gamble v. Commissioner*, 101 F.2d 565 (6th Cir. 1939), *cert. denied*, 306 U.S. 664 (1939).

In some instances the courts have sidestepped the issue in esti-

mating the effect of size by requiring affirmative evidence that a "skillful broker" could not realize the listed price in a reasonable time from the critical valuation date. *Helvering v. Maytag*, 125 F.2d 55 (8th Cir. 1942), *cert. denied*, 316 U.S. 689 (1942); *Bull v. Smith*, 119 F.2d 490 (2d Cir. 1941). The majority in the principal case quoted with approval from *Helvering v. Maytag*, *supra*, which may be an indication that the "skillful broker" rule would have been applied in absence of evidence to rebut its applicability; and, the court seemed to rely on expert testimony to rebut the "skillful broker" rule. Excerpts were quoted from the record indicating that the listed price could not have been realized by feeding the stock into the market over a period of one year. However article 7130, TEX. REV. CIV. STAT. ANN. (1925), requires that valuation be made ". . . at the *time of the death* of the decedent" (emphasis added), and would seem to conflict with the "skillful broker" approach (which allows a reasonable time after death to secure the listed price). Valuation is to be determined by a supposed sale at death, and not at what could subsequently be realized. Affirmative evidence showing the effect of a block on the listed price at death would seem to be the burden placed on the taxpayer by the statute—not a further requirement to show affirmatively that a block could not be sold on the market at its listed price within a reasonable time after death by a skilled broker.

A further point to be noted is that article 7130 requires that estate appraisers ". . . shall appraise such property at its actual market value, if it has a market value, and in case it has none, then its real value at the time of the death of the decedent." It is important to observe that the statute differentiates between "actual market value" and "real value." This differentiation could present a problem in applying the blockage rule because the rule's basic premise is that the sale of a large block in an existing open market will force the price down, *Schnorback v. Kavagh*, 102 F. Supp. 828 (W.D. Mich. 1951), and apparently the appraiser is concerned with "real value" only when there is no open market. Thus, it is believed that the blockage rule will not be a factor in ascertaining "real value." If either unlisted stocks or securities in a closely held corporation are involved, the size of the block will not be important in arriving at its valuation since in such case there is no market price on which a block sale can operate. "Real value" should be dependent on other factors such as net worth, earnings, dividend capacity, book value,

and any other relevant matter presented by the evidence. See *Montclair Trust Co. v. Zink*, *supra*.

No reasonable objection could prevent application of the blockage theory where other classes of assets are involved, *e.g.*, animals, realty, or bonds. The ability of each market to absorb any type of asset must in all fairness be considered. Furthermore, it is believed that the blockage theory should not be restricted to downward adjustments. In a proper case "actual market value" could require that the stock be valued higher than the listed price, *e.g.*, where control of a corporation is involved the large controlling interest could be worth more than listed market value. In either case valuation is primarily a question of fact and should be determined from all evidence which may shed light on increased or decreased value. Placing the burden on the taxpayer would seem justified, but the taxpayer should not be bound by an arbitrary and unreasonable standard. The blockage rule is an aid in alleviating such a problem. The ultimate goal of the courts and legislature in this area should be the development of an objective standard, thus making it unnecessary to rely completely on the appraiser's subjective opinion.

Charles E. Galey

Torts — Discovered Peril — Actual Knowledge of Perilous Position

P's decedent was standing on a train trestle removing debris from the creek below. Upon discovering the approach of a train decedent ran toward the opposite end of the trestle but, a few paces from safety, was struck and killed by D's train. The train crew testified that after they became aware of something on the trestle, it was five seconds before they realized it was a person and applied the brakes and sounded the horn. D's operators admitted that a man could be seen easily for three-quarters of a mile and that they were looking down the track as required. *Held*: Evidence as to conditions of visibility indicating that a man could be easily seen is sufficient to support a finding that a train crew discovered the peril of a decedent in time to prevent the injury, in spite of testimony that there was no actual discovery and that a proper lookout was maintained. *Creech v. Thompson*, —Tex.—, 297 S.W.2d 817 (1957).

The common law rule of last clear chance, first applied in the celebrated English case of *Davies v. Mann*, 10 M.&W. 546 (1842),

represented an effort by the courts to lessen the severity of contributory negligence as a defense by permitting plaintiff to recover notwithstanding his own negligence, provided that defendant failed to seize the last opportunity to avoid the harm. PROSSER, TORTS 290 (2d ed. 1955). The doctrine of discovered peril varies the last clear chance rule. It is generally recognized in Texas that three facts must be found before plaintiff is entitled to base a recovery on the doctrine of discovered peril: (1) plaintiff's peril was partly caused by his own negligence, (2) actual discovery of plaintiff's danger by defendant before the accident, and (3) failure by defendant thereafter to use means at hand to avoid the harm. *Sisti v. Thompson*, 149 Tex. 189, 229 S.W.2d 610 (1950); *Turner v. Texas Co.*, 138 Tex. 380, 159 S.W.2d 112 (1942); *Martin v. Texas & N.O.R.R.*, 236 S.W.2d 567 (Tex. Civ. App. 1951) *error ref.* Thus, the basic prerequisite of recovery in Texas under the doctrine of discovered peril is actual knowledge by defendant of plaintiff's danger. *Galveston Ry. v. Price*, 240 SW. 524 (Tex. Comm. App. 1922); *Autry v. Dallas Ry. & T. Co.*, 98 S.W.2d 254 (Tex. Civ. App. 1936) *error disp.* Under the common law last clear chance rule, as applied by the majority of courts, it is not required that defendant actually discover plaintiff's peril, but that he could have discovered the peril by the exercise of reasonable care. HARPER AND JAMES, TORTS § 22.13 (1956). However, in Texas it is not sufficient to show that defendant *could* or *should* have discovered plaintiff's peril; it must be found that defendant was *in fact* aware of plaintiff's peril. *Panhandle & S.F. Ry. v. Napier*, 135 Tex. 314, 143 S.W.2d 754 (1940); Comment, 9 Sw. L.J. 254 (1955).

It is of course apparent that the burden of proving this actual knowledge by defendant is ordinarily the plaintiff's most difficult problem in establishing a case based on the discovered peril rule. Defendant's denial of actual discovery is not conclusive, as actual discovery is a question of fact to be determined from the evidence. *Texas & N.O.R.R. v. Goodwin*, 40 S.W.2d 182 (Tex. Civ. App. 1931) *error ref.* And since in most cases proof of actual discovery must of necessity be in the form of circumstantial evidence, *San Antonio & A.P. Ry. v. Jaramilla*, 180 S.W. 1126 (Tex. Civ. App. 1915) *error ref.*, it is well settled that circumstantial evidence is competent to support a finding of actual discovery. *Texas & N.O.R.R. v. Goodwin*, *supra*. But such evidence must be sufficient to warrant an inference that plaintiff's danger was actually discovered. *Schaff v. Copass*, 262 S.W. 234 (Tex. Civ. App. 1924) *error disp.*

In *Schubmacher v. Posey*, 147 Tex. 392, 215 S.W.2d 880 (1948), the court applied the well settled rule that evidence tending to prove one guilty of the "rather grave fault" of failing to act to prevent injury to another must not be imputed or presumed, but must be found as a fact. The theory behind this principle is that such an omission is so contrary to general human nature that the very fact of failure to avoid the harm militates against holding that defendant was aware of plaintiff's danger. *Galveston Ry. v. Price*, *supra*; *Dupree v. Burlington*, 251 S.W.2d 559 (Tex. Civ. App. 1952) *error ref.* In the principal case the Supreme Court affirmed the trial court in permitting a recovery based on the jury finding that *D*'s operators did see decedent, but supported by evidence only that *D*'s operators could have seen decedent. This case is apparently an extension of the traditional Texas rule that actual discovery cannot be proved from evidence only that defendant could have realized plaintiff's peril.

Although a casual reading of the case may leave the impression that the rule requiring actual awareness of plaintiff's danger has been changed, a careful study of the language of the instant case reveals that the substantive law of discovered peril is unchanged. But it is believed that permitting the jury to infer that defendant did actually see plaintiff solely from evidence that defendant could have seen plaintiff lessens the weight of evidence necessary to establish a *prima facie* case. Presumably under the holding of the principal case all a plaintiff need do to be entitled to an issue on discovered peril is to allege and prove that defendant could have seen plaintiff's peril. Defendant is then put at the disadvantage of showing that he did not see plaintiff, for if the only evidence introduced is that defendant could have seen plaintiff, the finding may be for plaintiff, since this case concludes that such evidence is sufficient to establish actual discovery of plaintiff. It is believed that this represents an undesirable extension of the doctrine of discovered peril.

Dennis Trent

Torts — Malpractice — Statute of Limitations

P sustained injuries as the result of an unauthorized operation performed on him by *D*, a surgeon. Prior to the operation *D* promised that he would not invade *P*'s spinal column during the surgery, and that the operation would consist only of clipping the nerves

on either side of the spine. In violation of this agreement *D* operated directly on *P*'s spine. *P* discovered the wrongful act beyond the time normally allowed for bringing actions under the statute of limitations in Tennessee. The trial court dismissed the complaint because it was not brought within the limitations period. *Held*: There is a duty on the physician, arising out of the confidential and fiduciary relationship that exists with his patient, to disclose any wrongful acts or omissions to the patient, and a failure to so disclose will be a fraudulent concealment which tolls the running of the statute of limitations. *Hall v. De Saussure*, — Tenn. App. —, 297 S.W.2d 81 (1956), *cert. denied*, 297 S.W.2d 90 (Tenn. 1956).

Normally a cause of action for malpractice by a physician accrues and the applicable limitation period commences to run when the wrongful act or omission occurs, even though the patient does not know of the injury. *Albert v. Sherman*, 167 Tenn. 133, 67 S.W.2d 140 (1934); *Thompson v. Barnard*, 142 S.W.2d 238 (Tex. Civ. App. 1940), *aff'd*, 138 Tex. 277, 158 S.W.2d 486 (1942). Although the courts have been reluctant to qualify this rule, several exceptions have been recognized which allow a patient to recover for his injuries in certain cases; for example, some courts have applied the "physician-patient" doctrine so that the statute will not run until the course of treatment by the physician ceases, *Huysman v. Kirsch*, 6 Cal. 2d 302, 57 P.2d 908 (1936); *Meyers v. Clarkin*, 33 Ohio App. 165, 168 N.E. 771 (1929); while a few courts have held that if a foreign substance is left in the patient's body, the statute is tolled until the patient actually has or reasonably should have discovered the substance. *Pellett v. Sonotone Corp.*, 55 Cal. App. 2d 158, 130 P.2d 181 (1942). Most jurisdictions have adopted the "fraudulent concealment" exception, to the effect that where the physician fraudulently conceals any wrongful acts or omissions the statute will not begin to run until the patient learns of the injury. *Cappuci v. Barone*, 266 Mass. 578, 165 N.E. 653 (1919); *Hudson v. Shoulders*, 164 Tenn. 70, 45 S.W.2d 1072 (1932); *Thompson v. Barnard*, *supra*.

Various requisites have developed in the application of the "fraudulent concealment" doctrine. Before the statute of limitations is tolled many jurisdictions require an affirmative concealment or misrepresentation and that the physician have the specific intent to prevent the patient from obtaining knowledge of his cause of action. *Pickett v. Aglinsky*, 110 F.2d 628 4th Cir. 1940); *Brown v. Grinstead*, 212 Mo. App. 533, 252 S.W. 973 (1923); *Carrell v. Denton*,

138 Tex. 145, 157 S.W.2d 878 (1942). Other courts have held that mere non-disclosure alone is enough to toll limitations on the theory that the relationship of physician and patient is one of trust and confidence, and the mere non-disclosure of any acts of negligence or malpractice by the physician is fraud. *Burton v. Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934); *Tabor v. Clifton*, 63 Ga. App. 768, 12 S.E.2d 137 (1940); *Schmucking v. Mayo*, 183 Minn. 37, 235 N.W. 633 (1931). In a recent case, it was held that the fiduciary relationship gives rise to an implied exception to the statute of limitations. *Hinkle v. Hargens*, 81 N.W.2d 888 (S.D. 1957). Generally, the courts require knowledge of the illegal act on the part of the physician as an essential element to toll the statute. *Hudson v. Moore*, 239 Ala. 130, 194 So. 147 (1940); *Maloney v. Brackett*, 275 Mass. 479, 176 N.E. 604 (1931); *Carrell v. Denton*, *supra*.

In the instant case a manifest injustice would be done if a recovery were not allowed as the plaintiff had no reason to suspect that the physician had operated contrary to the plaintiff's express wishes. If the patient had no remedy in such a case, an unscrupulous physician could escape liability, while an honest doctor who voluntarily made a full disclosure to the patient under the same circumstances often would be held liable. See 13 WASH. AND LEE L. REV. 264 (1957). It has been stated that the past reluctance of most courts to follow the rule as applied in the principal case stems from a deep-seated judicial suspicion toward such claims of wrongful acts by physicians. See Comment, *Fraudulent Concealment and Statute of Limitations*, 31 MICH. L. REV. 875 (1933). Opponents of this exception to the general rule have said that it would allow a plaintiff to trace a malady to an original cause alleged to have occurred many years before and therefore no doctor could ever be safe from liability. But the policy of protecting physicians from stale lawsuits should be balanced with a policy of allowing injured persons compensation for acts of substandard medical care over which they have little or no control. Also physicians may protect themselves through the use of liability insurance, while an injured party ordinarily bears the entire loss. Due to the special relationship between a physician and his patient, persons are forced to place great trust and confidence in a doctor that he will perform in a professional and efficient manner. The trend toward a result as that imposed in the principal case seems a logical and just conclusion in malpractice cases.

Robert G. Chappell

Wills — Avoidance by Survivor — Renunciation of Benefits

H and *W* executed a joint and mutual will which devised all the property of each to the survivor in fee simple and also devised all property owned by the survivor at his death to *H* and *W*'s three children equally. Immediately after *H*'s death, *W* revoked the will, renounced any benefit thereunder and refused to serve as independent executrix. Later, *W* executed a second will devising all her estate to one of the three children named in the mutual will. After *W*'s death the two children not taking under the second will sued to enforce the terms of the mutual will. The devisee under the second will contended that the mutual will was unenforceable against *W* because she took no benefits under it when *H* died. *Held*: Acceptance of benefits by the surviving testator is not a condition precedent to enforcement of the terms of a mutual will. *Weidner v. Crowther*, — Tex. —, 301 S.W.2d 621 (1957).

The traditional rule is that where parties execute a joint will which is also mutual (*i.e.*, contractual in nature), the will remains ambulatory and may be revoked by the survivor after the death of the other testator. *Wyche v. Clapp*, 43 Tex. 543 (1875). Although the revoked will cannot be enforced *as the will* of the survivor, equity will enforce the *contractual portion* of the mutual will on suit by beneficiaries named in it, at least where the contract was not itself inequitable. *Murphy v. Slaton*, 154 Tex. 35, 273 S.W.2d 588 (1954); *Cate v. Cate*, 235 S.W.2d 456 (Tex. Civ. App. 1950) *error ref.*

While the above principles have been recognized consistently in Texas decisions, critical analysis shows that the courts have said they were enforcing the contracts because the survivor did certain acts in each case. For example, in *Wagnon v. Wagnon*, 16 S.W.2d 366 (Tex. Civ. App. 1929) *error ref.*, and *French v. French*, 148 S.W.2d 930 (Tex. Civ. App. 1940) *error dism., judgm. cor.*, the survivor's probate of the mutual will and acceptance of benefits under it "rendered the contract enforceable" against him. In *Moore v. Moore*, 198 S.W. 659 (Tex. Civ. App. 1917) *error ref.*, and *Rosetti v. Benavides*, 195 S.W. 208 (Tex. Civ. App. 1917) *error ref.*, the contract "became obligatory" on the survivor when she qualified as independent executrix under terms of the mutual will. Such contracts also have been enforced on the theory that estoppel prevented revocation where the survivor took benefits under the mutual will.

Nye v. Bradford, 189 S.W.2d 889 (Tex. Civ. App. 1945), *aff'd*, 144 Tex. 618, 193 S.W.2d 165 (1946); *McWhorter v. Humphreys*, 161 S.W.2d 304 (Tex. Civ. App. 1941) *error ref. w.o.m.* It is evident, as stated in the principal opinion, that an important fact is present in this case which distinguishes it from the foregoing examples, *viz.*, here the survivor studiously refrained from doing any of the above acts (except that she offered the mutual will for probate as the will of her husband only) in a deliberate effort to avoid being bound by the terms of the mutual will. The principal case is also unique in this respect, the heirs seeking enforcement of the mutual will are in no sense remaindermen, the devise to the wife being in fee simple. The Court also ruled out any limitation over to the children. Hence the children had no property interest to assert.

By means of the following hypothet the Court aptly illustrated the sound theoretical basis for its holding that acceptance of benefits by the survivor is not a condition precedent to enforcement of the contract: *H* and *W* each own as their separate property 100 acres of land. *H* devises his land to child *A*, and in exchange *W* devises her land to child *B*. *H* dies and his land passes to child *A* per the will. *W* then revokes the mutual will and renounces any benefit thereunder, thus avoiding any binding effect of the contract on herself. If *W* does not execute a new will, *A* will receive not only all of *H*'s land by devise but also one half of *W*'s land by inheritance upon *W*'s death. As the Court points out, *W* personally accepts no benefits under the mutual will, but an injustice is done both to *H* (who fully performed and now cannot revoke) and to child *B* (a third-party donee beneficiary of *H* and *W*'s contract, whose rights under the mutual will are prejudiced by *W*'s failure to perform her contract with *H*).

The Court seemed to base its denial of "effective revocation" on two grounds: first, the necessity of protecting the contract rights of donee beneficiaries under the mutual will and secondly the fact that it would be "manifestly unjust" to permit revocation by *W* after *H* had "fully performed the contract" by leaving the mutual will unaltered until his death. These two reasons given for the holding are directly analogous to the rules relating to donee beneficiary contracts, as well as results obtained where bilateral contracts are fully performed by one party. See *Larrabee v. Porter*, 166 S.W. 395 at 403 (Tex. Civ. App. 1914) *error ref.*; 2 WILLISTON, CONTRACTS §§ 357, 368, 1439 (rev. ed. 1936). While the Court states its con-

clusions in the language of equity, its reasoning has a solid foundation in contract law.

The contentions of the wife's devisee in the principal case disclose that mistaken conclusions were drawn from precedent in this field. While opinions have stated that where the survivor did certain acts, the courts *would* enforce the contractual portion of the will against him, it must be noted that *no prior case* had held that absent such acts the courts would *not* enforce the contract. In other words, these acts by the survivor were never said to be the *only* grounds for enforcement of the contract. There is also an important common factor which seems to unify all of the prior cases: Whatever the reason given, wherever the courts enforced the contract an equitable result was reached. This "rule" should work conversely also, and effective revocation might be allowed in a situation where the survivor not only accepted benefits under the mutual will but also acted as executor and probated it, if the contract itself were inequitable. The equity side of the court could simply decline specific performance of the mutual will contract, letting the survivor's new will stand. The principal case leaves the courts free to reach an equitable solution in cases of either type.

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