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William C. O'Keefe
University of Michigan Law School

Edson R. Sunderland
University of Michigan Law School

Grover C. Grismore
University of Michigan Law School

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NOTE AND COMMENT

TAXATION—INTERNAL REVENUE ACT.—Under the federal Revenue Act of 1921 the taxable profit or deductible loss on sales of stock, bonds and other property is the actual profit or loss, if the purchase was after February 1, 1913. Act, § 202 (a). The tax payer (other than a corporation) may, however, at his option, pay a flat tax of 12½% on his profit, provided he has held the property more than two years, and provided further that he first deducts losses on other property, and provided further, that his total tax is at least 12½% of his total net income. See Act, § 206.

If the purchase was before March 1, 1913, the taxable profit is the actual profit, but not more than the profit compared with March 1, 1913, and the deductible loss is the actual loss, but not more than the loss as compared with March 1, 1913. The following rules show the application of the Act, using $1 as the original cost.

(1) Original cost $1; value 1913, $2; selling price $3—result, $1 taxable profit. Act § 202 (b) (1). Or the taxpayer may pay 12½% flat as stated above. Under the prior Act, trust estate stock worth $561,798.00, March 1, 1913, and sold for $1,280,996 in 1917 shows a taxable profit for the difference. *Merchants L. & T. Co.* v. *Smietanka*, 255 U. S. 509 (1921). Where a cor-

poration sells its assets in 1917 for $6,000 more than their value March 1, 1913, plus additions, less depreciation, the $6,000 is taxable. *Eldorado Coal Co.* v. *Mager,* 255 U. S. 522 (1921). Stock bought in 1912 for $500; worth $695 March 1, 1913, and sold for $13,931 shows a taxable profit of $13,236. *Goodrich* v. *Edwards,* 255 U. S. 527 (1921).

(2) Original cost $1; value 1913 fifty cents; selling price $2—result, taxable profit $1. See § 202 (b) referring back to (a). Or the taxpayer may pay 12½% flat as stated above. Under the prior Act, stock purchased for $231,300 in 1902; worth $164,480 March 1, 1913; and sold for $276,150 in 1916 showed a taxable profit of $44,850. *Walsh* v. *Brewster,* 255 U. S. 536 (1921).

(3) Original cost $1; value 1913 $3; selling price $2—result, no taxable profit. See § 202 (b) (3).

(4) Original cost $1; value 1913 $2; selling price $2—result, no taxable profit. See § 202 (b) (3). Under the prior Act, even though on liquidation the stockholders get twice what they invested, yet if the selling price was not more than the value on March 1, 1913, there is no tax. *Lynch* v. *Turrish,* 247 U. S. 221 (1918).

(5) Original cost $1; value 1913, $2; selling price $1—result, no taxable profit or deductible loss. See § 202 (b) referring back to (a). Under the prior Act there is no taxable profit on stock bought in 1909 and sold at the same price in 1916, even though the value was less on March 1, 1913. *Walsh* v. *Brewster,* 255 U. S. 536 (1921).

(6) Original cost $1; value 1913, fifty cents; selling price 75 cents—result, no deductible loss or taxable profit. See § 202 (b) (2). Under the prior Act stock received in exchange in 1912 for stock then worth $291,600; worth $148,635 March 1, 1913, and sold for $269,346 in 1916 shows no taxable profit. *Goodrich* v. *Edwards,* 255 U. S. 527 (1921).

(7) Original cost $1; value 1913, fifty cents; selling price $1—result, no deductible loss. See § 202 (b) (2) and (a).

(8) Original cost $1; value 1913, fifty cents; selling price fifty cents—result, no deductible loss. See § 202 (b) (2).

(9) Original cost $1; value 1913, fifty cents; selling price twenty-five cents—result, deductible loss of 25 cents. See § 202 (b) (2).

(10) Original cost $1; value 1913, $2; selling price 50 cents—result, deductible loss of 50 cents. See § 202 (b) referring back to (a).

CONSTITUTIONAL LAW—TAXATION—INCOME AS PROPERTY.—The words "property" and "income" are of such character that it is difficult to confine them within the inflexible boundaries of strict definitions. It has been stated that "a tax on incomes is not a tax on property, and a tax on property does not embrace incomes." BLACK ON INCOMES, (Ed. 3) § 36. In *Raymer* v. *Trefry,* (Mass. 1921), 132 N. E. 190, under a statutory proceeding, complaint was made for the abatement of an income tax assessed at the rate of 2½% per annum in respect of income received as associate professor in Harvard University. The Massachusetts constitution, Amendment 44, puts

income in two classes for purpose of taxation, and then reads: "The General Court may tax income not derived from property at a lower rate than income derived from property." Complainant contended that as income derived from annuities was taxed only 1½%, income not derived from property could be taxed no more than income derived from property (annuities) under the above provision. The court held the tax valid, saying: "Salary is income derived from property." It takes the position that "property" is to be considered in its broadest sense, and as contracts of labor and service are protected under the constitution as property rights, citing *Bogni* v. *Perotti*, 224 Mass. 152, the income from such property rights, *salary*, is also property. On the proposition that salary is income there seems to be no dispute. "Income," as defined by Mr. Webster, is "that gain which proceeds from labor, business, property, or capital of any kind; as * * * the proceeds of professional business, * * * salary." Webster's Int. Dic. 745, cited in *Mundy* v. *Van Hoose*, 104 Ga. 292, 299. Salary is income. *White* v. *Koehler*, 70 N. J. Law 526. Is income in this sense, then, derived from property? What constitutes property within the meaning of the Massachusetts constitution? The court holds that property is a word of large import, and includes even contracts of service, and hence income derived from such contracts is derived from property and under the former decisions of the same court is property. *Opinion of Justices*, 220 Mass. 613, 624. "The word 'property' literally taken, is *nomen generalissimum*, but it is not always so used." *Wells Fargo Co.* v. *Mayor*, 207 Fed. 871, 876. It "extends to every species of valuable right and interest." *Watson* v. *Boston*, 209 Mass. 18, 23. It "includes everything which goes to make up one's wealth or estate." *Carlton* v. *Carlton*, 72 Me. 115. "Labor or the right to labor is as much property as land or money." *Jones* v. *Leslie*, 61 Wash. 107. "But not in the sense that it can be liable to a property tax." *State* v. *Wheeler*, 141 N. C. 773. "Property is the right and interest which one has in land and chattels to the exclusion of others." Bouvier, citing 17 Johns. (N. Y.) 283. For further definitions see WORDS AND PHRASES, "Property."

Property has not only a broad general meaning, but also a more limited significance. Although it may be broad enough to cover the right to work, the question before the Massachusetts court is the same question that the Georgia court answered in *Savannah* v. *Hartridge*, 8 Ga. 23, 28, saying: "The point to be decided is, not whether income may not possibly be comprehended under the general name of 'property,' but *whether such is its meaning, and such was the design of the Legislature, in this Act?*" The objections to the decision are that the framers of the constitutional amendment may not have used the word in its general sense when referring to incomes, and "it is a cardinal principle of constitutional construction to give to a constitution and its provisions, the meaning, if possible of ascertainment, intended by its framers." *Laird* v. *Sims*, 16 Ariz. 521, 524. Under the view of the Massachusetts court there is practically nothing of value that is not property and as all income is derived from something of value, tangible or intangible, all income therefore is derived from property, and

the provision relating to income not derived from property, is nullified for it has nothing to be effective upon. By the court's construction of the word "property" the classification in the constitution is practically eliminated. It would seem more logical to say that the framers of the provision used "property" in a more limited sense, and did intend to make such a classification of incomes as their words indicate. "The words of the amendment are to be construed in such a way as to carry into effect what seems to be the reasonable purpose of the people in adopting them." *Attorney General* v. *Methuen,* 236 Mass. 564. There is also the objection that the income is not derived from the contract of service, but from performance under the contract. The contract gives a right to render services, but the right to compensation, to the income, comes into being by performance,—by rendering services, and hence although the contract is property, the income is not derived from that contract of service, but is the product of the services themselves. The question remaining is whether the services are property. "A man's right to labor, * * * or practice a lawful profession, may not be taken away from him or be restricted by any act of the State, not within its police powers, such act being considered a deprivation of property within the constitutional inhibition, State or Federal. Such cases are far from saying, however, that services actually rendered under such a contract are themselves property. It is one thing to say that a man's right to engage or sell his services may, for the purposes of its protection, be considered a species of property,—and quite another to assert that services actually rendered by one person to another are to be considered property in order to enlarge remedies for collecting the debt. The right to labor is one thing,—the service itself is quite a different thing." *Gleason* v. *Thaw,* 185 Fed. 345.

Although the Massachusetts case seems to have gone a greater length than any other in its use of the word "property," it is supported by *Eliasberg Bros. Co.* v. *Grimes,* 204 Ala. 492, holding that income is property within the meaning of the Alabama constitutional provision limiting the rate to a certain percentage of the value of the state's taxable property, and by *State* v. *Pinder,* 30 Del. 416, holding that income is property within the meaning of a provision in the Delaware constitution. But in *Waring* v. *Savannah,* 60 Ga. 93, it was held that income was not property within the meaning of a constitutional provision that taxes must be uniform. In *Glasgow* v. *Rowse,* 43 Mo. 479, an income tax was considered not a tax upon property within the meaning of a constitutional provision requiring taxation on property to be in proportion to its value, and in 1918 this decision was followed in construing another income tax statute, but by a court divided four to three. *Ludlow-Saylor Wire Co.* v. *Wollbrinck,* 275 Mo. 339. In the *Income Tax Cases,* 148 Wis. 456, the court held that property was one thing—income another. See also *Opinion of Justices,* 77 N. H. 611; *Wilcox* v. *Commissioners,* 103 Mass. 544; 11 A. L. R. 313, *Note;* WORDS AND PHRASES, First and Second Series, *Income, Property.*

From this brief review of the cases, it is apparent that the words are of such a general character, so flexible in their significance, that their true

meaning can only be determined by a decision of the highest appellate court arrived at after a full consideration of the purpose of the provision, the context, the history of the Constitution, and the intent of the Constitutional Convention, the Legislature, and the people. W. C. O'K.

DECLARATORY JUDGMENTS.—The subject of declaratory judgments has received a great deal of attention in the United States during the last few years, and the interest aroused has resulted in the enactment of statutes in a considerable number of states authorizing courts to declare the rights of parties in cases where relief of the conventional sort is inadequate, inconvenient or impossible. Such judgments may now be obtained in California, St. 1921, ch. 463; Connecticut, P. A. 1921, ch. 258; Florida, Laws 1919, No. 75; Hawaii, Laws 1921, Act 162; Kansas, Laws 1921, ch. 168; New Jersey, Laws 1915, ch. 116, Sec. 7; New York, Laws 1920, ch. 925, Sec. 473; Wisconsin, Laws 1919, ch. 242.

Following the suggestion first appearing in this REVIEW (16 MICH. L. REVIEW 69, December 1917) the Michigan legislature passed the first general act in this country giving courts of law and equity authority to render such judgments. PUB. ACTS, 1919, No. 150; 17 MICH. L. REV. 688. But when the first case under the new act came before the supreme court of Michigan the court itself raised the question of its constitutionality, and invited briefs from the attorney general and from some of the known supporters of the statute, upon the question whether it conferred upon the courts non-judicial functions. And in the opinion which the court rendered upon the case referred to, the statute was held to be vulnerable on the point suggested, and it was declared to be unconstitutional, Justices Sharpe and Clark dissenting. *Anway* v. *Grand Rapids Ry. Co.*, 211 Mich. 592. See comment on this case in 19 MICH. L. REV. 86, and 30 YALE L. JOUR. 161, and an article severely criticising it in 5 MINN. L. REV. 172, entitled DECLARATORY JUDGMENT, by JAMES SCHOONMAKER of the St. Paul bar.

After the decision in the *Anway* case, the legislature of Kansas, undaunted by the adverse action of the Michigan supreme court, enacted the Michigan Declaratory Judgment Act as a Kansas statute, using for the most part the exact provisions of the Michigan act, but adding the phrase "in cases of actual controversy," which did not appear in the Michigan law. See the text of this statute and comment thereon in 19 MICH. L. REV. 537.

Pursuing the course taken in Michigan, a constitutional attack was made on the Kansas law in the first case which arose under it. *State ex rel. Hopkins* v. *Grove* (Kan. 1921) 201 Pac. 82. By a remarkable coincidence this case was almost identical with the *Anway* case in Michigan. In the Michigan case the court was asked to declare whether the plaintiff had a right to enter into a contract which was possibly prohibited by a penal statute. In the Kansas case the court was asked to declare whether the defendant had a right to enter into an office from which he was possibly prohibited by a penal statute. In neither case had the party taken any legal step toward the questionable act,—in Michigan he had not entered into the contract, in

Kansas he had not entered upon the office. In each case the party wished an advance ruling by the court before risking the penalty.

The supreme court of Kansas unanimously upheld the validity of the declaratory judgment act and made the declaration asked. They referred to the *Anway* case as setting forth very fully the arguments against and in favor of its validity, in the majority and minority opinions, but deemed it unnecessary to go over the ground there covered. In regard to the view of the majority of the court as expressed in the *Anway* case, the Kansas court said:

"This view appears to us unsound, and to be the result of confusing declaratory judgments with advisory opinions and decisions in moot cases, and perhaps also of an inclination to treat a general practice that has been long established as having acquired the force of a constitutional guaranty."

The court said that the principle of the declaratory judgment had been practically approved in Kansas in the recent case of *State* v. *Allen*, 107 Kan. 407, where appeals by the state in criminal cases for the purpose of settling points of law, were held to be proper subjects for judicial cognizance. See comment on *State* v. *Allen* in 19 MICH. L. REV. 79.

The supreme court of Kansas has often given convincing demonstration that remedial progress is not incompatible with judicial soundness or constitutional security. The decision just rendered is a further proof that the American system of judicial supervision of legislation can be made workable in a land of rapid social development. E. R. S.

SPECIFIC PERFORMANCE AT LAW—RECOVERY OF FULL AMOUNT OF MATURED INSTALLMENT IN SPITE OF PRIOR REPUDIATION.—Every now and then one finds an illustration of what might with propriety be called judicial myopia,—an inability of the court to see through a phrase or a name to the substance behind it, with results which to the man in the street are apt, not without reason, to appear to lack that element of justice and common sense that has ever been the proud boast of the Common Law. In *George W. Blanchard & Sons Co.* v. *American Realty Co.* (N. H., 1921), 115 Atl. 4, P and D entered into a written contract which provided that "The vendor agrees to sell, and does hereby sell, and the purchaser agrees to buy, and does hereby buy, and agrees to pay for all the pulp timber on a certain tract of land." It was further stipulated that the timber should all be removed by the purchaser within five years, and that he should pay $100,000 for it in four equal annual installments, payment to be made on the first day of April in each of the four years immediately following the date of the agreement. D, the purchaser, cut a small quantity of timber and paid the first installment. When the second installment came due he was sued for it and a judgment rendered against him in *George W. Blanchard & Sons Co.* v. *American Realty Co.*, 79 N. H. 295. Soon thereafter, and before the third installment came due, D notified P that he had abandoned the contract. P refused to acquiesce in the abandonment and when the time for payment of the third installment arrived brought suit to recover the full amount thereof. It was held that

since the written contract was not under seal it could not, in view of the New Hampshire statute (P. S. c. 137, sec. 3), transfer any title to or interest in the trees; that what D got was a mere "license" to enter, cut trees and by that act acquire title to them; that the fact that he did not choose to exercise his license could not deprive P of his right to the full contract price since, "when the contract was executed nothing remained to be done by the plaintiff."

Even the most superficial analysis seems to indicate that the court's position is an inconsistent and untenable one. It has apparently misled itself by the use of the "convenient and seductively obscure" word, license,—a word which is commonly used indiscriminately with any one of a number of separate and distinct connotations. Among other things it may be used to refer to a mere gratuitous permission to go upon land, revocable at the pleasure of the land-owner and not imposing any duties whatsoever upon him. See *Nowlin Lumber Co.* v. *Wilson,* 119 Mich. 406; *Houston* v. *Laffee,* 46 N. H. 505. Or it may refer to a so-called permission, or right or series of rights to go upon land, acquired by contract, with a correlative contractual duty or series of contractual duties devolving upon the landowner Such a contract creates no rights or interest in the land, as the phrase is, and consequently the licensor has the power to break it by withdrawing the permission. However, such withdrawal of permission renders him liable to an action for damages for breach of contract (see *Wood* v. *Leadbitter,* 13 M. & W. 838; *King* v. *David Allen & Sons, Billposting, Ltd.,* [1916] 2 A. C. 54; 13 MICH. L. REV. 401) or perhaps to a suit in equity for specific performance if the remedy at law is inadequate. See *Hurst* v. *Picture Theatres Ltd.,* [1915] 1 K. B. 1. That such a contract is not fully performed by the licensor until the full period for which the permission is given has expired seems too clear for argument. It may be true, as stated by the court in the principal case, that the mere fact that the seller still has certain negative obligations does not prove that the contract is still executory (citing *Fletcher* v. *Peck,* 6 Cranch 87, 137), yet a more complete *non sequitur* could not be well imagined than to say that from this it follows that one to whom negative obligations alone attach has therefore fully performed his contract. In *McCrea* v. *Marsh,* 12 Gray 211, 212-213 it is said, *semble,* "Assuming that the plaintiff, by purchase of the ticket from the defendant, obtained permission to enter the family circle in the Howard Athenaeum, in his own person, and occupy a place there during the exhibition, yet it was 'only an executory contract.' It was a license legally revocable, and was revoked before it was in any part executed." See also *Buenzle* v. *Newport Amusement Assn.,* 29 R. I. 23; *Kerrison* v. *Smith,* [1897], L. R. 2 Q. B. 445. Again it may be used to mean what is called an irrevocable permission to go upon land, acquired either by a contract to convey or by an ineffectual attempt to convey an interest in land, construed as a contract to convey. Such contracts are specifically enforcible in equity and create an equitable interest which, in principle at least, is not distinguishable from an easement or a profit, as the case may be. *Duke of Devonshire* v. *Eglin,* 14 Beav. 530; *Ashelford* v.

Willis, 194 Ill. 492. In such a case also it seems quite clear that the licensor has not fully performed his contract in any true sense until the conveyance has been executed, unless we are willing to admit what the court in the principal case seems expressly to deny, *viz.,* that an interest in land may be created without a grant. It must be admitted that this is the effect of some of the cases, but in them there is present an element not present here, *viz.,* a promissory estoppel. See *Rerick* v. *Kern,* 14 S. & R. 267; *Ruthven* v. *Farmers Coöperative Creamery Co.,* 140 Ia. 570; TIFFANY, REAL PROPERTY, [Ed. 2], sec. 349d.

The court in the principal case, cavalierly and with a vagueness characteristic of cases involving licenses, fails to determine the exact nature of the rights acquired by D. That a correct solution of the problem involved depends upon such a determination as well as upon other factors, must be apparent. If the contract is to be interpreted as one intended to assure the grant of a profit, then we have the case of a contract to convey in which the money is to be paid in installments at definite dates, no time being set for making the conveyance. If to this situation we should apply rule number one laid down by Sergeant Williams in his note to *Pordage* v. *Cole,* 1 Wm. Saund. 319*i,* we should have to say that the promises to pay are absolute and independent, and that therefore P is entitled to recover the full amount of each installment as it matures, no matter what happens. However, it is doubtful whether this rule would be regarded as uniformly applicable by a modern court since it is often in conflict with the underlying theory of dependency of promises. See *e. g. Taul* v. *Bradford,* 20 Tex. 261. But cf. *Busch* v. *Stromberg-Carlson Tel. Mfg. Co.,* 217 Fed. 328, 332. Neither is it reasonable to hold that the promise to pay the last installment and the promise to convey are mutually concurrent conditions, as is usually held in cases involving a contract to convey a fee, *Beecher* v. *Conradt,* 3 Kernan 108; *Eddy* v. *Davis,* 116 N. Y. 247, for if this construction were placed upon the agreement in the principal case, it would follow that at the time set for conveyance there would no longer be anything to convey, since the last installment was not payable until very near the time when the profit was by its terms to come to an end.

The case seems more nearly analogous to those involving a contract to grant a leasehold estate at an agreed rental payable in installments at fixed dates. In these cases it is quite uniformly held in effect that the execution of the lease is a condition precedent to the right to rent. If the prospective lessee refuses to take a lease the landowner recovers simply the value of his bargain, i. e. the difference between the agreed rent and the rental value of the premises. *Silva* v. *Bair,* 141 Cal. 599; *Post* v. *Davis,* 7 Kan. App. 217; *Cleveland* v. *Bryant,* 16 S. C. 634; *Oldfield* v. *Angeles Brewing & Malting Co.,* 62 Wash. 260; Ann. Cas. 1912 C 1050 and note citing other cases. This is true even though the landlord has not acquiesced in the refusal to take a lease but has permitted the premises to remain vacant expecting to hold the prospective lessee for the rent. See *Oldfield* v. *Brewing and Malting Co., supra.*

On the other hand if D got simply a series of contractual rights to go upon P's land, then we have the question as to whether or not D could by repudiating the contract during the course of performance compel P to do all in his power to make the most out of the unexercised portion of the series of rights remaining at the time of the repudiation. In effect it becomes simply a rather unique case calling for an application of the principle which denies to an innocent contracting party the right to recover avoidable damages. That the mutual promises in such a contract are not wholly independent and absolute is apparent when we consider what the court would in all probability have done had P repudiated or failed wrongfully to fulfill its promise to permit D to cut timber unmolested. It would seem to be in accord with principle to require P to make a reasonable effort to dispose of the remainder of the series of unexercised rights after notice of repudiation or else to have their value deducted from the amount of damages recoverable in an action for breach of contract. The case from this point of view is not unlike the employment contract cases in which it is quite generally held that an employee who has been wrongfully dismissed is bound to make a reasonable effort to find other employment. *Maynard* v. *Royal Worcester Corset Co.*, 200 Mass. 1; *Hinchcliffe* v. *Koontz*, 121 Ind. 422; *Byrne* v. *School Dist.*, 139 Ia. 618. Compare also the cases involving correspondence school contracts in which tuition is made payable in installments at fixed dates, no time being set for the furnishing of instruction. According to the better rule in such cases, where the pupil repudiates his contract the school can recover simply damages for breach of contract and not the face value of the installments. *International Text Book Co.* v. *Martin*, 82 Neb. 403; *International Text Book Co.* v. *Roberts*, 168 Mich. 501 and cases therein cited. *Contra*, is *International Text Book Co.* v. *Martin*, 221 Mass. 1. As is said in *Payzu Ltd.* v. *Saunders*, [1919] 2 K. B. 581, "what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case."

To allow P to recover the full amount of the installments under these circumstances is simply to enforce a penalty. If specific performance is ever to be made available as a remedy at law certainly it should be confined to cases like those involving the sale of chattels (see 17 MICH. L. REV. 283) in which the legal machinery is adequate to secure at least a fair measure of justice for the defendant. G. C. G.