SMU | Dedman School of Law

SMU Law Review

Volume 21 | Issue 4 Article 16

January 1967

Recent Decisions

RECENT DECISIONS

Civil Procedure — Open-End Judgments in Water Rights Cases

Once again a writ of mandamus was filed in the famous Texas "Valley Water Case."[1] Relators contended that the purported judgment in the trial court, rendered by Judge Starley and allegedly disposing of claims to the water rights along the Rio Grande valley, was interlocutory, from which no appeal could be taken. The judgment contained an open-end provision stating that the court retained jurisdiction over the case to "modify, enlarge, or abrogate any portion" of the judgment.[2] Relators asked that the judge be compelled to proceed to final judgment. *Held, application denied*: The judgment is a final, appealable one so long as the open-end provision is confined to the "administration, allocation, and distribution of the water" in accordance with the adjudicated rights determined by the court. *State v. Starley,* 413 S.W.2d 451 (Tex. Civ. App. 1967).

In Texas a judgment, whether at law or in equity, must have the essential characteristic of finality before an appeal is allowed.[3] Finality is achieved when the judgment, viewed as a whole, disposes of all issues and parties in a case, either by express provision or by necessary implication.[4] An interlocutory judgment, on the other hand, leaves for the future a determination on some material issue in the case. The purpose of this rule is to protect the courts from vexatious, frivolous, and untimely appeals. Exceptions to this rule are provided by statute in Texas which specifically grants an appeal from an interlocutory judgment.[5] Without this statutory authority an appeal will lie only from a final judgment.

The requirement of finality in judgments has caused problems in cases involving adjudication of water rights, as illustrated in the *Starley* case. Due to the fluctuating flow of a stream and the complexities of carrying out a decree deciding the rights and priorities of litigants, there is a need for continued supervision over the controversy. A number of states have handled this problem of management in water rights cases through constitutional amendments and statutes. Varying degrees of authority have

[1] This class action was originally filed in 1956 to determine the rights to the water in the Rio Grande River from the Falcon Reservoir to the Gulf of Mexico. Several mandamus suits have been filed seeking to compel the several judges involved in this case to proceed to trial or perform other acts as in this case. For a discussion of the importance and expenses of this case, see Wilson, *The Proposed State Bar Water Rights Adjudication Statute,* 29 TEXAS B.J. 1015 (1966).

[2] The one paragraph in particular which relators contended made the judgment interlocutory in nature contained the following:

> This court retains jurisdiction of this cause and the issues embraced herein and upon good cause shown, may from time to time modify, enlarge or abrogate any portion or feature of this decree or of the decisions and tables and sections filed herewith and made a part hereof, by order or supplemental judgment or decree to be entered at the foot hereof.

State v. Starley, 413 S.W.2d 451, 453 (Tex. Civ. App. 1967).

[3] 3 TEX. JUR. 2d *Appeal and Error* § 76 (1959).

[4] *Id.* § 77.

[5] TEX. REV. CIV. STAT. ANN. art. 2008 (1925) (appeal from an interlocutory judgment sustaining or over-ruling a plea of privilege) and TEX. REV. CIV. STAT. ANN. arts. 2250, 2251 (1925) (interlocutory appeals in receivership cases).

been given to either an administrative agency, a court, or both, to retain jurisdiction in such cases.[6]

In rendering judgment Judge Starley contended that the problem could be cured by a judicial exception to the general rule of finality in the form of an open-end judgment since this type of judgment was not unusual and commonly used in stream adjudications. To support this proposition respondents pointed to language in a landmark California case establishing the trial court's power to retain jurisdiction not only over adjudicated rights, but also undecreed rights, by judicial adoption of the open-end judgment.[7] However, as the civil appeals court in *Starley* noted, in California the declared policy that water be put to its fullest beneficial use was embodied in a self-enacting constitutional amendment,[8] and thus could be implemented by the courts. In Texas, the constitutional Conservation Amendment is not self-enacting and specifically requires the legislature "to pass all such laws as may be appropriate" to control, preserve, and distribute the state's water.[9] Since the amendment places the duty on the legislature to implement the public policy, the judiciary may not initiate a new procedure without legislative authority.

In 1965 after years of criticism from the Supreme Court of Texas,[10] and legal writers, for failure to enact remedial legislation,[11] the legislature passed sections 9-15 of article 7589b,[12] which permit the trial court to retain jurisdiction under certain circumstances in suits to determine water rights. Article 7589b authorizes retention of jurisdiction by the trial court to enlarge, abrogate, or modify the judgment when (1) the case is pending appeal, (2) the decree is confined to the "administration, allocation, and distribution" of the water, and (3) the rights involved have been adjudicated by the court.[13]

Viewed in light of this statute, the language in the judgment by Judge Starley was clearly "an expression by the court of its authority under statutory law enacted in accordance with the mandate of the Constitution."[14] Although the civil appeals court had to reject a judicially created exception which would give the courts considerably more latitude in dealing with problems in water adjudications, the necessarily limited decision will help to solve some of the problems in this area. *J.L.A.*

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[6] There are three general types of water right adjudicatory procedures provided in these statutes: (1) the "Colorado system" is a straight court adjudication system, (2) the "Wyoming system" is an administrative system with an appeal allowed to the courts from the administrative determination, and (3) the "Oregon system" is also an administrative adjudication procedure, but it differs from the Wyoming system in that the adjudication is not effective until the administrative agency obtains court approval of its determination. Although Texas water law is many years behind the other western states, the Oregon system which affords parties an automatic judicial review is preferred in Texas over the Wyoming system which places the burden and expense of appeal on the appealing party.

[7] City of Pasadena v. City of Alhambra, 33 Cal. 2d 908, 207 P.2d 17 (1949).

[8] CAL. CONST. art. XIV, § 3.

[9] TEX. CONST. art. XVI, § 59.

[10] City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798 (1955).

[11] *See e.g.*, King, *Inadequacies of Existing Texas Procedure for Determination of Water Rights on Major Stream Systems*, U. OF TEXAS, PROCEEDINGS OF WATER LAW CONFERENCE 66-73 (1956).

[12] TEX. REV. CIV. STAT. ANN. art. 7589b (1957, as amended 1965).

[13] *Id.* at § 9.

[14] State v. Starley, 413 S.W.2d 451, 466 (Tex. Civ. App. 1967).

Constitutional Law — Criminal Law — Search and Seizure — The Mere Evidence Rule

Hayden robbed the Diamond Cab Company on March 17, 1962 at approximately eight a.m. The police were notified that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane. The police entered the house without arrest or search warrants and began to search for a man of the description they had received.[1] During the search, Hayden was found on the second floor feigning sleep. Simultaneously with Hayden's arrest, an officer in the basement found items of clothing in the washing machine which fitted the description of the suspect's clothes. Hayden was convicted in a state trial court where the clothes were introduced in evidence. Hayden did not appeal his conviction, but sought relief under the Maryland Post Conviction Act,[2] claiming that the clothes introduced at his trial, regardless of the fact they were seized incident to a valid search, were mere evidence and excluded by the fourth amendment. The Maryland trial court denied his application.[3] Hayden unsuccessfully applied to the federal district court for a writ of habeas corpus. The circuit court of appeals, one judge dissenting, reversed and granted the writ.[4] The Supreme Court granted certiorari. *Held, reversed*: Items of only evidential value may be seized by a police officer during a search incident to a legal arrest. *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

The mere evidence doctrine was first definitely established[5] in the case of *Gouled v. United States*.[6] In *Gouled*, and later cases,[7] the Supreme Court interpreted the fourth amendment's protection against invasion of privacy to exclude all personal property except fruits, instrumentalities, and contraband of a crime from seizure incident to a legal search.[8] The class of excluded property was labeled mere evidence. Thus, this mere evidence was considered the product of an unreasonable search, and inadmissible to prove guilt in court. There is no express language in the fourth amendment to support the mere evidence rule. Regardless of the vague constitutional source, some federal courts justified the rule's existence because it helped to preserve the privacy of the individual by limiting the scope of

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[1] Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967). In this case the Supreme Court broadened the scope of permissible search without a warrant to allow police in "hot pursuit" of a suspect to enter the suspect's home.

[2] MD. ANN. CODE art. 27, § 645 (1967).

[3] Hayden v. Warden, Md. Penitentiary, 233 Md. 613, 195 A.2d 692 (1963).

[4] Hayden v. Warden, Md. Penitentiary, 363 F.2d 647 (4th Cir. 1966).

[5] Boyd v. United States, 116 U.S. 616 (1886), hinted at the mere evidence exclusionary rule.

[6] 225 U.S. 298 (1921).

[7] Abel v. United States, 362 U.S. 217, 234-35 (1960), *noted in* 15 Sw. L.J. 341 (1961); United States v. Rebenowitz, 339 U.S. 56, 64 n.6 (1950); Haris v. United States, 331 U.S. 145, 154 (1947), *noted in* 15 Sw. L.J. 341 (1961), *and* 20 Sw. L.J. 391, 392 (1966); United States v. Lefkowitz, 285 U.S. 452, 465-66 (1932).

[8] Gouled v. United States, 255 U.S. 298 (1921). The origin and legal implications of the terms "instrumentalities," "fruits" and "contraband" are discussed in Shellow, *The Continuing Vitality of the Gouled Rule: The Search for and Seizure of Evidence*, 48 MARQ. L. REV. 172 (1964); Note, *Eavesdropping Orders and the Fourth Amendment*, 66 COLUM. L. REV. 355 (1966); Note, *Limitations of Seizure of Evidentiary Objects: A Rule in Search of Reason*, 20 U. CHI. L. REV. 319 (1953); 54 GEO. L.J. 593 (1966); 45 N.C.L. REV. 512 (1967).

a legal search.[9] The exact definition of what property constituted mere evidence was never ascertained. Rather, the federal courts tended to interpret the rule arbitrarily because the differentiation between mere evidence and an instrument of a crime was often imperceptible.[10]

In the *Hayden* case, the Court, speaking through Justice Brennan, discarded the mere evidence rule on the grounds that the right of the citizen to privacy was not further invaded by a legal search for purely evidentiary matter than by a search for contraband, fruits, or instruments of a crime.[11] In either case, the citizen's right to privacy is protected by the fourth amendment's procedural safeguards demanding that the government official meet the test of "probable cause" and "specificity" before a judge will issue a search warrant or allow the introduction of evidence seized incident to a valid arrest in court.[12] The Court, using the rationale of *Schmerber v. California*,[13] concluded that the scope of reasonable seizure incident to a legal search was not violated if there was a connection between the items to be seized and criminal behavior.[14] The Court refuted the argument that mere evidentiary property was more private and deserved more protection on the basis that "nothing in the nature of property seized for evidence is more private than an instrumentality; . . ."[15] Further, the court reasoned the mere evidence limitations on property seizable incident to a legal search resulted in hair-splitting, arbitrary decisions by the police and the courts and was inconducive to a sound rationale of law enforcement.[16] Seizure of purely evidentiary items served the necessary purpose of helping the government to identify criminals in the same manner as did the introduction of instruments, fruits and contraband, and therefore served the necessary function of preventing crime.[17]

The *Hayden* case indicates the Supreme Court has responded to public and political criticisms raised after *Miranda v. Arizona*.[18] The decision to eliminate the mere evidence doctrine and to widen the scope of legally seizable evidence connecting a suspect to a crime will hopefully replace the confession as the major tool of police investigation. Although the *Hayden* case dealt with the scope of search incident to arrest, the Supreme Court has implied that search warrants may now be issued to seize mere evidentiary items. In the Court's attempt to rebalance criminal justice, it may

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[9] United States v. Poller, 43 F.2d 911, 914 (1930).

[10] For example, in these cases the Court seemed to be swayed by the reasonableness of the search and not the nature of the property. *Compare* Marion v. United States, 275 U.S. 192, 194 (1927) *with* United States v. Lefkowitz, 285 U.S. 452 (1932). *Compare also* United States v. Guido, 251 F.2d 1, 3 (7th Cir. 1958) *with* United States v. Lerner, 100 F. Supp. 765, 768 (N.D. Cal. 1951) *and* Morrison v. United States, 104 App. D.C. 352, 262 F.2d 449 (D.C. Cir. 1958) *and* Matthews v. Conea, 135 F.2d 534, 537 (2d Cir. 1943).

[11] 387 U.S. at 301-02.

[12] *Id.* at 302.

[13] 384 U.S. 757 (1966), *discussed in* 20 Sw. L.J. 869 (1966).

[14] Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 306-07 (1967).

[15] *Id.* at 309.

[16] *Id.*

[17] *Id.* at 306 n.11.

[18] Miranda v. Arizona, 384 U.S. 436 (1966), *discussed in* Comment, *Custodial Interrogation as a Tool of Law Enforcement: Miranda v. Arizona and the Texas Code of Criminal Procedure*, 21 Sw. L.J. 255 (1967), *and* 21 Sw. L.J. 697 (1967).

have sacrificed more of the citizen's rights to privacy than benefited the prosecution in preventing crime. Mr. Justice Brennan never directly set a limit on the scope of a "reasonable" search once the fourth amendment's procedural requirements are met. The interpretation future courts place on the words "cause to believe that the evidence sought will aid in a *particular* apprehension or conviction,"[19] could indicate the criteria of reasonableness for future searches. The courts can either interpret this phrase to limit the seizure of mere evidence only to a crime actively under investigation, or they can interpret the scope of reasonable search broadly, enabling the police to search all a suspect's personalty and seize mere evidence of a crime committed in the past or contemplated in the future.

P.A.F.

Constitutional Law — Loyalty Oaths — Texas Article 6252-7's Restriction on Freedom of Association

Gilmore, a tuba instructor at Dallas County Junior College, refused to execute the non-subversive loyalty oath which was required of all instructors at the College and due to this refusal was dismissed from his teaching position. He thereafter brought an action against the trustees of the College for a declaratory judgment and injunctive relief,[1] claiming that the trustees' enforcement of Texas' loyalty oath statute, article 6252-7,[2] Texas Revised Civil Statutes, deprived him of his first amendment rights of freedom of speech, belief, conscience and association and that the statute was unconstitutionally vague. *Held*: In order to be constitutional, loyalty oaths must include the element of specific intent. Otherwise they suffer from "impermissible overbreadth" and result in a denial of the affiant's freedom of association guaranteed by the fourteenth amendment. *Gilmore v. James*, No. CA #3-1777 (N.D. Tex., Aug. 30, 1967).

The United States Supreme Court has required that loyalty oaths be subject to certain restrictions in order to be held constitutional.[3] They must include the element of scienter or knowledge of the proscribed organization,[4] they must be clear and capable of objective measurement,[5] and they must include the requirement of specific intent on the part of the affiant to participate in the proscribed organization's illegal activities.[6] The specific intent concept is included for the purpose of directing the oath at active participants as opposed to passive members. The Texas

[19] 387 U.S. 294, 307 (1967) (emphasis added).

[1] 28 U.S.C.A. § 2281 (1964).

[2] TEX. REV. CIV. STAT. ANN. art. 6252-7 (1962).

[3] *See* Note, *The Requirement of Specific Intent—A Further Limitation on Loyalty Oaths*, 21 Sw. L.J. 684 (1967).

[4] Wieman v. Updegraff, 344 U.S. 183 (1952).

[5] Baggett v. Bullitt, 377 U.S. 360 (1964).

[6] Elfbrandt v. Russell, 384 U.S. 11 (1966).

statute in question provides that no state funds may be paid to any person who has not executed an oath attesting that he is not and never has been a member of the Communist Party, and that he is not and during the past five years has not been a member of certain subversive organizations set out by the statute.[7] The three-judge district court hearing the case upheld Gilmore's contention that the statute denied him freedom of association and was unconstitutionally vague and uncertain. The court cited the recent Supreme Court cases of *Elfbrandt v. Russell*[8] and *Keyishian v. Board of Regents*[9] as authority for the doctrine that unless loyalty oaths include the specific intent requirement they result in a denial of freedom of association guaranteed by the first and fourteenth amendments.

The absence of the specific intent element in the Texas statute was the controlling reason for the court's decision. *Elfbrandt* and *Keyishian* leave no doubt that states must include in their loyalty oaths this requirement. Otherwise they are in conflict with present Supreme Court doctrine.

G.E.S.

Deeds — The Use of Negative Evidence To Overcome the Prima Facie Case of Delivery Established by Recordation

Williams sued Jennie Anderson, seeking title and possession of a piece of property located in Dallas, Texas. Williams based his claim upon a warranty deed previously executed by Willie Anderson, the defendant's deceased husband. The deed purportedly conveyed the property to Williams, subject to a reserved life estate in the grantor, and was duly recorded in the records of Dallas County. After recordation the deed had been returned to Anderson and apparently never delivered to Williams. The evidence showed that there was no consideration made or tendered by the plaintiff, nor that the plaintiff had ever mentioned the transfer to anyone, nor had the plaintiff in any way treated the property as his own. Anderson made the mortgage payments on the property until his death and executed a will leaving the property in question to his wife and a third party. The defendant maintained that there had never been actual delivery of the deed, and that Anderson lacked the requisite mental capacity both at the time of the purported transfer of the property and the delivery of the deed. The jury found that Anderson did not lack the sufficient mental capacity but that there was no delivery of the deed. *Held, affirmed*: The prima facie case of delivery which was established by proving the act of filing the deed for record is effectively overcome by negative evidence tending to show a lack of intent to convey and in such a case the jury will be given discretion to find that a recorded deed, valid on its

[7] TEX. REV. CIV. STAT. ANN. art. 6252-7 (1962).
[8] 384 U.S. 11 (1966).
[9] 385 U.S. 589 (1967).

face, has no legal effect. *Williams v. Anderson*, 414 S.W.2d 731 (Tex. Civ. App. 1967).*

Title to a piece of transferred property will vest upon execution and delivery of the deed.[1] But delivery must be accompanied by the requisite intent of the grantor before the transfer can become operative as a conveyance.[2] The intention of the grantor is shown from all the facts and circumstances preceding, attending and following the execution of the instrument.[3] The question of delivery is a question of both law and fact and the courts give the jury wide latitude in determining this question.[4] Before the court may take the issue from the jury the question of intent must be clear.[5]

When there is no evidence as to actual delivery of the deed, and where the deed was properly recorded, a prima facie presumption of delivery arises. The presumption of delivery may be rebutted by proof that the recording of the instrument was for some other purpose, or that there was fraud, accident, or mistake, or that the grantor had no intention of divesting himself of title.[6] An extension to this third exception, that the grantor had no intention of divesting himself of title, was established by the Texas Supreme Court in *Thornton v. Raines*,[7] where the court was faced with a problem similar to the one in *Williams v. Anderson*.[8] The court stated in *Thornton* that if any evidence is introduced, such as the making of a will, purported lack of delivery, or mental incapacity, no matter how negative in character, tending to show lack of intent to convey, a jury will be given extensive discretion to find that a recorded deed, valid on its face, was not actually delivered.

Thus, the court in *Williams v. Anderson*[9] followed the law in Texas holding that the presumption raised by recordation can be rebutted by showing (1) that the deed was recorded for a different purpose, (2) that there was fraud, accident or mistake, or (3) that the grantor had no intention of divesting himself of title. Concerning the latter, the jury is given wide discretion to find lack of requisite intent through evidence negative in character.

L.J.B.

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* [*Editor's note*: This case is perhaps also significant in that law students in the Legal Clinic of Southern Methodist University School of Law actively participated in the trial of the case and the argument of the appeal.]

[1] Parks v. Willard, 1 Tex. 350 (1846); Hall v. Edwards, 222 S.W.2d 167 (Tex. Civ. App. 1920).

[2] Bussan v. Donald, 244 S.W.2d 271 (Tex. Civ. App. 1951) *error ref. n.r.e.*

[3] Thornton v. Raines, 157 Tex. 65, 299 S.W.2d 287 (1957); Check Kuhn v. Downs, 208 S.W.2d 154 (Tex. Civ. App. 1948) *error ref. n.r.e.*; Walker v. Erwin, 106 S.W. 164 (Tex. Civ. App. 1907). Note that *Thornton v. Raines* was criticized in a Note, 35 TEXAS L. REV. 852 (1957).

[4] Towey v. Henderson, 60 Tex. 291 (1883); Dorman v. Ryan, 293 S.W. 888 (Tex. Civ. App. 1927) *error ref.*; Johnston v. Johnston, 67 S.W. 123 (Tex. Civ. App. 1902).

[5] McCartney v. McCartney, 93 Tex. 359, 55 S.W. 310 (1900); Wheat v. Wheat, 239 S.W. 667 (Tex. Civ. App. 1922).

[6] Thornton v. Raines, 157 Tex. 65, 299 S.W.2d 287 (1957); Koppleman v. Koppleman, 94 Tex. 40, 57 S.W. 570 (1900); Ford v. Hachel, 77 S.W.2d 1043 (Tex. Civ. App. 1935).

[7] 157 Tex. 65, 299 S.W.2d 287 (1957).

[8] 414 S.W.2d 731 (Tex. Civ. App. 1967).

[9] *Id.*

Family Law — Child Support — Enforcement

Pursuant to a divorce decree rendered in 1946, Hooks, the relator, was required to make periodic child support payments. By the spring of 1961 he was $4,070 in arrears and found in contempt of court. After several months in jail he was released, ordered to pay $60 per month until his youngest child reached age eighteen, and held in continuing contempt until the $4,070 arrearage was paid in full. Hooks made the monthly payments required by the 1961 order but did not reduce the arrearage. When his youngest child reached age eighteen he discontinued all payments and refused to pay the delinquent amounts due under the 1961 order. His ex-wife brought suit to enforce payment; he was again found in contempt and confined in the county jail. Hooks brought this habeas corpus proceeding, claiming that the district court had no power to enforce the 1961 order after his youngest child reached eighteen. *Held, dismissed*: The district court has power to enforce payment of its child support orders after the beneficiary child reaches age eighteen if the order was made prior to the time the child reached age eighteen. *Ex Parte Hooks*, 415 S.W.2d 166 (Tex. 1967).

Article 4639a[1] provides that the court rendering a divorce may order either parent to make periodic or lump-sum payments for the support of their children until such children reach age eighteen, and to enforce these orders by civil contempt. The supreme court has held that under article 4639a the district courts can confine a delinquent parent until he purges himself of contempt by paying the amount of accumulated periodic payments.[2] However, it is also settled that the court loses its jurisdiction to order new child support payments after the children of the divorced couple reach age eighteen.[3] Thus, in the present case the narrow question was whether the court could enforce, after the child's eighteenth birthday, an order made before that time.

The supreme court held that the statute created two distinct powers. First, the court rendering the divorce is authorized to order support payments; this power is limited to the period during which there are children under eighteen. In addition, the court is empowered to enforce its support orders by contempt; this second power is not limited to the period during which there is a child under eighteen. Therefore, the district court had power to enforce the 1961 judgment ordering Hooks to pay the $4,070 even though no child was under eighteen at the time of enforcement because the order had been made during the pre-eighteen period when the court had jurisdiction to enter a support order.

The case epitomizes the appalling inadequacy of the existing child support provisions. By settled rule, a contempt proceeding is the only method of enforcing court ordered child support payments.[4] In the instant case Hooks made the required periodic payments from 1961 until 1963 but

[1] TEX. REV. CIV. STAT. ANN. art. 4639a (Supp. 1966).
[2] *Ex parte* Savelle, 398 S.W.2d 918 (Tex. 1966).
[3] *Ex parte* Hatch, 410 S.W.2d 773 (Tex. 1967).
[4] *See Ex parte* Hatch, 410 S.W.2d 773 (Tex. 1967) and cases cited therein.

did nothing to make up the pre-1961 deficiencies. His ex-wife thus had to choose between accepting the payments or instituting new contempt proceedings. If she followed the latter course the monthly payments probably would have ceased, either because Hooks, angered by the contempt action, would have become recalcitrant or because he would have been in jail and thus unable to earn the money to make the payments. In order to avoid possible loss of the monthly payments, the ex-wife as a practical matter had to refrain from trying to recoup the past deficiencies. Had the supreme court not held that the district court had continuing jurisdiction to enforce its orders, the ex-wife would have lost her chance to enforce payment of the arrearages at the only time it was practical for her to assert it, *i.e.*, after the children reached age eighteen.

C.M.D.

Federal Judiciary — Judicial Appointment of the District of Columbia School Board

Under D.C. Code section 31-101 the school board for the District of Columbia is appointed by the United States District Court of the District of Columbia.[1] Hobson sought a declaratory judgment and injunction forbidding exercise of authority by Hansen, the superintendent of the schools and other members of the board, on the grounds that the statute was an unconstitutional delegation of executive powers and duties in the judiciary. The case was heard by a three-judge district court in accordance with 28 U.S.C. section 2282.[2] Both parties moved for summary judgment. *Held*: Defendant's motion for summary judgment granted. Congress can empower the District Court of the District of Columbia to appoint the school board by virtue of article I, section 8, clause 17 of the Constitution in conjunction with article III,[3] or by virtue of article II, section 2, clause 2.[4] *Hobson v. Hansen*, 265 F. Supp. 902 (D.D.C. 1967).

Under article I, section 8, clause 17 of the Constitution, Congress has plenary power to legislate for the District of Columbia. One result of this power has been that the District Court for the District of Columbia

[1] D.C. CODE ANN. § 31-101 (1961) in its pertinent part provides: "The members of the Board of Education shall be appointed by the United States District Court judges of the District of Columbia."

[2] 28 U.S.C. § 2282 (1964) provides: "An interlocutory or permanent injunction restraining the enforcement, operation, or execution of any Act of Congress for repugnance to the Constitution shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." *See also* Hobson v. Hansen, 252 F. Supp. 18 (D.D.C. 1967).

[3] U.S. CONST. art. I, § 8, cl. 17 states: "[Congress shall have Power] . . . . To exercise exclusive legislation in all Cases whatsoever, over such District . . . as may . . . become the seat of the Government of the United States." U.S. CONST. art. III, § 1 provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . ."

[4] U.S. CONST. art. II, § 2, cl. 2 speaks of the presidential power of appointment and then adds: "[B]ut the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

has been given powers and assigned duties which could not be received by other federal courts.[5]

Prior to 1933 the courts of the District were generally assumed to be legislative courts. Obiter in *Ex parte Bakelite*[6] expressly called the courts of the District legislative courts. This idea was rejected by the Supreme Court in *O'Donoghue v. United States*,[7] where it was held that the courts of the District were constituted by virtue of article III and therefore the judges were entitled to the protection of that article. The Supreme Court then added that because of Congress' plenary power to legislate for the District, federal courts in the District could be given powers which could not be given to other article III courts. The Supreme Court recognized that the courts in the District had a type of dual status.

To this point, the decision of the court in the instant case seems to be sufficiently grounded on precedent.[8] However, the court suggests an alternative basis to support its decision: the power of federal courts to appoint inferior officers. In support of this proposition the court cites, in part, article II, section 2, clause 2.[9]

The court cites *In the Matter of Hennen*[10] which held that a clerk in a federal court was an inferior officer which the Constitution would have the courts of law appoint. In *Hennen* it was emphasized that the appointing power of article II, section 2, clause 2 was undoubtedly intended to be exercised by the department of government to which the officer to be appointed most appropriately belonged.[11] The court in the instant case stated that *Ex parte Siebold*[12] explicitly refuted the proposition that *Hennen* meant that it could only appoint officers related to the judicial function. The Court in *Siebold* devised this test: the appointive power assigned to courts must not be so incongruous in the duty required so as to excuse the court from its performance or to render its acts void.[13]

The test established in *Siebold* is not easily understood nor easily applied, but it is relied upon by the majority in the instant case. As Judge Skelly Wright said in his dissent, it would seem that on its face the appointment of the members of a school board is a function incongruous with the functioning of the judiciary. Judge Wright also felt that the courts in the District should no longer be viewed as "hybrid," because this meant

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[5] The District Court of the District of Columbia has been vested with revisionary powers over patent appeals, Butterworth v. Hoe, 112 U.S. 50 (1884); over rates fixed by public utilities, Kellar v. Potomac Elec. Co., 261 U.S. 428 (1923); and over orders of the Federal Radio Commission, Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930).

[6] 279 U.S. 438 (1924).

[7] 289 U.S. 596 (1933).

[8] *Id.*

[9] *See* note 4 *supra.*

[10] 38 U.S. (13 Pet.) 230 (1839).

[11] *Id.* at 257-58.

[12] 100 U.S. 371 (1880).

[13] *Id.* at 398. Judge Skelly Wright in his dissent in the instant case suggests that the appointments in the *Siebold* case could be classified as "court-related" personnel. In his opinion the appointment of members of the school board was a function incongruous with the judicial function because it embroils the judiciary in public affairs and thereby adversely affects both the independence and prestige of the court. Hobson v. Hansen, 265 F. Supp. 902, 921-25 (D.D.C. 1967) (dissent).

that the citizens of the District were disadvantaged by having a court which was active in an area he felt was purely political.[14]

The decision of the court seems to be founded on sufficient precedent to sustain their holding that the District Court in the District of Columbia can be assigned this power, even if the propriety of doing so is questionable. The use of article II, section 2, clause 2 to support its decision in the alternative leaves much to be desired, for this section applies to every federal court in the United States. It has long been established that all other federal courts cannot be assigned non-judicial duties.[15] It is doubtful that this interpretation of article II, section 2, clause 2 is correct.

C.R.R.

Negotiable Instruments — The Requirement of Reasonable Promptness in Holding a Drawee Bank Liable for Late Revocation of a Check

Payee, Pure Ice & Cold Storage Co., participated in a check exchange practice with John Calvin, the payor, mainly because of payor's poor credit standing. Drawee, Exchange Bank & Trust Co. of Dallas, received the check in question on Tuesday, September 25, 1962, but did not return the check dishonored until Thursday, September 27, 1962, which was beyond the statutory deadline prescribed in article 342-704 of the Texas Banking Code.[1] Payee attempted collection by sending the check back through and upon failure to collect, obtained a promissory note from payor for the sum owed. After a period of just under two years and slightly before the statute of limitation had run, payee instituted suit against drawee Exchange Bank & Trust Co. of Dallas. *Held, reversed*: When a drawee bank fails to revoke a check within the statutory period,[2] it is necessary to exercise the election to hold the bank liable with reasonable promptness. *Pure Ice & Cold Storage v. Exchange Bank & Trust Co.*, 415 S.W.2d 897 (Tex. 1967).

The American Banker's Association recognized the problems involved

[14] 265 F. Supp. at 921-25.

[15] Muskrat v. United States, 219 U.S. 346 (1911).

[1] The provisions of the statute, material here, are as follows:

> 1. . . . [I]tems presented to a drawee bank shall be received by it, . . . *shall* be conditional and subject to revocation during the day of presentment or *until midnight of the banking day after the day of presentment*, exclusive of Sundays and holidays, if it is finally determined that the drawee bank was not at the time of presentment . . . obligated to pay the item, and if the drawee bank shall within that time refuse payment and return the item. . . .
>
> 2. If the item is presented through a clearing house, the drawee bank shall, within the time prescribed, return the item to the clearing house presenting it.
>
> 3. . . . If the drawee bank in refusing payment of any item fails to comply with the provisions of this Article within the time above prescribed it shall at the *election of the owner of the item*, be deemed to have adopted the item and shall be liable for the amount thereof.

TEX. REV. CIV. STAT. ANN. art. 342-704 (1964) (emphasis added).

[2] *Supra* note 1.

in deferred posting and proposed a model statute for all states in the Model Bank Collection Code.[3] To effectuate the smooth and speedy transaction of business and give as much permanency to the procedure as possible, the Texas Banking Code adopted a deferred posting statute. Under the statute, payment of the check by the drawee bank does not become final until midnight of the day following the day of presentment. And if the bank is delinquent in revocation, " the drawee bank . . . shall at the election of the owner . . . be liable for the amount thereof."[4]

The lower courts directed much attention to the word "election" in the statute, treating it as if it meant election of remedies. Election of remedies is the prosecution of one of two inconsistent remedies until final judgment. The true meaning of the word "election" in context with this statute is merely an option whether or not to hold the bank liable. The supreme court properly held this "election" not to be an election of remedies.

The court required that in conjunction with the purpose of the statute, the election to hold the drawee bank liable should be done with reasonable promptness. The purpose of the statute was (1) to expedite the check collection procedure and (2) to establish some finality of provisional credits. To not require such a standard could leave the provisional credits unsettled until the limitations had run. The court did not set a definite "reasonable time" but did indicate that the statute of limitations was not to govern and that slightly less than two years was beyond the scope of reasonable time.

Although the Uniform Commercial Code has superseded the Texas Banking Code, it still includes the same requirement of reasonable time. Since this section of the Uniform Commercial Code[5] has been adopted in all of the jurisdictions adopting the Uniform Commercial Code, this problem of "what is reasonable time" will be inherent whenever the statute is applicable. The legislatures have required the banks to act within a very limited time period and it seems only logical that the courts will act in accordance and require similar expeditious action on the part of the payee.

J.F.

Taxation — Texas Gas Gross Production — Exemption of Fuel Used in Gas Lift Operations

Plaintiffs, operators of Texas oil and gas leases, used casinghead gas as a power source to operate either mechanical or hydraulic (Kobe method) equipment used to lift oil from beneath the surface of the land. They did not sell any of the casinghead, nor was such gas used for any other purpose. The Texas Comptroller assessed gas gross production taxes[1] on the

[3] 2 T. PATTON, DIGEST OF LEGAL OPINIONS 1373 (4th ed. 1942).
[4] *Supra* note 1.
[5] UNIFORM COMMERCIAL CODE § 4-401.

[1] TEX. TAX.-GEN. ANN. arts. 3.01-.10 (1964).

casinghead so produced and used, which assessment was paid under protest and the instant suit was brought to recover the same on the ground that casinghead gas used by the producer as fuel to lift oil is exempt from the Texas Gas Gross Production tax.[2] The trial court held for plaintiffs, and defendant appealed to the Austin Court of Civil Appeals. *Held, affirmed*: Casinghead gas used to operate equipment to lift oil from beneath the surface of the land is exempt from the Texas Gas Gross Production tax under the exclusion from the tax base of "gas used for lifting oil, unless sold for such purposes."[3] Said exemption is not limited to gas injected into the ground[4] but also applies to gas consumed in furnishing power to operate a motor which, in turn, operates equipment to lift oil from the earth, either hydraulically or mechanically. *Calvert v. Kadane*, 418 S.W.2d 315 (Tex. Civ. App. 1967), *error granted.*

Kadane turned on a question of statutory interpretation based on the legislative history of what is now article 3.01 of the Texas Gas Gross Production Tax Act.[5] Article 3.01's predecessor as originally enacted provided, *inter alia*, that "the value of residue gas lawfully *injected* into the earth . . . for lifting oil . . . ."[6] was excluded from the tax base in the computation of tax liability. The statute was amended in 1945 to provide that the value "of gas injected into the earth . . . and gas used for lifting oil, unless sold for such purpose"[7] should be excluded from the tax base. Subsequent amendments did not substantially affect the statute[8] which was codified in 1959 as article 3.01.[9] However, an attorney general's opinion issued December 30, 1947 construed the phrase "used for lifting oil" in the predecessor of article 3.01(2)(c) "to apply to gas injected into the earth for repressuring or lifting the oil out of the ground, and as having no reference to its use as fuel to generate mechanical power, such as pumping operations for lifting oil."[10] This opinion followed a prior opinion[11] but the latter had been issued prior to the 1945 statutory amendment.[12] The court found that the 1947 ruling was clearly wrong[13] and held that gas may be

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[2] *Id.* art. 3.01(2)(c) (1964).

[3] *Id.*

[4] This limitation had been administratively imposed by TEX. ATT'Y GEN. OP. No. V-467 (1947). *See also* TEX. ATT'Y GEN. OP. Nos. 0-4151-A, 0-3516 (1941) *construing* TEX. REV. CIV. STAT. ANN. art. 7047(b) (1941).

[5] TEX. TAX.-GEN. ANN. art. 3.01 (1964).

[6] TEX. REV. CIV. STAT. ANN. art. 7047(b) (1941) (emphasis added).

[7] Tex. Laws 1945, ch. 269, § 1, at 423, *amending* TEX. REV. CIV. STAT. ANN. art. 7047(b) (1941).

[8] Tex. Laws, 1st Spec. Sess. 1954, ch. 2, art. 1, § 1, at 3; Tex. Laws 1951, ch. 402, § 3, at 695.

[9] TEX. TAX.-GEN. ANN. art. 3.01 (1959).

[10] TEX. ATT'Y GEN. OP. No. V-467 (1947).

[11] *See* note 4 *supra.*

[12] *See* text accompanying notes 4, 10 *supra.* The Comptroller's Office applied TEX. ATT'Y GEN. OP. No. V-467 (1947) until 1967, seemingly without protest from taxpayers. However, in the trial court, Mr. W. B. Davis, Director of Oil and Gas Taxation in the Comptroller's Office, testified that no tax was levied on gas consumed by a motor "prime mover," used to compress injection gas that aerated or lifted a column of oil from the earth. Calvert v. Kadane, 418 S.W.2d 315, 318 n.3 (Tex. Civ. App. 1967).

[13] The court reasoned that when the legislature enacts an amendment to a presently existing statute, it is presumed to have intended some change or alteration of existing law. Calvert v. Kadane, 418 S.W.2d 315, 317 (Tex. Civ. App. 1967). *See* American Sur. Co. v. Axtell Co., 120 Tex. 166, 36 S.W.2d 715 (1931).

used to lift oil without being injected into the earth; the word "used" being synonymous with "employed" or "consumed."[14] Thus, the court concluded that gas used as a power supply for a motor used to operate equipment to lift oil from the earth, unless purchased for such purpose, is exempt from taxation under article 3.01.

The court thus overruled twenty years of administrative tax policy. However, the decision seems sound. The resultant boon to taxpayers is far from inconsequential. The only remaining uncertainty is whether Texas supreme court will allow the benefit to accrue to the taxpayer or whether any revision of the law will be left to the legislature.

S.C.S.

Torts — Availability of Consortium as a Joint Action by Husband and Wife

Plaintiff's husband, permanently disabled, filed a personal injury suit against defendent, but later settled out of court. Plaintiff filed a subsequent action in which she alleged that as a result of defendent's negligence she suffered a loss of the normal society, companionship, and consortium[1] of her husband to which she was entitled. In her petition plaintiff contended that the Maryland common law doctrine of consortium, giving the right of action to the husband but not the wife, violated the equal protection clause of the fourteenth amendment by discrimination against the female sex. The lower court sustained defendent's demurrer and plaintiff appealed to the court of appeals. *Held, affirmed*: The right to sue a third party for loss of consortium is available only as a joint action by both the husband and wife, and therefore the wife may not maintain a separate action after her husband has settled with the third party. *Deems v. Western Maryland Railway*, 231 A.2d 514 (Md. App. 1967).

At common law a wife was denied the right to sue a third party for loss of consortium[2] on the theory that "the legal existence of the wife is suspended or incorporated into that of the husband."[3] This common law doctrine was universally accepted until the 1950 decision of *Hitaffer v. Argonne Co.*,[4] in which the circuit court broke from the common law because of the equal status of the wife in modern legal theory. Since the *Hitaffer* case, some states have upheld the common law doctrine because

[14] *See* Southland Royalty Co. v. Pan Am. Petroleum Co., 378 S.W.2d 50 (Tex. 1964); Reynolds v. McMann Oil Co., 11 S.W.2d 778 (Tex. Comm'n App. 1928).

[1] Consortium has been generally defined as "the conjugal fellowship of husband and wife, and the right of each to the company, companionship, and aid of the other in every conjugal relation." McMillan v. Smith, 47 Ga. App. 646, 171 S.E. 169 (1933).

[2] Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950); La Eace v. Cincinnati, N. & P. Ry., 249 S.W.2d 534 (Ky. 1952); Nelson v. A.M. Lockett & Co., 206 Okla. 334, 243 P.2d 719 (1952).

[3] Deems v. Western Md. Ry., 231 A.2d 514, 521 (Md. App. 1967).

[4] 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).

of its historical significance,[5] while others have over-turned the doctrine because of its irrationality[6] or its violation of the equal protection clause.[7]

The majority of the Maryland court took a somewhat different approach in overturning the common law doctrine. They felt that both spouses were injured by the loss of consortium as a result of the negligence of the third party. Therefore the right of action for such injury should be held jointly by both the husband and wife as tenants by the entirety. This means that neither spouse can dispose of the right without the assent of the other. This action must be a part of the personal injury action of the injured spouse, and a settlement by the injured spouse, as occurred in the instant case, acts to extinguish the joint action for loss of consortium.

Classification of the action for loss of consortium as a joint right of both parties seems preferable to the other solutions so far offered.[8] The problem of double recovery is eliminated and both spouses receive equal protection under the law.[9]

T.W.W.

[5] Miller v. Sparks, 189 N.E.2d 720 (Ind. App. 1963); Potter v. Schafter, 161 Me. 340, 211 A.2d 891 (1965); Wiseman v. Knaus, 24 App. Div. 2d 869, 264 N.Y.S.2d 331 (1965); Garrett v. Reno Oil Co., 271 S.W.2d 764 (Tex. Civ. App. 1954) *error ref. n.r.e.* (legislature to make any change in the common law doctrine).

[6] Manning v. Jones, 349 F.2d 992 (8th Cir. 1965); Slovin v. Gauger, 193 A.2d 452 (Del. Super. 1963).

[7] Carey v. Foster, 345 F.2d 772 (4th Cir. 1965) (court extinguished the right of action in the husband rather than created a separate right in the wife); Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966); Clem v. Brown, 207 N.E.2d 398 (Ohio C.P. 1965). *But see* Krohn v. Richardson-Merrill, Inc., 406 S.W.2d 166 (Tenn. 1966), *cert. denied*, 87 S. Ct. 1160 (1967); Seagraves v. Legg, 147 W. Va. 331, 127 S.E.2d 605 (1962).

[8] *See* authorities cited in footnotes 5-7 *supra*.

[9] Igneri v. Cie de Transports Oceaniques, 323 F.2d 257 (2d Cir. 1963); Ekalo v. Constructive Serv. Corp. of America, 46 N.J. 82, 215 A.2d 1 (1965).