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RECENT CASE NOTES

Admiralty — Wrongful Death Actions — Use of State Substantive Law

Plaintiff's decedent drowned in navigable waters within a state's territorial limits while engaging in repairing a federal dam. Plaintiff sued the United States under the Federal Tort Claims Act,[1] and alleged that the United States was liable under the state employers' liability law.[2] The district court and the court of appeals refused to apply the state statute upon the theory that the standard of care it required was higher than was required by federal maritime law for negligence; hence, application of it to this maritime tort would be unconstitutional.[3] *Held*: A remedy for wrongful death created by a state statute may be invoked to recover for a death on navigable waters within a state's territorial limits, and the measure of negligence is the standard of care imposed by state law, rather than by federal maritime law.[4] *Hess v. United States*, 361 U.S. 314 (1960).

Under the United States Constitution, the control of admiralty is within the jurisdiction of the federal government,[5] but the Constitution has been interpreted to permit concurrent jurisdiction of federal and state governments in certain instances.[6] Accordingly, states may supplement the maritime rules[7] by permitting recovery in cases where maritime law provides no remedy.[8] Moreover, states may legislate freely on maritime problems of predominantly local concern.[9] However, the federal maritime rule generally must be applied to problems of national concern if there is a clear conflict

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[1] 62 Stat. 933, 983 (1948), 28 U.S.C.A. §§ 1346(b), 2674 (1950).

[2] Ore. Rev. Stat. § 654.305 (rev. ed. 1953). This statute creates a right to recover for death under certain circumstances, and requires an employer to use every device, care and precaution practicable for the protection and safety of life and limb. The general wrongful death statute of the state is Ore. Rev. Stat. § 30.020 (rev. ed. 1953).

[3] 1958 Am. Mar. Cas. 660, 259 F.2d 285 (9th Cir. 1959).

[4] Warren, C.J., Black, Douglas, Brennan, J.J., concurring; Harlan, Frankfurther, Whitaker, J.J., dissenting. See also, Goett v. Union Carbide, Inc., 361 U.S. 340 (1960), decided the same day as the principal case.

[5] U.S. Const. art. III, § 2; Detroit Trust Co. v. The Barlum, 293 U.S. 21 (1934); Panama R.R. v. Johnson, 264 U.S. 375 (1924); Robinson, Admiralty § 5 (1939).

[6] Gilmore & Black, The Law of Admiralty § 1-17 (1957).

[7] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 201 F.2d 833 (5th Cir. 1953).

[8] Gilmore & Black, op. cit. supra note 6.

[9] Maryland Cas. Co. v. Cushing, 347 U.S. 409 (1954); Kelly v. Washington, 302 U.S. 1 (1937) (states allowed to enforce local inspection laws despite federal legislation upon the subject); Cooley v. Board of Wardens, 19 U.S. (How.) 143 (1851) (local regulation of pilots allowed despite federal legislation upon the subject).

between substantive maritime law and state law.[10] Thus, if a seaman incurs a *non-fatal* injury within a state's navigable waters, the defendant's duty is measured by federal maritime standards[11] even though the plaintiff pursues his right through a state created remedy.[12]

In admiralty,[13] as at common law,[14] no remedy for wrongful death existed, on the theory that the action died with the person. However, admiralty courts have permitted the decedent's survivors to resort to the state wrongful death statutes for recovery.[15] The Supreme Court in *Pope & Talbot, Inc. v. Hawn*[16] intimated that substantive maritime law was still the measure of the right to recover, even though the action was brought under a state statute. However, the majority of lower federal courts have held that both the right and the remedy emit from the state; consequently, state law determines the duty of the defendant.[17] Conversely, one circuit has ruled that the state wrongful death statute creates only the right of action; recovery will still be determined by traditional maritime principles.[18] In *O'Leary v. United States Lines Co.*,[19] the majority of the court, relying upon the *Hawn* dictum, said maritime law must measure the recovery, although a state-created right was involved. The dissent in *O'Leary* thought the *Hawn* dictum referred only to traditional maritime rights and since maritime law allowed no

[10] Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) (the state burden of proof was in conflict with the maritime burden, and federal maritime law thus controlled); Davis v. Department of Labor, 317 U.S. 249 (1942); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917); Gilmore & Black, op. cit. supra note 6, at §§ 6-58 through 6-63. Comment, 50 Nw. U.L. Rev. 677 (1955).

[11] Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).

[12] According to admiralty usage, "right" is a well-founded claim, and "remedy" is the means employed to enforce that claim. A "right" sanctioned by the maritime law may be enforced through any appropriate common-law "remedy." Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 384 (1918). See Gilmore & Black, op. cit. supra note 6, at §§ 6-58 through 6-63.

[13] The Alaska, 130 U.S. 201 (1889); The Harrisburg, 119 U.S. 199 (1886).

[14] Prosser, Torts § 105 (rev. ed. 1955).

[15] Western Fuel Co. v. Garcia, 257 U.S. 233 (1921). See The Hamilton, 207 U.S. 398 (1907). Federal statutes now permit recovery for maritime wrongful death in certain areas: The Jones Act, 38 Stat. 1164 (1915) as amended 41 Stat. 1007 (1920), 46 U.S.C.A. § 688 (1958); Death on the High Seas Act, 41 Stat. 537 (1920), 46 U.S.C.A. §§ 761-768 (1958); Longshoremens' and Harbor Workers' Compensation Act, 44 Stat. 1424 (1927), 33 U.S.C.A. §§ 901-950 (1957).

[16] 346 U.S. 406 (1953). The Court said, at page 409, "Even if Hawn were seeking to enforce a state-created remedy for this right, federal maritime law would be controlling."

[17] See Curtis v. A. Garcia Y Cia, 241 F.2d 30 (3rd Cir. 1957); Graham v. A. Lusi, Ltd., 206 F.2d 223 (5th Cir. 1953); Truelson v. Whitney & Bodden Shipping Co., 10 F.2d 412 (5th Cir. 1926).

[18] O'Leary v. United States Lines Co., 215 F.2d 708 (1st Cir. 1954); See Comment, 35 B.U.L. Rev. 285 (1955).

[19] Supra note 18.

recovery for wrongful death, both the right and the remedy were created by state law, and state substantive law should control them.[20] Subsequently, the Supreme Court has allowed state substantive law to measure both the right and the remedy where the state wrongful death statute incorporates the federal maritime standard of care.[21]

In the principal case, the Court was confronted with a state statute that exacts a greater duty of care from the defendant[22] than does the maritime rule of negligence.[23] The Court extends *The Tungus v. Skovgaard*[24] principle of state law supremacy in wrongful death actions by ruling that the state substantive law measures the right and remedy of the parties, even though the defendant's negligence is measured by the higher state standard.[25] The Court relied upon the general language used in *The Tungus,* which held that the power of a state to create a recovery for wrongful death includes the power to determine when recovery shall be permitted.[26] Reliance was also placed upon *Western Fuel Co. v. Garcia,*[27] where the Court expressly stated that the right of recovery in these wrongful death actions was local in character. However, neither of the state statutes invoked in these cases placed a heavier duty of care upon the defendant, and there is no indication by the Court in the instant case that the problem is local. The opinion of the Court did not mention the *Hawn* case. The only limitation placed upon this ruling was that a state statute *might* be so offensive to maritime principles that admiralty courts would not enforce it.[28] The opinion of the Court was weakened considerably by the four concurring justices, who were expressly dissatisfied with *The Tungus* rule, but reserved their opinion on whether to overrule it.[29] Two of the dissenting justices favored application of the state substantive law only when it imposes no greater burden on the defendant than does federal maritime law,[30] while the third justice would have used the state law only as a remedial supplement to the federal maritime

[20] See Gilmore & Black, op. cit. supra note 6, at § 6-61.
[21] The Tungus v. Skovgaard, 358 U.S. 588 (1959); See United Pilots Ass'n v. Halecki, 358 U.S. 613 (1959).
[22] Ore. Rev. Stat. § 654.305 (rev. ed. 1953).
[23] See, e.g., The Max Morris, 137 U.S. 1 (1890).
[24] 358 U.S. 588 (1959).
[25] 361 U.S. at 321.
[26] The Tungus v. Skovgaard, 358 U.S. 588, 594 (1959).
[27] 257 U.S. 233 (1921).
[28] 361 U.S. at 320.
[29] Id. at 321, 322. These justices join in the opinion of the Court only because of a desire to see The Tungus v. Skovgaard rule applied when it increases the defendant's burden, just as when it lessens it.
[30] Id. at 322, 338, 339.

law.[31] Thus, while the Court's opinion positively enunciated the principle that state law controls both the rights and the remedies of parties in wrongful death actions, as advocated by the dissenting justice in the *O'Leary* case, the dissatisfaction of the majority of the Court with this rule indicates the inadvisability of wholehearted reliance upon it.

The principal decision emphasizes a curious anomaly in maritime law. If the injury is *not* fatal, the maritime law fully governs the rights of the parties, although regarding fatal injuries, state substantive law is the measure.[32] Thus, common-law defenses may be available in an area of maritime litigation.[33] In non-maritime litigation, the *Erie Ry.* rule[34] generally allows state law to control, but *Erie* is uniform in its non-uniformity, *i.e.*, state substantive law governs whether the injury is fatal or non-fatal. Fortunately, the inconsistency evidenced by the instant opinion will have only limited application, since many maritime wrongful death actions are now governed by federal statutes.[35] Although the Court did intimate that there may be state wrongful death statutes that are so offensive to maritime principles that an admiralty court would not enforce them,[36] it is difficult to imagine a wrongful death statute demanding a higher duty of care than the instant one, short of absolute liability. A federal rule for wrongful death actions in the area of litigation involved in the principal case, whether court-created[37] or congressionally created, would eliminate the "fatal" versus "non-fatal" anomaly, and align with the traditional maritime view of uniformity in matters of national concern.

Richard N. Countiss

Conflict of Laws — Due Process — In Personam Jurisdiction

P, a Texas oil company, sold to *D's* predecessor in title, a nonresident, a working interest in Texas oil leases and received payment

[31] Id. at 339.

[32] See 361 U.S. at 322, 323. Perhaps an even greater anomaly is that the situs of the injury causes this to be maritime litigation, with the resulting application of principles originally designed for seamen and maritime commerce, although neither party in this case was a member of either category.

[33] Gilmore & Black, op. cit. supra note 6, at § 6-61.

[34] Erie Ry. v. Tompkins, 304 U.S. 64 (1938). See Levinson v. Deupree, 345 U.S. 648 (1952).

[35] See note 15, supra. Under these statutes, seamen, longshoremen, and individuals killed on these high seas have a wrongful death action.

[36] 361 U.S. at 320.

[37] See Wilburn Boat Co. v. Fireman's Fund Ins. Co., 201 F.2d 833 (5th Cir. 1953); Note, 33 Temp. L.Q. 455 (1958).

from him for his portion of expenses for maintenance and development of the leased land. *D*, also a non-resident, acquired the oil lease interest by means of a trustee's sale and suit in a Texas court apparently to compel conveyance of this interest to him. Subsequently, when *D* failed to respond to *P's* demands for *D's* portion of additional maintenance and development expenses, *P* instituted an in personam action[1] in a Texas court to recover these expenses. *D*, having been personally cited under rule 108,[2] caused the suit to be removed to a Federal District Court on the basis of diversity of citizenship. *Held*: A non-resident natural person whose only contact with the forum is ownership of an interest in oil leases within the forum cannot be subjected to in personam jurisdiction based upon the minimum contacts theory without violating the due process clause of the fourteenth amendment to the United States Constitution. *Roumel v. Drill Well Oil Co.*, 270 F.2d 550 (5th Cir. 1959).

Until 1878 federal and state courts, unhindered by constitutional restrictions, utilized a liberal policy of permitting suits against non-residents.[3] In that year the Supreme Court in *Pennoyer v. Neff*[4] made a fundamental change by limiting the jurisdiction[5] of state courts in rendering in personam[6] judgments to actual physical power over the defendant. Consequently, strictly in personam jurisdiction could not be obtained over a *non-resident* by service of process outside the forum.[7] Even if a court attempted to assert authority, the judgment rendered would not be enforceable in other states because full faith and credit[8] is inapplicable to judgments which fail to meet the re-

[1] Plaintiff also unsuccessfully asserted an in rem action. 270 F.2d at 553. There is no mention in the opinion of an action quasi in rem.

[2] Tex. Rules Civ. Pro. Ann., rule 108 (1955).

[3] See Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens, 65 Yale L.J. 289, 292 (1956).

[4] 95 U.S. 714 (1878).

[5] Although it had been asserted that the due process requirement was not the same for judicial jurisdiction as opposed to "legislative jurisdiction," Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956), the Court in Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950) implied that the factors in that case which permitted judicial jurisdiction also were sufficient to meet the requirements for legislative jurisdiction. See Foster, Personal Jurisdiction Based on Local Causes of Action, 1956 Wis. L. Rev. 522, 567 (1956). In this Note, "jurisdiction" shall mean "judicial jurisdiction."

[6] This Note does not purport to deal with actions in rem, see 1 Ehrenzweig, Conflict of Laws 80 (1959), or actions quasi in rem, id. at 99. However, at least one writer has espoused the idea that the mechanical distinctions between in rem and in personam should be abolished in our present-day mobile society where property increasingly becomes intangible and the fictional res correspondingly more nebulous. See Traynor, Is This Conflict Really Necessary?, 37 Texas L. Rev. 657, 663 (1959).

[7] Pennoyer v. Neff, 95 U.S. 714, 733 (1878).

[8] U.S. Const. art. IV, § 1.

quirements of the due process clause.[9] The rigidity of the *Pennoyer* rule, which greatly emphasized both the principle of federalism[10] and the fear of causing appreciable inconvenience to non-resident defendants,[11] has resulted in a series of exceptions[12] to this absolute pronouncement which has been made applicable to non-resident corporations as well as non-resident individuals.[13] As to individuals, the major exception[14] was the widespread use of non-resident motorist statutes.[15] In regard to corporations, the Court successively accepted and then rejected "implied consent,"[16] "presence,"[17] and "doing business"[18] as tests to be met before permitting the state to exercise jurisdiction over a non-resident corporation.

[9] Pennoyer v. Neff, 95 U.S. at 734-35 (1878); U.S. Const. amend. XIV, § 1. Thus, the legal principle primarily responsible for maintaining the restrictions on state judicial power is that which prevents a state from exercising in personam authority over non-resident persons—natural or corporation—when it has failed to obtain personal jurisdiction over them. Sobeloff, Jurisdiction of State Courts over Non-Residents in Our Federal System, 43 Cornell L.Q. 196, 197 (1957).

[10] A salient feature of the federal system is the restriction on the states individually against extensions of power into other states. Ibid.

[11] See, e.g., Restatement (second), Conflict of Laws § 84(d) (Tent. Draft No. 3, 1956).

[12] See Kurland, The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts: From Pennoyer to Denckla: A Review, 25 U. Chi. L. Rev. 569, 578 (1958).

[13] In fact, the jurisdictional basis as to corporations has been broadened by the Supreme Court's increased willingness to concede their full "existence" in the forum state by a progressively liberal interpretation of the statutory requirement of "doing business." See Ehrenzweig, Pennoyer is Dead — Long Live Pennoyer, 30 Rocky Mt. L. Rev. 285 (1958).

[14] Minor exceptions included the transient rule, even when the defendant's presence was procured by the fraud or force of the plaintiff, e.g., Blandin v. Ostrander, 239 Fed. 700 (2d Cir. 1917); and voluntary submission, even though the defendant appeared for a purpose other than to attack the jurisdiction of the court, e.g., Western Life Indem. Co. v. Rupp, 235 U.S. 261 (1914); York v. Texas, 137 U.S. 15 (1890).

[15] From the doubtful premise that a state may preclude the use of its highways to non-resident individuals, it was thought to follow that a state might condition the use of the highways on receipt of consent to be sued in the state courts for any action arising out of the use of the highways. See, e.g., Hess v. Pawloski, 274 U.S. 352 (1927); Scott, Jurisdiction over Non-Resident Motorists, 39 Harv. L. Rev. 563 (1926).

[16] The consent thesis rested on the proposition that since a foreign corporation could not carry on business within a state without the permission of that state, the state could impose as a condition of engaging in business within its borders a requirement that the corporation appoint an agent to receive service of process within the state. Compare Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855) with St. Clair v. Cox, 106 U.S. 350 (1882). The major defects of this doctrine were recognized in International Shoe Co. v. Washington, 326 U.S. 310 (1945). See Annot., 44 A.L.R.2d 416 (1955).

[17] Bank of America v. Whitney Cent. Nat'l Bank, 261 U.S. 171 (1923); New England Mut. Life Ins. Co. v. Woodworth, 111 U.S. 138 (1884). The weakness of this theory was exposed by Judge Hand in Hutchinson v. Chase & Gilbert Inc., 45 F.2d 139 (2d Cir. 1930), and also in the International Shoe case, supra note 16.

[18] St. Louis Sw. Ry. v. Alexander, 227 U.S. 218 (1913); see Rothschild, Jurisdiction of Foreign Corporations in Personam, 17 Va. L. Rev. 129 (1930). In reality, the two major theories ("consent" and "presence") merged into this third theory and consequently, the International Shoe case, 326 U.S. 310 (1945), became the coup de grâce for the "doing business" theory also. Kurland, supra note 12, at 68. But see 1 Ehrenzweig, Conflict of Laws 113 (1959) where it is stated that although the "doing business" test was "still apparently assumed in the International Shoe case, it was soon abandoned in Travelers Health Assn. v. Virginia, 339 U.S. 643 (1950)."

The actual dilemma underlying judicial efforts to formulate a rationale for in personam jurisdiction lay in the fact that the doctrines were borrowed from laws relevant to wholly independent sovereignties rather than jurisdictions joined in a federation.[19] Unfortunately, *International Shoe Co. v. Washington,*[20] which discarded the above three tests (*viz.*, implied consent, presence, and doing business), served to destroy existent doctrine rather than to establish a new criterion for the courts to follow. Nevertheless, *International Shoe* is given credit for originating the minimum contacts doctrine,[21] which has been extended to permit a state to entertain proceedings against a foreign corporation doing business within the state without a license, even though the cause of action sought to be enforced did not arise out of the corporation's activities within the state.[22] When the minimum contact doctrine was recently construed to encompass a single transaction by mail,[23] it was not clear whether there could ever be contact so slight as to constitute a denial of due process if jurisdiction were asserted.[24] The latest relevant Supreme Court decision, *Hanson v. Denckla,*[25] emphasized the limitation to the minimum contacts doctrine, but no fundamental change was made in the Court's standard for determining the sufficiency of contacts, and it remains the same as that developed in the *International Shoe* case—

[19] Sobeloff, supra note 9, at 197.

[20] 326 U.S. 310 (1945).

[21] It is consistent with due process for a state to extend its jurisdiction over those having minimum contacts with the forum. Id. at 319.

[22] Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). See Recent Decisions, 50 Mich. L. Rev. 1381 (1952). See also Annot., 2 L. Ed. 2d 1664, 1670 (1958). The minimum contacts doctrine has been extended to individuals. See, e.g., State ex rel. Weber v. Register, 67 So. 2d 619 (Fla. 1953), where a non-resident's sale of an orange grove within the forum state constituted a sufficient contact with the forum to permit in personam jurisdiction over him.

[23] McGee v. International Life Ins. Co., 355 U.S. 220 (1957), Case Note, 12 Sw. L.J. 381 (1958); Note, 36 Texas L. Rev. 658 (1958). It has been suggested that possibly, the McGee decision, permitting jurisdiction over "one act" transactions, may be limited to defendants which, like insurance companies, are carrying on activities subject to a special scheme of state regulation. See, e.g., Brown, The Supreme Court 1957 Term, 72 Harv. L. Rev. 77, 196 (1958).

[24] See, e.g., Recent Decisions, 43 Minn. L. Rev. 569 (1959). In Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951), It was held that the negligent repairing of a roof within the forum state was a sufficient contact to permit in personam jurisdiction over a non-resident corporation.

[25] 357 U.S. 235 (1958). See also, Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957). It should be pointed out that there are several distinctions between the Hanson case and the McGee case other than the degree of contact with the forum state. See Recent Decisions, supra note 24. As an indication that the flexible transgression from Pennoyer to International Shoe was not without limits, the Court in the Hanson case pointed out that "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." 357 U.S. at 251.

"the traditional conception of fair play and substantial justice."[26] Consequently, the Court had indicated those factors to be considered in deciding personal jurisdiction, but it had not explained how each factor was to be weighed in combination with the others.[27]

In holding that defendant's contacts with the forum state were insufficient to subject him to the minimum contacts doctrine,[28] the court followed the established pattern of law, since at the time the cause of action accrued, Texas had failed to legislate in order to take advantage of the jurisdictional flexibility permitted by the minimum contacts doctrine.[29] Other than Texas' non-resident motorist statute[30] and its Texas Business Corporation Act,[31] the only applicable statutes[32]

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[26] 326 U.S. at 320. Still of importance was another pronouncement in the International case that it is the quality and nature, rather than the quantity, of corporate activities that is material. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[27] Kurland, supra note 12, at 86.

[28] 270 F.2d at 555.

[29] See Wilson, In Personam Jurisdiction over Non-Residents: An Invitation and a Proposal, 9 Baylor L. Rev. 363 (1957). Clearly, courts are able to obtain in personam jurisdiction over non-residents after the forum state has enacted "minimal contacts" legislation when the same fact situation would not have permitted such jurisdiction prior to the enactment of the statute. See, e.g., Parmalee v. Iowa State Traveling Men's Ass'n, 206 F.2d 518 (5th Cir. 1953); Zacharakis v. Bunker Hill Mut. Ins. Co., 281 App. Div. 487, 120 N.Y.S.2d 418 (1953). See also Annot., 44 A.L.R.2d 416 (1955).

[30] Tex. Rev. Civ. Stat. Ann. art. 2039(a) (1950).

[31] Tex. Bus. Corp. Act Ann. art. 8.01(A) (1955) provides that no corporation shall have the right to transact business in this state unless it shall have procured a certificate of authority to do so, and 8.01(B) describes the activities that shall not be considered the transacting of business in Texas "for the purposes of the Act." Article 8.01(A) states that service can be had upon the officers of foreign corporations that are "authorized" to transact business. Article 8.01(B) provides that "authorized" foreign corporations shall appoint a registered agent for service and if there is a failure to do so, service may be made upon the Secretary of State and by registered mail to the non-resident corporation. The weaknesses of this statute are apparent: It does not cover the actions that might be brought against non-resident corporations or individuals who have not complied with the act and the non-complying corporations are left subject to other articles, infra note 31; article 8.01(B) does not consider "transacting business in interstate commerce" or "conducting an isolated transaction completed within a period of thirty days and not in the course of a number of repeated transactions of like nature" to be doing business under the act; article 8.01(B) provides for substituted service upon "authorized corporations" without language to clearly indicate whether or not such form of service could be used to obtain jurisdiction of non-resident authorized corporations who were engaged only in activities that smacked of interstate commerce or that consisted of sporadic transactions that could be completed in thirty days; and it obviously would be to the best interest of a foreign corporation to refuse to comply with the act in order to be immune from the substituted service provisions of it.

[32] Tex. Rev. Civ. Stat. Ann. art. 2031 (1950) provides for service of process in Texas on the officer or agent of a non-resident corporation, joint stock company, or association. Tex. Rev. Civ. Stat. Ann. art. 2031(a) (1950) requires all foreign corporations doing business in Texas to grant a power of attorney to the Secretary of State as its service agent, and upon failure to do so, provision is made for the surrender of judicial privileges and for tacit approval of substituted service methods. Tex. Rev. Civ. Stat. Ann. art. 1529 (1945) applies only to pecuniary foreign corporations and requires the filing of articles of incorporation in order to receive a permit to do business. It also provides a non-exclusive list of activities that are not considered the doing of business.

were not broad enough[33] to permit the exercise of authority over non-resident corporations to the extent permitted by recent judicial decisions. However, article 2031(b) became effective August 10, 1959,[34] and this legislation, extending the jurisdiction of Texas courts, plugged the numerous loopholes which had placed the local citizens at a disadvantage in their dealings with non-residents. Consequently, this statute has placed non-resident individuals and corporations on an equal footing, and Texas now has the statutory authority to exercise jurisdiction over either whenever the necessary minimum contacts with the forum state have taken place.[35] Since this same type of statute has been applied retroactively in other states,[36] it is probable that on remand the court's decision would be based on a new interpretation of the facts in terms of Texas' new minimum contacts statute. It is possible that the defendant's activities, consisting of a suit filed by him in a Texas court,[37] his working interest in a Texas oil lease, and his contractual obligation to pay his share of the maintenance and development expenses to the leased land, would be held to constitute sufficient minimum contacts with the forum state; hence, in personam jurisdiction over the defendant could be acquired by a Texas court. Moreover, to avoid the possible contention that article 2031(b) is inapplicable because the procedural requirements for notification under rule 108 and article 2031(b) are different, there is no valid reason why the plaintiff cannot have the defendant cited again under article 2031(b).

In enacting article 2031(b), Texas has taken advantage of the Supreme Court's present position by adopting legislation permitting

[33] These statutes do not, in terms, apply to individuals. Article 2031 applies only to such entities as are adequately represented by normally responsible local agents and it is not useful in reaching those corporations that maintain neither ascertainable places of business nor agents that may be reached by usual processes. Further, article 2031 leaves open the question of appropriateness of service. See Wilson, Jurisdiction Over Non-Residents, 22 Tex. B.J. 221 (1959).

[34] Tex. Rev. Civ. Stat. Ann. art. 2031(b) (Supp. 1959). Section 5 of this article provides for notification of suit by substituted service upon the Secretary of State, who is to forward a copy of the process to the defendant by registered mail.

[35] There has been considerable dispute as to whether non-resident jurisdiction can be based solely upon a single tort committed or contract made by an individual without violating the due process clause of the fourteenth amendment to the United States Constitution. With only rare exceptions, state and lower federal courts have held that jurisdiction so obtained does not violate the Constitution. See, e.g., Johns v. Bay State Abrasive Products Co., 89 F. Supp. 654 (D. Md. 1950); Nelson v. Miller, 11 Ill.2d 378, 143 N.E.2d 673 (1957); Smyth v. Twin State Improvement Co., 116 Vt. 569, 80 A.2d 664 (1951). Contra, Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956).

[36] E.g., Ill. Ann. Stat. ch. 110, § 17(1) (Smith-Hurd 1956). In Nelson v. Miller, supra note 35, Sec. 17 was applied retroactively to causes of action which arose prior to its effective date. Cf. Ogdon v. Gianakos, 415 Ill. 591, 114 N.E.2d 686 (1953).

[37] This refers to the non-resident defendant's suit in a Texas court to compel conveyance to him of the oil lease interest which he had acquired by means of the trustee's sale.

the forum state to liberalize its in personam jurisdiction over non-residents in order to further the protection of its own citizens. Considering the far-reaching consequences of the numerous exceptions to the *Pennoyer* rule, it is apparent that the law in this field has made almost a complete reversal from the views expressed in *Pennoyer v. Neff*.[38] It is characteristic of our legal institutions that the first break with the rigidity of the *Pennoyer* rule was made, not in terms of a bold adjustment of legal concepts to counter this restriction on state power, but in terms that purported to fit new exceptions into an established framework of jurisdictional concepts. It is unfortunate that a bold adjustment in the form of a doctrine of *forum non conveniens* was not developed. Nevertheless, the end result may be very nearly identical in that the relevant determinants under *forum non conveniens* are quite similar to the test which the courts are presently developing, *viz.*, a balancing of interests between the inconvenience imposed on the non-resident on the one hand and the interest of the state in affording judicial protection to its citizens on the other. Accordingly, future Texas decisions under article 2031(b) will probably place great reliance on the minimum contacts doctrine in order to permit a fair balancing of interests between the parties.

Rice M. Tilley, Jr.

Constitutional Law — Congressional Investigations — First Amendment Limitations on Power To Punish for Contempt of Congress

Petitioner, a former college teacher, was called as a witness before a subcommittee of the House Committee on Un-American Activities investigating Communist infiltration into the field of education. Following his refusal to answer questions as to his membership in and affiliation with the Communist Party, petitioner was convicted for contempt of Congress in the federal district court; the Supreme Court, in the light of *Watkins v. United States*[1] remanded the case to the circuit court (which had affirmed the judgment) for further consideration. Thereafter the Court of Appeals for the District of Columbia Circuit reaffirmed the conviction. *Held*: Where first amendment rights are asserted to bar congressional inquiries, resolution of the issue always involves a balancing by the courts of the competing private and public interests involved in the particular

[38] See Ehrenzweig, supra note 3, at 311.

[1] 354 U.S. 178 (1957).

circumstances. If the balance is struck in favor of the governmental interests, the inquiry does not offend the first amendment to the Constitution. *Barenblatt v. United States,* 360 U.S. 109 (1959) (5-4).

Congress has the power, implied from the necessary and proper clause of the Constitution, to make investigations related to matters with which it may deal directly.[2] However, the scope of this power may be broader than the field of permissible direct legislative action since information concerning matters on which it cannot directly deal may be of aid to Congress in exercising its valid authority.[3] Either house may conduct inquiries itself, or may delegate its powers (usually to committees and subcommittees).[4] Refusal of witnesses to cooperate in an investigation is considered contempt of Congress, punishable either by Congress through its own processes[5] or through judicial trial based on a statute providing punishment for contumacy before Congress.[6] The early contempt cases were concerned with the scope of investigative power in terms of inherent limitations of the source of that power,[7] but recently the emphasis seems to have shifted to considerations of the Bill of Rights as a restraint upon the legislative power of investigation.[8] However, thus far, only the privilege against self-incrimination and the due process requirement that the questions be pertinent to the subject matter under investigation have been consistently upheld as limitations upon the investigatory power of Congress.[9]

The first amendment protections of free speech, press, and association have also been invoked as a defense, both in contempt of Congress proceedings[10] and in state legislative contempt proceedings as a fundamental right incorporated by the fourteenth amendment.[11] These freedoms of expression are very closely allied since press and speech are merely differing media for the communication of ideas and effective advocacy of such ideas is enhanced

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[2] U.S. Const. art. I, § 8; McGrain v. Daugherty, 273 U.S. 135, 161 (1927).
[3] Gose, The Limits of Congressional Investigating Power, 10 Wash. L. Rev. 61 (1935).
[4] Barsky v. United States, 167 F.2d 241 (D.C. Cir.), cert. denied, 334 U.S. 843 (1948).
[5] Anderson v. Dunn, 5 U.S. (6 Wheat.) 61 (1821).
[6] 52 Stat. 942, 2 U.S.C.A. § 192 (1938).
[7] E.g., McGrain v. Daugherty, 273 U.S. 135 (1927); Kilbourn v. Thompson, 103 U.S. 168 (1881).
[8] E.g., Watkins v. United States, 354 U.S. 178 (1957); Barsky v. United States, 167 F.2d 241 (D.C. Cir.), cert. denied, 334 U.S. 843 (1948).
[9] See Watkins v. United States, supra note 8; Quinn v. United States, 349 U.S. 155 (1955).
[10] See, e.g., Watkins v. United States, 354 U.S. 178 (1957); United States v. Rumely, 345 U.S. 41 (1953).
[11] See, e.g., Uphaus v. Wyman, 360 U.S. 72 (1959); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

by group association.[12] They are all protected by the Constitution as fundamental, indispensable liberties[13] under the hypothesis that speech will rebut speech, propaganda will answer propaganda, and free debate of ideas will result in the wisest governmental policies.[14] However, as these rights are not absolute,[15] the question is not whether, but to what extent the first amendment permits suppression of free expression.[16] The first attempt to evolve a standard for determining when the first amendment protects a witness from punishment for contempt of Congress was an adaptation of the "clear and present danger" test.[17] This test requires that one be permitted to advocate any idea he wishes unless there is a "clear and present danger" that a substantive evil which Congress has a right to prevent will result therefrom.[18] Accordingly, the evil must be extremely serious and the danger highly imminent.[19] In an attempt to adapt this test to circumstances involving silence, the court in *Barsky v. United States*[20] substituted the requirement that the danger "be represented as being reasonably potential" rather than "clear and present." But, it was not until *United States v. Rumely*[21] that the Supreme Court acknowledged, by implication, first amendment limitations[22] upon congressional inquiries; and since *Rumely* the only test considered by the Court has been that of balancing the interests of the government against those of the individual. This is the "reasonableness" test which has been used both in the field of economic liberties and in other areas of personal liberties.[23] This test has been applied differently in the two areas. In the economic cases, once a valid governmental policy has been established, the actual balancing of interests by the courts has been largely nugatory;[24] whereas, in the area of personal liberties, the courts have, in the main, been very zealous in applying the balancing process.[25] When the test is applied to first amendment limitations on congressional inquiries, the in-

[12] N.A.A.C.P. v. Alabama, 357 U.S. 449, 460 (1958).
[13] Id. at 461.
[14] American Communications Ass'n v. Douds, 339 U.S. 382 (1950).
[15] Gitlow v. New York, 268 U.S. 652, 664 (1925).
[16] Schenck v. United States, 249 U.S. 47, 52 (1919).
[17] See Barsky v. United States, 167 F.2d 241 (D.C. Cir.), cert. denied, 334 U.S. 843 (1948).
[18] Schenck v. United States, 249 U.S. 47, 52 (1919).
[19] Bridges v. California, 314 U.S. 252, 263 (1941).
[20] 167 F.2d 241 (D.C. Cir.), cert. denied, 334 U.S. 843 (1948).
[21] 345 U.S. 41 (1953).
[22] Watkins v. United States, 354 U.S. 178 (1957).
[23] Berman v. Parker, 348 U.S. 26 (1954); Dennis v. United States, 341 U.S. 494 (1951); Miller v. Schoene, 276 U.S. 272 (1928). See Boudin, Congressional and Agency Investigations: Their Uses and Abuses, 35 Va. L. Rev. 143, 197-201 (1949).
[24] Berman v. Parker, supra note 23.
[25] Dennis v. United States, 341 U.S. 494 (1951).

vestigation will be deemed to have offended the first amendment only if the interest of the witness in not cooperating outweighs that of the government in conducting the inquiry.[26] However, the interest of the individual involves more than the privilege to speak as he chooses, for the first amendment gives, also, the freedom not to speak as the government chooses and freedom from compulsive disclosure of moral, political, or religious opinions.[27] Fear of exposure to public scorn and retribution for expressing unorthodox views and advocating unpopular causes may undoubtedly have the same coercive effect upon the exercise of first amendment rights as imprisonment or fines.[28]

The Court distinguished the principal case from *Watkins v. United States*[29] where the petitioner, as a witness, refused to answer certain questions which he objected to as not pertinent to the congressional inquiry. In that case, the Court, although discussing at length the vagueness of the congressional resolution authorizing the investigations, held that the petitioner's refusal to answer was justified on the ground that the questions posed were not pertinent. At first impression, it seemed that *Watkins* was perhaps an indication of a trend which would give more emphasis to first amendment limitations upon the investigatory powers of Congress, but actually the Court avoided this constitutional issue. Thus, the principal case is the first real indication of the attitude of the Court toward first amendment limitations on congressional inquiries. The majority based its holding on the balancing principle, *i.e.*, that Congress may abridge the first amendment if the governmental interest in the abridgement is greater than the individual's interest in exercising that freedom.[30] In deciding that the balance should be struck in favor of the government, the Court reasoned that the Communist Party cannot be considered as an ordinary political party because its tenets include the ultimate overthrow of the government by force and violence.[31] Hence, investigations in the field of Communist activities are permissible on the principle of the government's right of self-preservation.[32] The dissent, however, seems to recognize the balancing principle only in cases where *conduct* is sought to be regulated and speech is only indirectly affected.[33] The dissenters take the position

[26] 354 U.S. 178 (1957).
[27] Public Util. Comm'n v. Pollak, 343 U.S. 451, 468 (1952) (dissent).
[28] American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950).
[29] Watkins v. United States, 354 U.S. 178 (1957).
[30] Id. at 198.
[31] Carlson v. Landon, 342 U.S. 524 (1952).
[32] Dennis v. United States, 341 U.S. 494 (1951).
[33] Cantwell v. Connecticut, 310 U.S. 296 (1940).

that the real interests involved were not balanced by the Court, and that, *if* balancing were proper, the Court should have balanced the right of the government to preserve itself, not against the individual's right to refrain from revealing Communist affiliations, but against the interest of all citizens in being able to join organizations and advocate causes without later being subject to governmental penalties. It would seem doubtful, however, that a different concept of interests to be balanced would tip the scale in favor of the individual when Communist activities are involved.[34] Moreover, it has been suggested that, whatever the test, Congress itself must make certain procedural changes in the inquiries, *viz.*, (1) prohibition of photographs and broadcasts during the hearing and (2) the right to secure and examine a limited number of favorable witnesses and to cross-examine hostile witnesses, personally or by counsel.[35]

Recognition that a witness has a right to refuse to answer even pertinent questions in congressional investigations seems to be based neither on a right of silence nor of privacy, but rather on the individual's interest in being able to join organizations, advocate causes, and express unorthodox beliefs without fear of later being punished by the government through exposure to public scorn and retribution. Even though these rights should not be abridged easily, Congress must be allowed to investigate as an aid to intelligent and informed lawmaking. The problem of balancing these often conflicting interests becomes even more complex when the government is trying to protect itself against overthrow by essentially undemocratic forces. However, the balancing principle, as applied by the majority in the instant case, prescribes no standards for the exercise of discretion by the courts. Actually the application seems to be that employed in the area of economic liberties—once the valid purpose of "self preservation" is established, the balancing process becomes superficial. The application suggested by the dissent might be better inasmuch as it encompasses the idea that each time the balancing principle is employed, cognizance must be taken of *two* threats to our democratic form of government, *viz.*, the one alleged by the government and also the more subtle threat that the democratic structure of our government will be undermined by encroachments on first amendment freedoms. It may well be that more is lost than gained when undemocratic methods from within are used to combat undemocratic forces from without. A more desirable accommodation

[34] Dennis v. United States, 341 U.S. 494 (1951).

[35] Galloway, Congressional Investigations: Proposed Reforms, 18 U. Chi. L. Rev. 478 (1951).

of these interests might be reached if the balancing principle, as suggested by the dissent, would be applied only upon proof by the government that abridgement of first amendment freedoms is necessary to protect the government from some substantial evil, necessary in the sense of being essential because every other constitutional method of obtaining information has failed and time is now of the essence. However, it is not in the courts' power to resolve completely the problem, for much of the trouble seems to lie in the abuse of investigatory powers by certain committees. Only Congress can rectify this, perhaps by setting up codes of conduct for committees and promptly censuring any breach of such code or by providing procedural requirements which would afford witnesses and persons implicated by witnesses some of the safeguards inherent in a judicial trial. However, it appears that until the scope of this limitation is defined more clearly by the courts and until Congress regulates more definitely its investigating committees, witnesses may expect protection from the first amendment only when the government's interest is something less crucial than "self-preservation."

Earldean V. S. Robbins

Corporations — Corporate Combination — De Facto Merger and Stockholder Appraisal Rights

A Corporation negotiated to acquire *B* Corporation. The resulting agreement provided that *B* would assign all of its assets to *A*; *A* would assume all of *B's* liabilities and would issue stock to *B;* whereupon *B* would dissolve and distribute the stock to its sole shareholder. The board of directors of each corporation approved the transaction, and a favorable majority vote of the stockholders of *A* was obtained. However, dissenting stockholders of *A* brought suit against *B* alleging that the transaction constituted a de facto merger. On this basis the stockholders sought to be paid the fair market value of their shares under a Delaware statute allowing appraisal rights in the case of a merger. *Held*: Where stockholders of a purchasing corporation suffer no injury because the essential nature of an enterprise has not changed, there is no de facto merger; therefore, dissenting shareholders will be denied appraisal rights. As to these shareholders the transaction in legal effect constitutes a purchase of assets, even though the same transaction might constitute a de facto merger as to stockholders of the selling corporation. *Heilbrunn v. Sun Chemical Corp.*, —Del.—, 150 A.2d 755 (1959).

A corporate merger is deemed to occur when two or more corporations unite through a transfer of assets and liabilities into one of the corporations which continues in existence, the other corporations being absorbed therein.[1] However, mere purchase of another corporation's assets does not necessarily constitute a merger, especially when the seller maintains its separate existence and the consideration for the sale moves to the seller and not to its stockholders.[2] The corporate merger serves to unite stockholders as well as assets of the merging corporations, while the primary function of a corporate sale of assets, historically, was to facilitate the winding up of the selling corporation, the proceeds (usually cash or stock of the purchasing corporation) therefrom being transferred by the seller to its shareholders upon dissolution.[3] However, neither a merger nor a sale of assets occurs when two or more corporations or their shareholders merely exchange stock and all corporations continue an independent existence.[4]

In the case of merger or alienation of assets, early common-law principles required unanimous shareholder consent,[5] and unless a corporation was failing, a sale of all its assets for cash or securities would be enjoined or set aside on application of even one shareholder.[6] Modern needs of the corporate form of doing business prompted state legislatures to authorize corporate combination when approved by less than all shareholders,[7] but early decisions held that shareholders of a selling corporation who dissented from majority approval of a particular combination were entitled to recover the fair market value of their shares in the assets of the consolidated corporation.[8] This protection was based on the theory that each shareholder has a contractual right to have the corporation fulfill the purposes for which it was created, and any merger was deemed to force the stock of another corporation upon the dissenters, thereby destroying the origi-

[1] See Fidanque v. American Maracaibo Co., 33 Del. Ch. 262, 92 A.2d 311 (1952); 15 Fletcher, Corporations § 7153 (rev. ed. 1938).

[2] Chicago, S.F. & C. Ry. v. Ashling, 160 Ill. 373, 43 N.E. 373 (1895); 15 Fletcher, op. cit. supra note 1, at § 7044.

[3] Hills, Consolidation of Corporations by Sale of Assets and Distribution of Shares, 19 Calif. L. Rev. 349 (1931).

[4] Butler v. New Keystone Copper, 10 Del. Ch. 371, 93 Atl. 380 (1915). In effect, one corporation usually ends up a subsidiary of the other.

[5] See Levy, Rights of Dissenting Shareholders to Appraisal and Payment, 15 Cornell L.Q. 420 (1939).

[6] See, e.g., Abbot v. American Hard Rubber Co., 33 Barb. 578 (New York 1861); see also Comment, 72 Harv. L. Rev. 1132, 1133 (1959).

[7] Note, 48 Mich. L. Rev. 525 (1950); see, e.g., Del. Code Ann. tit. 8, § 251(c) (1953); Tex. Bus. Corp. Act Ann. art. 5.03(b) (1955).

[8] See, e.g., Barnett v. Philadelphia Mkt. Co., 218 Pa. 649, 67 Atl. 912 (1907).

nal investment without due process of law.[9] Subsequently, state legislatures adopted the remedies provided by courts of equity by enacting appraisal statutes which permitted dissenting shareholders to be paid the fair market value of their shares in the case of a corporate merger.[10] Accordingly, the distinction between a merger and a sale of assets took on great significance since some states allowed appraisal rights in the case of a corporate merger but not in the case of alienation of assets.[11] However, seeming compliance with one authorized method of corporate combination, (*e.g.*, sale of assets) was not recognized by the courts when the method used assumed standardized characteristics of another authorized device, (*e.g.*, statutory merger).[12] A combination of this nature was held to constitute a de facto merger, and dissenting shareholders were allowed to recover as if a statutory merger had occurred.[13]

The fact that the shareholders of the purchasing corporation were seeking recovery under a theory of de facto merger places the instant case in a somewhat unique category since dissenting shareholders of the selling corporation generally choose to seek appraisal rights.[14] Some courts, in deciding whether or not a de facto merger exists as to the dissenting shareholders of a selling corporation, have required certain mechanical elements of a merger to be present, *e.g.*, assumption of the liabilities of the selling corporation by the purchasing corporation;[15] dissolution of the seller upon completion of the transaction;[16] and distribution of the purchasing corporation's stock to shareholders of the selling corporation.[17] However, in view of the close similarity in form between a present-day merger and sale of assets,[18] the very recent cases appear to develop a new theory of de facto merger. Under this theory, the *economic consequences* of a transaction are considered for purposes of evaluating the gravity of the change in a shareholder's investment rather than certain stand-

[9] Lauman v. Lebanon Valley R.R., 30 Pa. 42 (1858); International & G.N. R.R. v. Bremond, 53 Tex. 96 (1880).

[10] See, e.g., Del. Code Ann. tit. 8, § 262 (1953); Tex. Bus. Corp. Act Ann. art. 5.11 (1957). This right of appraisal, however, is conditioned upon shareholder compliance with certain statutory provisions. See, e.g., Tex. Bus. Corp. Act Ann. art. 5.12 (1955).

[11] See Note, 107 U. Pa. L. Rev. 420 (1959).

[12] See, e.g., Finch v. Warrior Cement Corp., 16 Del. Ch. 44, 141 Atl. 54 (1928).

[13] Drug Inc. v. Hunt, 35 Del. 399, 168 Atl. 87 (1933); City of Altoona v. Richardson Gas & Oil Co., 81 Kan. 717, 106 Pac. 1025 (1910).

[14] 150 A.2d at 757.

[15] Troupiansky v. Disston & Sons, 151 F. Supp. 609 (E.D. Pa. 1957).

[16] Marks v. Autocar Co., 153 F. Supp. 768 (E.D. Pa. 1954).

[17] Helvering v. Winston Bros., 76 F.2d 381 (8th Cir. 1935).

[18] See Comment, supra note 6, at 1138.

ardized characteristics of the combination viewed in the abstract.[19] Thus, when the purchasing corporation in reality is the seller because of the greater size and value of the corporation appearing to sell, a dissenting stockholder of the purported purchasing corporation may recover the fair market value of his shares on the theory of de facto merger since in effect the nature of his investment has been completely changed.[20] On this basis, the instant case would appear to be decided logically since the economic realities of this transaction show no substantial alteration of investment of shareholders of the purchasing corporation.[21] Accordingly, the court failed to find a de facto merger even though standardized characteristics of a merger were present,[22] and the question of whether dissenting stockholders are interested in the purchasing corporation or the selling corporation would appear to be immaterial. Under the recent Texas Business Corporation Act, dissenting shareholders of both the purchasing and selling corporations are entitled to appraisal rights in the case of a merger whereas in a sale of assets, only dissenting shareholders of the selling corporation are entitled to the fair value of their shares.[23] It appears that this appraisal right is accorded the dissenting shareholder despite failure to show injury.[24]

When a majority of stockholders choose to approve corporate merger for the purpose of economic expansion or otherwise, and a dissenting stockholder is faced with the risk inherent in a modified venture plus the added contingency of receiving stock different from that which induced the original investment, legislative policy favoring appraisal rights would seem justified. Moreover, in view of the similarity between the form of a merger and a sale of assets, the better view would not permit a majority of stockholders to approve a sale of assets which secures the same result as a merger, thereby depriving a dissenting stockholder of appraisal rights under most state statutes. Following the suggestion of the instant case, where a dissenting shareholder is able to show a serious reduction in dividend rate, pro rata earnings, redemption price, or the dissolution preference of his shares, or that his investment has been gravely altered in any other respect, a statute might well allow appraisal rights regard-

[19] See Farris v. Glen Alden Corp., 393 Pa. 427, 143 A.2d 25 (1958); see also, Bloch v. Baldwin Lomomotive Works, 75 Pa. D. & C. 24 (Common Pleas 1950) (overruled by Pa. Stat. Ann. tit. 15, § 2852-311F, 908C (1957)).

[20] Farris v. Glen Alden Corp., supra note 19.

[21] 150 A.2d at 758.

[22] 150 A.2d at 757.

[23] Tex. Bus. Corp. Act Ann. art. 5.11 (1957).

[24] Leeds, Merger, Consolidation, Reorganization and Receivership Under the Texas Business Corporation Act, 3-A Tex. Rev. Civ. Stat. Ann. 490 (Appendix 1956).

less whether the transaction is deemed a merger or sale of assets. The Texas approach would seem to reach a desirable result when the transaction is deemed to be a merger in that an eighty percent majority vote of approval is required (thereby insuring that a great majority is in favor of accepting the risk of any future contingency which may follow from the combination) but any dissenting shareholder of the remaining twenty percent is entitled to appraisal rights regardless of the effect of the transaction upon his investment. However, the Texas statute poses the same problem encountered in the instant case in that a transaction which purports to be a sale of assets may deny appraisal rights to shareholders of the purchasing corporation even though the nature of their investment has been gravely altered. Thus, an amendment to the Texas statute may be in order abolishing the distinction between merger and purchase of assets for purposes of awarding appraisal rights.

Ed G. Ruland

Fire Insurance — Concurrent Insurance Clause — Effect of Breach

P procured a fire insurance policy from *D* and later obtained another fire policy upon the same property from another insurer. The second policy, obtained without *D's* permission, was purchased by *P* after receiving information that the policy with *D* was worthless. Both policies, drawn according to the Texas Standard Form Fire Policy, contained clauses requiring permission for additional insurance[1] and disclaiming liability if the hazard is increased or if any provision of the contract is being violated at the time of loss.[2] *P* sought recovery from *D* for a fire loss and *D* contended that the procurement of the second policy without *D's* permission prevented recovery on the first policy. *Held*: Where one Texas Standard Form Fire Policy is in effect when a second one is issued by a different insurer and both policies contain a prohibiton against additional insurance, the first policy remains effective and renders the second

[1] "If the co-insurance clause is not applied, no other fire insurance is permitted unless the total amount is inserted in the blanks which follow: Item No. 1_____; 2_____; 3_____; 4_____; 5_____."

[2] "Unless otherwise provided in writing added hereto, this company shall not be liable for loss accruing . . . (a) while the hazard is increased by any means within the knowledge or control of the insured, provided that such increase in hazard is not usual and incidental to the occupancy as herein described . . . (e) while any other stipulation or condition of this policy is being violated."

policy unenforceable if the second policy is obtained under a mistake of fact that does not increase the moral risk of over-insurance.[3] *American Ins. Co. v. Kelley*, — Tex. —, 325 S.W.2d 370 (1959).

The majority of concurrent insurance clauses[4] either limit additional insurance without a specific statement concerning the validity of such insurance,[5] or specifically prohibit other insurance whether it is valid or not.[6] Where the former clause exists, additional *unenforceable* insurance, by the better view,[7] does not invalidate the policy in question, even though the additional insurance is unenforceable because a like clause in it has been violated.[8] However, the latter clause has been construed to terminate liability, regardless of the enforceability of the additional insurance or the reason for its invalidity[9] unless the additional insurance is void on its face.[10] The purpose of these clauses is to prevent the increased moral hazard that may result from over-insurance,[11] although if the insured is unaware of the additional policy[12] or does not regard it as being in force,[13] the policy in question may be sustained.

Older Texas Standard Form Fire Policies have included a provision terminating liability upon the procurement of another insurance policy "whether valid or not,"[14] and Texas courts adhered to the prevailing view toward this type of clause, *viz.*, if violated, recovery on both policies was precluded.[15] Moreover, this clause has been

[3] Griffin, Norvell, and Hamilton, JJ., dissenting; Calvert, Walker, JJ., concurring on the basis of the opinion of the court of civil appeals, 316 S.W.2d 452.

[4] The Texas concurrent insurance clause is found in note 1 supra. The 1918 New York Standard Form Fire Policy contained the "whether valid or not" provision. The 1943 Revised New York Policy eliminated this provision and allowed the insurer to attach its own provisions concerning other insurance. By the mid-1950's, only Texas, New Hampshire, Minnesota, and Massachusetts had not adopted the revised form. See Vance, Insurance §§ 7, 144 (3rd ed. 1951).

[5] Sweeting v. Mutual Fire Ins. Co., 83 Md. 63, 34 Atl. 826 (1896).

[6] Heldreth v. Federal Land Bank, 111 W. Va. 602, 163 S.E. 50 (1932).

[7] Vance, op. cit. supra note 4, at § 144.

[8] Cornett v. Farmer's Mut. Fire Ins. Ass'n, 208 Iowa 450, 224 N.W. 524 (1929); Hubbard & Spencer v. Hartford Fire Ins. Co., 33 Iowa 325 (1871); Sweeting v. Mutual Fire Ins. Co., 83 Md. 63, 34 Atl. 826 (1896). Contra, Graham v. American Eagle Fire Ins. Co., 182 F.2d 500 (4th Cir. 1950).

[9] Home Ins. Co. v. Shriner, 235 Ala. 165, 177 So. 890 (1937); Heldreth v. Federal Land Bank, 111 W. Va. 602, 163 S.E. 50 (1932).

[10] Home Ins. Co. v. Shriner, supra note 9; Cox v. Home Ins. Co., 331 Mo. 10, 52 S.W.2d 872 (1932).

[11] American Ins. Co. v. Replogel, 114 Ind. 1, 15 N.E. 810 (1888); Continental Ins. Co. v. Riggs, 277 Ky. 361, 126 S.W.2d 853 (1939).

[12] Home Ins. Co. v. Shriner, 235 Ala. 165, 177 So. 890 (1937); Continental Ins. Co. v. Riggs, supra note 11.

[13] Dwelling House Ins. Co. v. Garner, 56 Ill. App. 199 (1894).

[14] 325 S.W.2d at 371.

[15] British Am. Assur. Co. v. Mid-Continent Life Ins. Co., 37 S.W.2d 742 (Tex. Comm. App. 1931); Providence-Washington Ins. Co. v. Levy & Rosen, 222 S.W. 216 (Tex. Comm. App. 1920).

construed to include a completely void policy,[16] and the intent,[17] knowledge,[18] or mistake[19] of the insured was no defense.[20]

The instant case is the first judicial construction of the present Texas Standard Form Fire Policy, which has eliminated the "whether valid or not" clause,[21] and it reverses the Texas position toward violation of the concurrent insurance clause. In altering the rule of *British Am. Assur. Co. v. Mid-Continent Life Ins. Co.*,[22] the elimination of the "whether valid or not" provision, and the consequent consideration of the motives of the insured were determinative.[23] Thus, the court reasoned that the "other insurance" contemplated by the initial insurer must be enforceable, and since the concurrent insurance clause in the second policy was violated in its inception, it never became enforceable and was not violative of the same prohibitive clause in the initial policy. However, since the purpose of the prohibition is prevention of the moral hazard that arises from over-insurance,[24] recovery is limited to an insured whose mental attitude toward the additional policy has not increased the risk of the insurer.[25] Although the reasoning of the court concerning the unenforceability of the second policy is in accord with the authority upon which it relies,[26] some courts construing similar contractual provisions have not placed express limitations of intent upon the right to recover if the second policy is held unenforceable.[27] Accordingly, other courts have held that an insured's motive[28] or awareness of the additional policy[29] does not bar recovery. The court in the instant case, however, reasoned that a requirement of good faith was necessary to protect the interests of the insurer.[30] Here, the facts indicate that the insured was not overly doubtful of his original insurer's stability, since he reported the loss, representing at that time that no other

[16] Southern Nat'l Ins. Co. v. Barr, 148 S.W. 845 (Tex. Civ. App. 1912); Wilson v. Aetna Ins. Co., 33 S.W. 1085 (Tex. Civ. App. 1896).

[17] National Union Fire Ins. Co. v. Dorroh, 133 S.W. 475 (Tex. Civ. App. 1911).

[18] Gross v. Colonial Assur. Co., 121 S.W. 517 (Tex. Civ. App. 1909).

[19] Fidelity-Phoenix Fire Ins. Co. v. Two States Tel. Co., 289 S.W. 726 (Tex. Civ. App. 1926).

[20] But see Home Ins. Co. v. Collins, 55 S.W.2d 898 (Tex. Civ. App. 1932) error ref.

[21] 325 S.W.2d at 370-1.

[22] 37 S.W.2d 742 (Tex. Comm. App. 1931).

[23] 325 S.W.2d at 372-3.

[24] American Ins. Co. v. Replogel, 114 Ind. 1, 15 N.E. 810, 812 (1888).

[25] 325 S.W.2d at 373.

[26] Id. at 372.

[27] See, e.g., Kossmehl v. Millers Nat'l Ins. Co., 238 Mo. App. 671, 185 S.W.2d 293 (1945); DeShields v. Ins. Co., 125 S.C. 457, 118 S.E. 817 (1923). But see American Ins. Co. v. Replogel, 114 Ind. 1, 15 N.E. 810 (1888).

[28] Cornett v. Farmer's Mut. Fire Ins. Ass'n, 208 Iowa 450, 224 N.W. 524 (1929).

[29] Hubbard & Spencer v. Hartford Fire Ins. Co., 33 Iowa 325 (1871).

[30] 325 S.W.2d at 373.

policies covered the property, but the court abandons its subjective inquiry into the motives of the insured at this point and finds that the representation the insured thought to be false was in fact true, because it had initially held that the second policy was unenforceable in its inception.[31] Thus, the instant case represents a new approach by Texas courts to the problem of violation of the concurrent insurance clause present in the Texas Standard Form Fire Policy.

The potpourri of results obtained on this problem is indicative of the difficulty courts confront in attempting to reconcile an obvious violation of policy terms with a strict attitude toward insurers and sympathy for policy holders. The court apparently recognized that if the second policy was not "other insurance" (and thus not a violation of the terms of the first policy), injustice could result to the first insurer since the moral risk may be increased by the additional unenforceable policy. Thus, it attempted to limit application of this construction by requiring a good faith purchase by the insured. Although this limitation seems to be a better reasoned rule than the rule of courts holding the first policy valid irrespective of intent, if the court is truly concerned with the moral hazard it would have been closer to reality in following the reasoning of earlier Texas cases barring recovery on both policies[32] since it is probable that even an innocent attempt to over-insure will increase the moral risk of the insurer.

Richard N. Countiss

Oil and Gas — Leases — Implied Covenants

An oil and gas lease, containing no express agreements for mandatory drilling, was executed in 1940 for a primary term of ten years. In 1956, the lessor sued to have the lease terminated because of cessation of production after the primary term and, in the alternative, for partial cancellation because of the lessee's alleged breach of the implied convenant to develop and of an implied covenant to explore. The lessee had completed a dual production oil and gas well in 1949 and acidized the well in 1950. The well was a marginal producer and no further drilling or reworking operations occurred until September 1956, subsequent to lessor's filing of the instant

[31] Id. at 374.

[32] See, e.g., Boatner v. Providence-Washington Ins. Co., 241 S.W. 136 (Tex. Comm. App. 1922); Boatner v. Home Ins. Co., 239 S.W. 928 (Tex. Comm. App. 1922).

suit, at which time the well was reworked successfully and production was thereby increased considerably. *Held, for the lessee on all three counts*: A covenant to explore (as distinguished from the covenant of additional development) is not implied in an oil and gas lease after production in paying quantities is obtained. *Clifton v. Koontz*, — Tex. —, 325 S.W.2d 684 (1959).[1]

As the purpose of an oil, gas, and mineral lease is to obtain production with payment of royalty,[2] the courts have found implied covenants therein more readily than in other types of contracts.[3] Where there are no express provisions relating to further drilling,[4] the covenant for additional development with reasonable diligence[5] is frequently implied after production in paying quantities has been obtained. It requires the lessee to continue development of the lease by drilling those wells which a prudent operator would drill under the circumstances.[6] However, courts do not require an operator to drill unless the lessor demonstrates that there is a reasonable expectation of profit after factors such as the interests of all parties, special circumstances affecting the particular property, and general conditions prevailing in the industry, have been considered.[7] The amount of profit which must reasonably be expected is that which will cover the costs of development and production and leave a reasonable profit for the lessee.[8] Moreover, testing of deeper horizons may be included in the development covenant[9] as well as further drilling into an already producing strata.[10]

Considerations of a separate covenant *to explore* have arisen because a few cases in some jurisdictions have removed the burden of proof as to potential profit from the lessor when an unreasonable

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[1] The primary holding of the case concerns the definition of "production in paying quantities" after the primary term.

[2] Gulf Prod. Co. v. Kishi, 129 Tex. 487, 492, 103 S.W.2d 965, 968 (1937).

[3] Brown, The Implied Covenant For Additional Development, 13 Sw. L.J. 149, 150 (1959).

[4] W. T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W.2d 27 (1929); Union Sulphur Co. v. Texas Gulf Sulphur Co., 42 S.W.2d 182 (Tex. Civ. App. 1931) error ref.

[5] Aye v. Philadelphia Co., 193 Pa. 451, 44 Atl. 555, 556 (1899).

[6] Texas Pac. Coal & Oil Co. v. Barker, 117 Tex. 418, 6 S.W.2d 1031 (1928). The mythical prudent operator is said to be one who acts with due regard to the interests of both lessor and lessee. Brown, supra note 3, at 160.

[7] Brewster v. Lanyon Zinc Co., 140 Fed. 801 (8th Cir. 1905); Summers, Oil and Gas § 135 (1927). See Walker, The Nature of the Property Interests Created by an Oil and Gas Lease in Texas, 11 Texas L. Rev. 399, 422-26 (1933).

[8] Fort Worth Nat'l Bank v. McLean, 245 S.W.2d 309 (Tex. Civ. App. 1951) error ref. n.r.e.

[9] Texas & Pac. Coal & Oil Co. v. Stuard, 269 S.W. 482 (Tex. Civ. App. 1924) error dism.

[10] Texas Pac. Coal & Oil Co. v. Barker, 117 Tex. 418, 6 S.W.2d 1031 (1928).

period of time lapses.[11] Accordingly, there is authority that an unreasonable delay in itself constitutes a prima facie case of breach;[12] when the delay is so unreasonable that the lessee appears to be holding the lease for speculative purposes only, a breach is conclusively established and the element of potential profit becomes immaterial.[13] The decisions which remove potential profit as a requirement are said to be following a "modified" prudent operator standard.[14] Advocates for the proposition that there is a separate implied covenant to explore reason that the injury to the lessor in being deprived for an unreasonable period of an opportunity to acquire exploration by another lessee is distinguishable from loss of potential royalties or damage by drainage, *i.e.*, where the lessee fails to perform additional development.[15] Thus, some cases have mentioned a duty to explore both when the issue concerns testing of deeper strata than that from which production has been obtained[16] and when the lessor wishes to obtain additional development from producing strata.[17] This argument is based on the theory that a prudent operator will often *explore* with no guarantee of a reasonable chance for profit whereas he will be more cautious in *developing*.[18] Because of these distinctions, it has been maintained that a separate covenant to explore has actually been enforced and now only needs to be recognized.[19] Others contend, however, that the exploration duty mentioned in cases is not distinguishable from that of development but rather contained therein; therefore, development is the only implied covenant that is needed.[20]

The only Texas decision which expressly recognizes an implied covenant of further exploration regardless of expected profit is that of the court of civil appeals in *Willingham v. Bryson*.[21] The supreme

[11] Sauder v. Mid-Continent Petroleum Corp., 292 U.S. 272 (1934); Doss Oil Royalty Co. v. The Texas Co., 192 Okla. 359, 137 P.2d 934 (1943).

[12] Nolan v. Thomas, 228 Ark. 572, 309 S.W.2d 727 (1958); Doss Oil Royalty Co. v. The Texas Co., supra note 11.

[13] Sand Springs Home v. Clemens, ___ Okla. ___, 276 P.2d 262 (1954).

[14] Jones, Rights and Remedies For Non-Development and Failure to Offset (Legal Aspects), Southwestern Legal Foundation Fourth Annual Inst. on Oil & Gas L. & Tax., 57, 67-70 (1953).

[15] Meyers, The Implied Covenant of Further Exploration, 34 Texas L. Rev. 553, 555 (1956).

[16] Trust Co. v. Samedan Oil Corp., 192 F.2d 282, 284 (10th Cir. 1951).

[17] Sauder v. Mid-Continent Petroleum Corp., 292 U.S. 272 (1934); Sinclair Oil & Gas Co. v. Masterson, 271 F.2d 310 (5th Cir. 1959).

[18] Meyers, supra note 15, at 557.

[19] Meyers, The Covenant of Further Exploration: A Comment, 37 Texas L. Rev. 179, 180 (1958).

[20] Brown, The Proposed New Covenant of Further Exploration: Reply to Comment, 37 Texas L. Rev. 303, 322-31 (1959).

[21] 294 S.W.2d 421 (Tex. Civ. App. 1956). The court held that the lease was cancelled unless the lessee commenced drilling to a deeper sand, the existence and potential production of which were unknown.

court in the principal case expressly overruled the *Willingham* case,[22] and thus definitely negatived the existence of a separate implied covenant to explore in Texas. Accordingly, the covenant *to develop* is apparently regarded as sufficient protection for the lessor and exploration is merely one aspect of development.[23] Moreover, the decision in the principal case is salutary for, if the court had recognized the suggested covenant and its requirement to drill regardless of expected profit, the prudent operator standard established by stare decisis would have been eradicated and not merely "modified."[24] Burdening the lessee with an absolute duty to drill when he has no reason to expect a profit would be far more than requiring him to exercise reasonable diligence.[25] Decisions which inflict this burden on the lessee usually stress a public policy against a lessee's inactivity over an unreasonable time, but it has been suggested that the intent of the parties should determine implied covenants.[26] In holding that the lessor must show that the lessee had not acted prudently, the court recognized reasonable expectation of profit as essential under the facts of the instant case and held that the lessor had not shown cause for such expectation. However, the court expressly declined to pass on questions where an unreasonable length of time has elapsed or where a very large tract is held by production from a small area.[27] Hence, it is questionable whether the court would deem such conduct by a lessee a breach of the prudent operator standard, although the lessor has not shown that profit can reasonably be expected from further drilling.

Since the court in the instant case has rejected the position that a separate implied covenant of exploration will be recognized in Texas, it would seem that lessors may obtain further development after initial production only by enforcing the implied covenant to develop. However, the court did cast doubt on the prudent operator test of the *development* covenant. Does the court intend that a profit motive be an essential element of the hypothetical prudent operator in all factual situations, or just under facts like these where no unreasonable delay or vast acreage is involved? This question being unanswered, it is doubtful whether a showing of potential profit will be necessary in all cases in order to have a prima facie case of breach in Texas. Equitable principles will probably control whenever a lessee

[22] 325 S.W.2d at 696.
[23] See Discussion Note, 6 Oil & Gas Rep. 1099 (1956).
[24] See Brown, supra note 20, at 326.
[25] See Jones, supra note 14, at 69.
[26] Discussion Note, supra note 23.
[27] 325 S.W.2d at 696.

flagrantly disregards implied obligations. Cases cited by the court imply that the fictitious prudent operator, who acts with the interests of both lessee and lessor in mind, is the test in determining a breach irrespective of the facts. The principal opinion is not so broad. Accordingly, one may conclude that the burden of proof of potential profit was on the lessor because the time lapse was not unreasonable and the tract was not very large. It follows that the principal case is precedent for future *development* cases only when the factual situations are very similar.

Charles R. Johnson

Taxation — Accrued Income — Taxability of Vehicle Dealers' Reserves

The taxpayers are automobile and trailer dealers who utilize the accrual method of accounting. Their customers generally purchase the vehicles on a credit basis, whereby they make a down payment and execute an assignable or negotiable instrument payable to the dealer which represents the balance of the purchase price plus insurance and a "finance charge." The dealers discount these instruments "with recourse" to finance companies under contracts which provide for immediate payment to the dealers of a major portion of the purchase price and retention by the finance companies of the remainder. The finance companies credit the amount retained to a "dealer's reserve" account in the name of the dealer for the purpose of securing performance by the dealer of his obligations, *viz*, guarantee of payment of the instrument and other liabilities to the finance company. The companies remit the amount in the reserve to the dealers as their obligations are discharged. During the taxable years involved, the dealers included in their gross income the cash which they received in the year of sale but did not include amounts which the finance companies had credited to the reserve accounts in their names. The Commissioner proposed a deficiency assessment of these amounts. *Held*: Accrual basis vehicle dealers realize taxable income of amounts credited to "dealer's reserve" accounts in the year in which they are credited. *Commissioner v. Hansen*, 360 U.S. 446 (1959).

Prior to 1916 income tax legislation recognized only a cash basis method of accounting,[1] and income was considered taxable only when

[1] 2 Mertens, Federal Income Taxation § 12.05 (1955).

it was actually received.[2] The Revenue Act of 1916 authorized the accrual method of accounting as a deviation from the cash basis,[3] and thus certain taxpayers realized taxable income when it accrued by generally accepted accounting principles rather than when it was actually received.[4] Accordingly, under the current rule a taxpayer who keeps his books on the accrual basis of accounting is allowed to use that method for tax purposes provided that income is clearly reflected.[5] As the accrual method of accounting signifies the right to receive income and not its actual receipt,[6] income is considered taxable to an accrual basis taxpayer when all the facts have occurred which fix its right of receipt and the amount thereof is reasonably ascertainable.[7] However, if a contingency exists which creates reasonable doubt as to the collectibility of the income[8] or prevents determination of the amount with reasonable certainty,[9] the income will not be considered accrued for tax purposes.[10] The contingency must be real and substantial, and mere vague possibilities affecting determination of the amount or collection of the income will not defer its accrual.[11]

The Commissioner's original position regarding credits to "dealer's reserve" accounts was that these amounts were taxable to accrual basis dealers in the period in which they were credited on the grounds that (1) the contingency of default on the part of the purchaser was not sufficient to postpone accrual, and (2) the dealer had the absolute right either to receive the amount in cash or to have it applied in reduction of his liabilities to the finance company.[12] The Tax Court pointed out that the second ground would not apply in situations where the dealers indorsed the instruments "without recourse,"[13] but sustained the Commissioner's first ground and affirmed

[2] Maryland Cas. Co. v. United States, 251 U.S. 342 (1920); Mutual Benefit Life Ins. Co. v. Herold, 198 Fed. 199 (D.C. N.J. 1912), aff'd, 201 Fed. 918 (3rd Cir. 1913), cert. denied, 231 U.S. 755 (1913).

[3] § 13(d), 39 Stat. 771 (1916).

[4] United States v. Anderson, 269 U.S. 422 (1926).

[5] Int. Rev. Code of 1954, § 446. If the taxpayer utilizes the cash basis of accounting, he realizes taxable income only when it is received, either actually or constructively. Treas. Reg. § 1.446-1 (c)(i)(1957).

[6] Spring City Foundry Co. v. Commissioner, 292 U.S. 182 (1934).

[7] Treas. Reg. § 1.446-1 (c)(ii)(1959).

[8] Brown v. Helvering, 291 U.S. 193 (1934).

[9] Security Flour Mills Co. v. Commissioner, 321 U.S. 281 (1944).

[10] Lucas v. American Code Co., 280 U.S. 445 (1930).

[11] Continental Tie & Lumber Co. v. United States, 286 U.S. 290 (1932); Universal Oil Products Co. v. Campbell, 181 F.2d 451 (7th Cir.), cert. denied, 340 U.S. 850 (1950).

[12] G.C.M. 9571, X-2 Cum. Bull. 153 (1931).

[13] Shoemaker-Nash, Inc. 41 B.T.A. 417 (1940). In these situations, the only remedy of the finance company upon default by the purchaser would be repossession of the vehicle and forcing the dealer to repurchase it.

the holding that the amounts in the reserves were taxable when credited whether the notes were "with" or "without" recourse.[14] The circuit courts, on the other hand, viewed reserves which could be diminished by charges for delinquent notes (*i.e.*, reserves created from the discount of "with recourse" notes) as subject to sufficient contingencies that amounts therein could not accrue as income to the dealers.[15] These courts held that taxpayers realized taxable income of amounts in "dealer's reserve" accounts only where the dealers indorsed the instruments "without recourse."[16] The Tax Court rejected this distinction as logically insupportable.[17] Subsequently the Commissioner revised his position by pointing out as a third ground for holding the amounts in the reserve taxable in the year of credit that each sale by the dealers involved two distinct transactions. The first transaction was the sale of the vehicle whereupon the dealer realized taxable accrued income; the second transaction was the discount of the instrument, which transaction was merely tantamount to an assignment of accounts receivable.[18] The Tax Court sustained this "two-transaction" theory and also maintained its view that there was an insufficient contingency to postpone accrual of income.[19] However, the majority of district and circuit courts continued to hold that the contingency was sufficient to defer accrual of the income.[20] Moreover, these courts took the position that each sale in essence involved one "three-cornered" transaction, rather than two distinct transactions.[21] Two circuit courts affirmed the determinations of the Commissioner and the Tax Court. The Sixth Circuit sustained the Commissioner's two transaction theory,[22] and the

[14] Shoemaker-Nash, Inc., supra note 13; Ray Woods Used Cars, Inc., 11 CCH Tax. Ct. Mem. 983 (1952).

[15] Keasbey & Mattison Co. v. United States, 141 F.2d 163 (3rd Cir. 1944).

[16] Id. at 167. The court pointed out that reserves under this type of indorsement are merely provisions for time of payment.

[17] Blaine Johnson, 25 T.C. 123, 130 (1955).

[18] Rev. Rul. 57-2, 1957-1 Cum. Bull. 17.

[19] Evans Motor Co., 29 T.C. 555 (1957).

[20] Texas Trailercoach v. Commissioner, 251 F.2d 395 (5th Cir. 1958); Modern Olds v. United States, 2 Am. Fed. Tax R.2d 395 (5th Cir. 1958). The Senate Finance Committee has reported its approval of a bill which will provide some relief to dealers who followed the holdings of these courts. Under this bill, the dealers are given two alternatives for paying the tax due on the income not previously reported. First, the dealers can treat the amounts as required changes in accounting methods. Under this alternative reserves built up prior to 1954 need not be reported, and only the excess of the current balance over the 1954 balance is to be reported. The second alternative permits computation of the deficiencies (or overassessments) which would arise if the income had been reported in the prior years, and the sum of these amounts (plus interest up to the time of selecting this alternative) may be paid in five annual installments, generally beginning in 1961. Staff of Senate Comm. on Finance, 86th Cong., 2d Sess., Report on Income Tax Treatment of Certain Dealers' Reserves (Comm. Print 1960).

[21] Texas Trailercoach v. Commissioner, supra note 20.

[22] Schaeffer v. Commissioner, 258 F.2d 861 (6th Cir. 1958).

Seventh Circuit adopted the Commissioner's original position.[23]

Without discussing whether the instant sales involved two distinct transactions, the Court in the principal case pointed out that the obligations to the finance companies were those of the dealers rather than the purchasers.[24] The Court then adopted the rationale of the Commissioner's original position (and that of the Seventh Circuit), holding that the dealers had a fixed right to receive the amounts in the reserves either in cash or by discharge of their liabilities to the finance companies; hence, these amounts were taxable in the year of credit.[25] As applied to the facts in the instant case this rationale is supportable both in logic and authority. Since a taxpayer receives income when an obligation is discharged by another for his benefit,[26] it would follow that a fixed right to have an obligation discharged constitutes accrued income to accrual basis taxpayers. However, the opinion left completely open the question of whether "finance charges" or other amounts which were credited to the reserve, but were not part of the purchase price, would accrue to the dealer. The Court pointed out that the dealers had failed to sustain their burden of proof in this respect, since they had neither defined "finance charges" nor shown how they were treated on the books of the finance companies.[27] It would seem that had the Court adopted the "two-transaction" theory, these charges would constitute accrued income as part of the contract price.[28] However, the dealers then would have been entitled to a deduction of a reasonable amount for bad debts expense.[29]

From the holding in the principal case it would seem that accrual basis dealers realize taxable income of amounts credited to dealer's reserve accounts in their names when: (1) the dealers have liabilities to the finance companies arising out of their guaranty that the vehicle purchaser will perform and other contractual obligations;[30]

[23] Baird v. Commissioner, 256 F.2d 918 (7th Cir. 1958), aff'd, 360 U.S. 446 (1959).

[24] 360 U.S. at 463.

[25] 360 U.S. at 465-66.

[26] See Douglas v. Wilcutts, 296 U.S. 1 (1935); Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929).

[27] 360 U.S. at 468.

[28] Wiley v. Commissioner, 266 F.2d 48 (6th Cir. 1959).

[29] Int. Rev. Code of 1954, § 166(c); cf. Schaeffer v. Commissioner, 258 F.2d 861 (6th Cir. 1958).

[30] In addition to the guaranty of payment by the vehicle purchaser, the dealers in the instant case had the following contractual obligations to the finance companies: (1) an obligation to purchase repossessed cars at an amount equal to the balance of the unpaid note; (2) an obligation to share a portion of a refund of the service charge in case the vehicle purchaser paid the note in full prior to maturity; and (3) an obligation to make good any deficiency incurred in the resale of repossessed cars. The finance companies would charge the amounts in the reserves in discharge of any of these obligations.

(2) the finance companies are to credit the amounts in the reserve directly out of the balance of the purchase price; and (3) the finance companies are to charge the amounts in the reserves in discharge of the obligations of the dealers. Obviously, many ostensibly similar contracts will not fall within this limited category, and in future litigation courts will be faced with questions left open in the principal case. For example, the Court failed to reach a final determination on the question of whether the reserves were subject to sufficient additional contingencies to defer accrual of the income. This question would be of vital importance if the contracts were changed in such a manner that the vehicle purchasers rather than the dealers were obligated to the finance companies.[31] Moreover, the question of taxability of the finance charges and other amounts not part of the balance of the purchase price remains unanswered.

Larry M. Lesh

Unincorporated Associations — Labor Unions — Member's Cause of Action for Conduct of Another Member

P, while a member of defendant union's local in Galveston, obtained employment in Dallas. The Galveston local granted *P* clearance to be admitted to the union's local in Dallas, but the union's business agent in Dallas refused *P* permission to assume the employment for which he had been accepted. The union offered *P* no remedy on his complaint and warned *P* that continued complaining would result in his dismissal from the union. *P* sued the union for damages resulting from the alleged wrongful conduct of the union's agent. The union filed a plea in abatement contending that an unincorporated association is not liable to one member for the conduct of another member. *Held*: A member of an unincorporated association has a cause of action against the association for intentional harm caused by another member if the association authorizes or ratifies the conduct of the wrongful member. *United Ass'n of Journeymen v. Borden*, ___Tex___, 328 S.W.2d 739 (1959).

At common law a labor union, as well as any other unincorporated association, is not a legal entity distinct from its individual mem-

[31] The Senate Finance Committee proposed an amendment to the new bill which would include this type of transaction. However, the court in the principal case expressly stated that it was considering only situations in which the obligations were those of the dealers, not the purchasers. 360 U.S. at 463.

bers, and therefore cannot sue or be sued in its common or associate name.[1] However, courts have utilized various theories regarding labor unions which have modified and curtailed the operation of this common-law rule.[2] Federal courts have held that labor unions achieve an entity status through necessary implication from federal statutes recognizing their legal existence.[3] Many states have adopted this view,[4] but other states have rejected it, reasoning that federal statutes cannot create a quasi-corporate entity for purposes of suit.[5] In the absence of the federal rule, jurisdictions with no statute relating to suability of unincorporated associations have developed other methods to circumvent the common-law rule.[6] Statutes enacted by a majority of states, allowing suits against unincorporated associations, fall within one of three categories: (1) statutes permitting some of the members to sue and be sued for the benefit of the whole;[7] (2) statutes which allow an officer to represent the membership in judicial proceedings; and (3) statutes which allow the associate name to be used as a party plaintiff or defendant.[8] The Texas statute falls within the third category, and provides that unincorporated associations "doing business within this state" may be sued in their common names.[9] Pursuant to this provision Texas courts have held that the statute consti-

[1] Moffat Tunnel League v. United States, 289 U.S. 113 (1933); Vance v. McGinley, 39 Mont. 46, 101 Pac. 247 (1909).

[2] Witmer, Trade Union Liability: The Problem of the Unincorporated Corporation, 51 Yale L.J. 40 (1941).

[3] United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922). This rule applies only where federal rights are involved. Fed. R. Civ. P. 17(b); Sperry Products, Inc. v. Association of Am. R.Rs., 132 F.2d 408 (2d Cir. 1942), cert. denied, 319 U.S. 744 (1943).

[4] Williams v. United Mine Workers, 294 Ky. 520, 172 S.W.2d 202 (1943); Varnado v. Whitney, 166 Miss. 663, 147 So. 479 (1933); McClees v. Grand Int'l Bhd., 59 Ohio App. 477, 18 N.E.2d 812 (1938).

[5] Forest City Mfg. Co. v. International Ladies' Garment Union, Local 104, 233 Mo. App. 935, 111 S.W.2d 934 (1938).

[6] E.g., waiver of the defense of non-suability if not timely asserted, Hotel, Restaurant & Soda Fountain Employees, Local 181 v. Miller, 272 Ky. 466, 114 S.W.2d 501 (1938); estoppel from assertion of non-suability where the association held itself out as subject to suit, Clark v. Grand Lodge of Bhd. of R.R. Trainmen, 328 Mo. 1084, 43 S.W.2d 404, 413 (1913); class actions in equity against a few members as representatives of the entire membership, AALCO Laundry & Cleaning Co. v. Laundry Linen & Towel Chauffeurs Union, Local 336, 115 S.W.2d 89 (Mo. Ct. App. 1938); or merely allowing actions against associations without the aid of statute, Syz v. Milk Wagon Drivers' Union, Local 603, 323 Mo. 130, 24 S.W.2d 1080 (1930).

[7] This type of statute incorporated the equity doctrine of virtual representation. Colt v. Hicks, 97 Ind. App. 177, 179 N.E. 335 (1932).

[8] Cole, The Civil Suability, At Law, of Labor Unions, 8 Fordham L. Rev. 29 (1939).

[9] Tex. Rev. Civ. Stat. Ann. art. 6133 (1925); Tex. Rules Civ. Pro. Ann. rule 28 (1941). Courts in other jurisdictions have either construed similar statutes to include labor unions only if they are "doing business" other than merely benefitting their members, St. Paul Typothetae v. St. Paul Bookbinders Union, Local 37, 94 Minn. 351, 102 N.W. 725 (1905), or included labor unions within the purview of the statute regardless of their activity, Deeney v. Hotel & Apartment Clerks' Union, 57 Cal. App. 2d 1023, 134 P.2d 328 (1943).

tutes the unincorporated association a legal entity,[10] and that "doing business" refers to property rights in which the membership is jointly interested.[11]

Courts have adopted various theories for imposing liability on unincorporated associations for conduct of their members. Upon one theory the action of the association is deemed the proximate cause of the injury to the third party.[12] Another theory considers the association to have conspired with the member to commit the unlawful act.[13] By a third theory, members are agents of the association, and the association is deemed liable for those acts of its members which it authorizes or ratifies.[14] Section 6 of the Norris-LaGuardia Act[15] provides that an association is not liable for conduct of its individual members unless it has participated in, authorized, or ratified the conduct. Thus, federal courts determine liability of associations for conduct of their members upon the third theory, *i.e.*, the agency concept, in cases within federal jurisdiction.[16] However, since states are free to determine liability of associations for conduct of their members in cases within their exclusive jurisdicton, each state may adopt whichever of the theories it deems desirable.[17] Texas courts generally have applied the agency test in actions for money damages against unincorporated associations for the conduct of their members.[18] The rationale behind the agency concept is that all members of the association are co-principals, and the wrongful member is their common agent.[19] Accordingly, courts have disallowed recovery from the association by one member for the negligence of another member on the ground that one principal cannot sue his co-principal for conduct of the common agent.[20]

The court of civil appeals allowed the suit by a member against the

[10] Brotherhood of R.R. Trainmen v. Cook, 221 S.W. 1049 (Tex. Civ. App. 1920) error ref.

[11] San Antonio Fire Fighters' Local 84 v. Bell, 223 S.W. 506 (Tex. Civ. App. 1920) error ref.

[12] United States v. Railway Employees' Dep't, AFL, 283 Fed. 479 (D.C. Ill. 1922); United Traction Co. v. Droogan, 115 Misc. 672, 189 N.Y. Supp. 39 (1921).

[13] Kroger Grocery & Baking Co. v. Retail Clerks' Ass'n, Local 424, 250 Fed. 890 (D.C. Mo. 1918); Alaska S.S. Co. v. International Longshoremen's Ass'n, 236 Fed. 964 (D.C. Wash. 1916).

[14] Great No. Ry. v. Great Falls Lodge, IAM, 283 Fed. 557 (D.C. Mont. 1922).

[15] 47 Stat. 71 (1932), 29 U.S.C. § 106 (1946).

[16] See United Bhd. of Carpenters & Joiners v. United States, 330 U.S. 395 (1946).

[17] Note, 63 Harv. L. Rev. 1035, 1040 (1950).

[18] International Printing Pressmen Union v. Smith, 145 Tex. 399, 198 S.W.2d 729 (1947).

[19] De Villars v. Hessler, 363 Pa. 498, 70 A.2d 333 (1950); Annot., 14 A.L.R.2d 473 (1950).

[20] Marchitto v. Central R.R., 9 N.J. 456, 88 A.2d 851 (1952); Hromek v. Gemeinde, 238 Wis. 204, 298 N.W. 587 (1941).

union in the principal case upon the theory adopted by federal courts, *viz.*, that labor unions achieve an entity status through necessary implication from federal statutes.[21] This court then held that the member was entitled to damages on the basis of cases allowing damages for wrongful expulsion and the Texas Right-to-Work Law.[22] The Supreme Court, however, treated the instant case solely upon agency principles. It recognized the general rule that a member of an unincorporated association has no cause of action against the union for conduct of another member, but reasoned that an exception to this rule exists, *viz.*, where the act complained of is adverse to the interests of the injured member and is ratified by the association.[23] However, two previous Texas decisions, the *Allen* case[24] and the *Atkinson* case, [25] had denied members recovery from their unions in similar situations. The court in the principal case distinguished the *Allen* case on the ground that it is proper to impute mere negligence rather than willful and malicious conduct of one member to the entire membership.[26] The concurring opinion pointed out that the *Atkinson* case, which involved intentional conduct on the part of an agent of the union, should be overruled to the extent that it contradicts the decision of the majority.[27] At least one other jurisdiction has utilized the reasoning of the principal case,[28] which is derived from the agency doctrine that a principal is not liable for conduct of the agent while pursuing interests adverse to those of the principal.[29]

If the doctrine of an agent acting adversely to his principal is analogous to a member of an unincorporated association acting adversely to the interests of another member, the principal case has reached the correct conclusion. Moreover, if an unincorporated association can be said to have a substantive legal entity status, *e.g.*, holding property in its name as an entity which is subject to execution for association debts, the rationale of a member suing an association is as acceptable as a shareholder suing the corporation. Although the Texas statute regarding suits against unincorporated associations constitutes the association an entity for procedural purposes,

[21] Borden v. United Ass'n of Journeymen, 316 S.W.2d 458, 460 (Tex. Civ. App. 1958); see United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922).

[22] Id. at 460.

[23] 328 S.W.2d at 742.

[24] Brotherhood of R.R. Trainmen v. Allen, 230 S.W.2d 325 (Tex. Civ. App. 1950) error ref., cert. denied, 340 U.S. 934 (1951).

[25] Atkinson v. Thompson, 311 S.W.2d 250 (Tex. Civ. App. 1958) error ref. n.r.e.

[26] 328 S.W.2d at 744.

[27] Id. at 750.

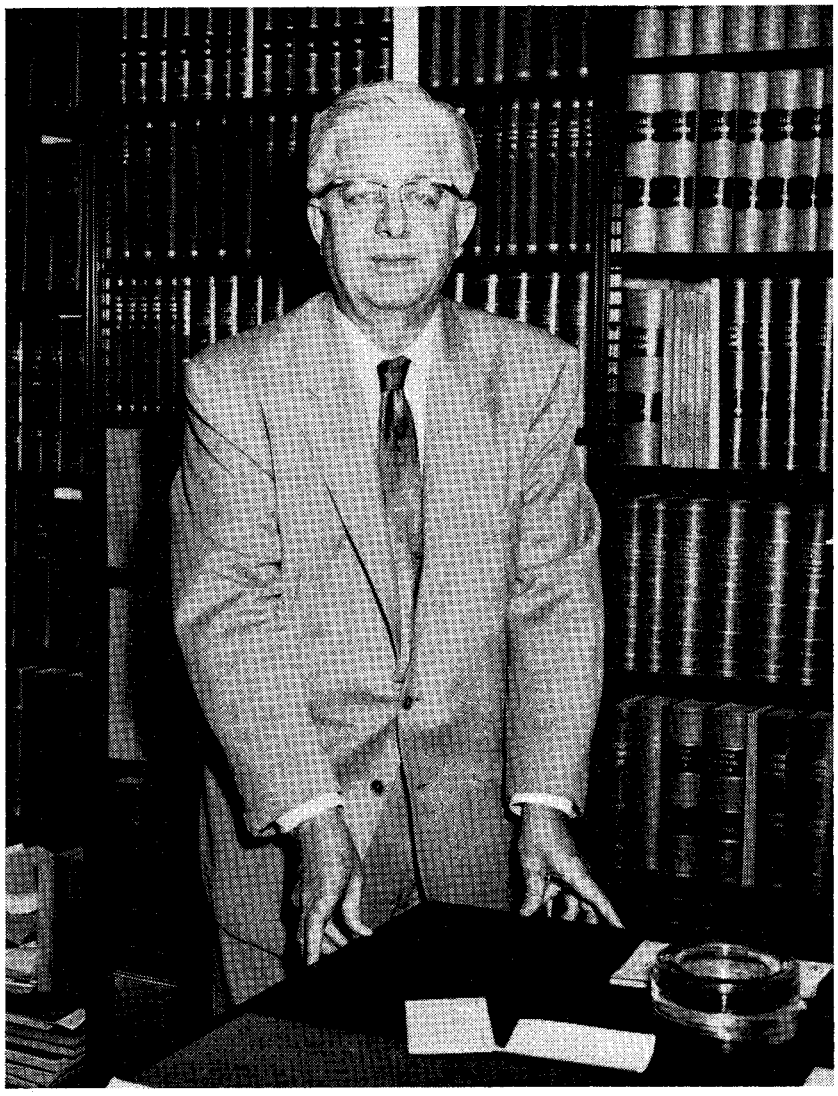
[28] Taxicab Drivers Local 889 v. Pittman, 322 P.2d 159 (Okla. 1957).

[29] Citizens State Bank v. Western Union Tel. Co., 172 F.2d 950 (5th Cir. 1949); 2 Mechem, Agency, § 1728 at 1311 (1914).

it would seem that Texas law regarding substantive liability of associations contemplates that associations, like partnerships, are nothing more than aggregates of their individual members. The statute provides that the "joint property of all the members" rather than the "property of the association" will be bound by judgment.[30] Thus, by permitting the plaintiff in the principal case a cause of action against his union the court has allowed plaintiff to subject his joint property to execution. Plaintiff is, in effect, suing himself. Admittedly, the nature of a labor union is sufficiently sui generis that special rules, such as the one in the instant case, are more appropriate than general unincorporated association rules. However, the court in the principal case failed to correlate the procedural right to sue an unincorporated association with the substantive liability of the association, *i.e.*, as an aggregate of its individual members rather than as a legal entity. It would seem that the proper analogy is between a suit by a member against his unincorporated association and a suit by a partner against his partnership, and the rule to be applied is that one partner cannot sue the partnership of which he is a member.

Larry M. Lesh

[30] "Where suit shall be brought against such company or association, and the only service had shall be upon the president, secretary, treasurer, or general agent of such company or association, and judgment shall be rendered against the defendant company, such judgment shall be binding on the joint property of all the stockholders or members thereof, and may be enforced by execution against the joint property; but such judgment shall not be binding on the individual property of the stockholders or members, nor authorize execution against it." Tex. Rev. Civ. Stat. Ann. art. 6136 (1925); see Nini v. Cravens & Gage Co., 253 S.W. 582, 587 (Tex. Civ. App. 1922).



WILMER DALLAM MASTERSON, JR.
September 11, 1908—May 20, 1960

In Memoriam

Professor Wilmer Dallam Masterson, Jr.

John W. Riehm†

Professor Masterson's death created a void in the law teaching profession that will be hard to fill, and was a great blow to his brethren on this faculty. Few men possess the combined talents of good judgment, technical mastery of a field, and teaching skill. Professor Masterson was one of those few. To those who associated with him, studied under him, or heard him lecture, it would serve no purpose to repeat the record of his accomplishments; suffice it to say that those of us who knew him best can look back to the days when he was with us and say we had the opportunity of associating with one of those rare individuals, a true Christian scholar.

† Dean, School of Law, Southern Methodist University.

PROFESSOR WILMER DALLAM MASTERSON, JR.

Joe E. Estes†

Wilmer Dallam Masterson, Jr. was my friend—and a friend of the bar and bench of the country. Much of his recognized merit in the field of law, both in practicing and in teaching, stemmed from his integrity as a human being.

Without ostentation, without pridefulness or dogmatism, he used his fine concise mind and encyclopaedic knowledge with patience, courteousness, frankness, and with the real generosity of a greatly human person. He knew and practiced the objectives of court procedure—the just, speedy, and inexpensive disposition of litigation—with the wisdom of broad understanding.

As a lawyer, I was in a number of cases with and against Wilmer D. Masterson, Jr. I found him a worthy adversary and an invaluable ally. I remember one case of tremendous consequence which went through all the courts,[1] in which he had read every case in the digest (literally hundreds) on void judgments. He had an analytical lucidity about his handling of a case, which, coupled with his patience in acquiring thorough knowledge of the controversy, fact and law, enabled him to evaluate essentials, sift out non-essentials, and come into court to use his rare kind of thrifty fluency in handling his case incisively on the real issues involved. His briefs were always short, concise—and convincing.

He never raised false issues. He was not a "brush fighter." He stipulated uncontroverted facts, and expertly employed the discovery process in getting the facts on critical issues. He abhorred vexatious time consuming formalities.

His interests, however, went far beyond success as a practicing lawyer. He was indeed a scholar—a practical scholar—who studied the fabric of the law with the same lucid thoroughness he applied to individual cases, saw the areas of weakness, and resultantly, Wilmer D. Masterson, Jr. will also be remembered for having had a hand in the improvement of the administration of justice.

As an Authority on Oil and Gas law and on Court Procedure he appeared before Bar Meetings all over our state and in many others. He was a leader of Institutes all over the country. Courts have used his writings as a basis for decision. As an illustration, the United States Court of Appeals for the Fifth Circuit stated:[2] "However, as

† Chief Judge, United States District Court, Northern District of Texas.

[1] Henderson v. Shell Oil Co., 143 Tex. 142, 182 S.W.2d 994 (1944), 146 Tex. 467, 208 S.W.2d 863, cert. denied, 335 U.S. 884 (1948).

[2] Haby v. Stanolind Oil & Gas Co., 228 F.2d 298, at 300-01 (5th Cir. 1955).

to absent parties, whose property interests are not bound by the decree, we agree with what has been so well stated by Professor Wilmer D. Masterson, Jr. in his excellent article presented before the 1954 Fifth Circuit Judicial Conference:

> 'For centuries, courts, particularly those exercising equity jurisdiction, have had and have exercised broad discretion on the matter of parties to lawsuits. If justice would be best and most conveniently served by having them brought in, then brought in they should be. By the same yardstick, if justice and convenience can best be served by limiting the controversy to that asserted by plaintiff against the named defendant, then it should be so limited.' "

His long service as a member of the Advisory Committee of the Texas Supreme Court on Rules of Civil Procedure attests his generosity to his profession as well as the recognition of his leadership in the field of Procedure.

Wilmer D. Masterson, Jr. will be remembered by the legal profession, Bench and Bar alike, as a fine lawyer and scholar who contributed much to the continuing development of his profession and to the solution of problems implicit in such development; as a great teacher who gave much to the creation of a whole generation of practicing attorneys.

By those who were so fortunate as to know him, he will be remembered as a lawyer, teacher, and man of such superior quality that all he touched reflected the greatness of the man.

PROFESSOR WILMER DALLAM MASTERSON, JR.

Board of Editors, Southwestern Law Journal

The students who have served on the staff of the *Southwestern Law Journal* are greatly indebted to Professor Masterson. As student editors, they have had the benefit of working with him in publishing the many outstanding articles which he contributed to the Journal[1] and of receiving his invaluable advice and counsel in the supervision of student writings. As students of the law school, they have received practical and thorough instruction in some of the most complicated areas of the law.

As a writer, Professor Masterson possessed the rare ability of presenting a complicated legal problem in an understandable manner and suggesting a legally sound and practical solution to that problem. As a supervisor of student writing, he spent many hours helping the student develop those abilities of legal analysis and expression that are essential to any lawyer. In the classroom, Professor Masterson's patience and understanding in allowing students to question and comment upon the concepts involved in his courses won him the deep admiration and respect of all his students. His primary concern in teaching was not to create legal stumbling blocks that left the student in confusion and uncertainty, but to remove the stumbling blocks and instill in the student a conception of the legal intricacies of the particular subject in such a manner that they were not easily forgotten. However, perhaps Professor Masterson's greatest asset, and the one most beneficial to those who worked with him and were taught by him, was his complete devotion to the law, and his constant desire to strengthen its weaknesses and remove its contradictions. He has earned a place in the minds and hearts of his students that will not be replaced.

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[1] The following Articles by Wilmer D. Masterson, Jr. have appeared in the Southwestern Law Journal:

Adversary Depositions and Admissions Under Texas Practice, 10 Sw. L.J. 107 (1956);
Double Fraction Problems in Instruments Involving Mineral Interests, 11 Sw. L.J. 281 (1957);
Marital Property Problems from an Oil and Gas Lessee's Standpoint, 4 Sw. L.J. 151 (1950);
Preparation and Submission of Special Issues in Texas, 6 Sw. L.J. 163 (1952);
A Survey of Basic Oil and Gas Law, 6 Sw. L.J. 1 (1952);
Texas Court Rule Amendments Which Will Become Effective January 1, 1955, 8 Sw. L.J. 377 (1954).
The Shut-In Royalty Clause in an Oil and Gas Lease, 12 Sw. L.J. 459 (1958).