



January 1950

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Recommended Citation

John C. Hood, *Agency and Partnership*, 4 Sw L.J. 263 (1950)
<https://scholar.smu.edu/smulr/vol4/iss3/2>

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AGENCY AND PARTNERSHIP

Texas. The Supreme Court of Texas was recently confronted with a unique contract involving the dissolution of a partnership.¹ The members of a partnership entered into a written agreement providing that upon the death of either partner, persons named in the instrument were to act as trustees in the "management, disposition, control, and settlement of all the affairs of the partnership." By the agreement the partners did "grant, sell, and convey" unto such trustees all property of the partnership. The instrument directed that the trustees were to pay all debts and legal obligations due by the partnership "at the time of the death of either of said partners" and thereafter to deliver "one-half of the then remaining trust estate to the surviving partner and one-half to the heirs or legal representatives of the deceased partner."

In sustaining the validity of the trust agreement, the court cited several earlier cases in which partners had made agreements as to ownership and continued operation of the partnership after the death of one partner. In the *Gaut* case² two partners had agreed that upon the death of either partner, title to all property was to vest in the survivor; the survivor was to be indebted to representatives of the deceased, as therein stipulated. The court said, "That such an agreement, made *bona fide*, and for valuable consideration, is valid and effectual, to transfer the title to the property, is well settled."³

In the *Alexander's Executors* cases⁴ the partners entered into an agreement providing that upon the death of either partner, the surviving partner was to continue the partnership until the business venture was concluded. The court quoted Justice Story for the proposition "that it is competent for the partners to provide

¹ *Smith v. Wayman*, ————Tex.———, 224 S. W. 2d. 211 (1949).

² *Gaut v. Reed Bros. & Co.*, 24 Tex. 46 (1859).

³ *Id.* at 54.

⁴ *Alexander's Representatives v. Lewis*, 47 Tex. 481 (1877); *Lewis v. Alexander's Executors*, 34 Tex. 608 (1871); *Kottwitz v. Alexander's Representatives*, 34 Tex. 689 (1869).

by agreement for the continuance of the partnership after death,"⁵ and sustained the validity of the agreement. The court recognized the general rule that upon the death of a partner the partnership is immediately terminated, but the court was of the opinion that it is entirely competent for the parties to vary this general result of law by an express agreement."⁶

In the principal case the partners were attempting to relieve the surviving partner of the burdensome job of properly disposing of extensive and varied partnership interests. As the court pointed out, a trust for such a purpose was novel. However, recognizing that partnerships are based on contracts, the court properly sustained the validity of the partnership agreement.⁷

Arkansas, Texas. During 1949 the Supreme Courts of Arkansas and Texas each decided a case involving the liability of an oil company for injuries resulting from negligence on the part of employees of an agent. In *Sinclair Refining Company v. Piles*⁸ Sinclair and one Harris made an agreement under which the latter assumed charge of Sinclair's bulk sales station. The products were to remain the property of Sinclair until sold. Harris was required to take proper care of the equipment and to comply with a financial remittance plan. The selling price of the products was to be determined by Sinclair. Delivery trucks with Sinclair's trade mark painted on them were to be furnished by Harris, who was to employ (subject to Sinclair's approval) and to pay his own truck drivers. Harris was to be responsible for, and to hold Sinclair blameless for, any negligent acts of the drivers. Audas, one of Harris' truck drivers, delivered to a retail store a quantity of what was thought to be kerosene. Actually, the fuel contained

⁵ 47 Tex. at 485, quoting from *Burwell v. Mandeville's Executor*, 2 How. 573, 567 (1844).

⁶ 34 Tex. at 713.

⁷ The rights of the parties were determined on the basis that as the trustees were given full power to represent the partnership in any necessary litigation, neither the surviving partner nor the heirs of the deceased partner were necessary parties to a suit to dissolve the trust and a subsequent hearing wherein receivers obtained a court order to sell the partnership property.

⁸ —Ark.—, 221 S. W. 2d. 12 (1949).

15% gasoline. The plaintiff was injured by an explosion of some of the mixture bought from the storekeeper and sued Sinclair for damages. The defense was that Harris was an independent contractor and Audas his servant, for whose acts Sinclair was not responsible. In affirming judgment for the plaintiff the court considered not only the contract but also the acts and conduct of the parties under the contract and found that such acts and conduct would warrant an inference that Sinclair intended or consented that Audas (as well as Harris) was to be its servant or agent. The court concluded that it was the purpose of Sinclair to retain complete control of all that was done in connection with the sale and delivery of its kerosene, gasoline, and other products and that the rule of *Magnolia Petroleum Co. v. Johnson*⁹ should apply. The test is not whether the company actually directed the delivery of the oil but whether it had the right to control delivery.

In the Texas case of *Humble Oil & Refining Co. v. Martin*¹⁰ a customer left her car in the driveway of one of Humble's filling stations to be serviced. Before doing so, she obtained permission from an employee, who was then working on another car, to leave her car there while she went for some groceries. Before any employee had touched the car, it rolled by gravity into the street and injured plaintiffs, who sued Humble and the owner of the car. Judgment for plaintiffs against both defendants was affirmed (the majority of the court also holding that Humble was entitled to indemnity from the owner of the car). The same defense was made as that interposed in *Sinclair v. Piles*. The contract between Humble and the operator of the filling station was known as a "Commission Agency Agreement." Under it Humble rented the station to the operator, the rental to be determined by the amount of products sold. The operator was paid on a commission basis and had the general duties of running a service station, which included operating under a system of strict financial control. He also made reports and performed other duties required of him

⁹ 149 Ark. 553, 233 S. W. 680 (1921).

¹⁰ ———Tex.———, 222 S. W. 2d. 995 (1949).

from time to time by the company. The fact that neither Humble, the operator, nor the station employees considered Humble as the employer or master and the fact that the contract expressly repudiated any authority of Humble over the employees were held not conclusive. There was other evidence bearing on the right and power of Humble to control the details of the station work with reference to the operator himself and with reference to his employees. It was expressly contemplated that the operator would hire employees. The evidence was found to establish that the operator was not an independent contractor but was in about the same situation as a store clerk who happens to be paid a commission instead of a salary. The case of *The Texas Company v. Wheat*¹¹ was distinguished on the ground that it involved a dealer type of relationship in which the lessee of the filling station bought from the landlord, The Texas Company, and sold the products as his own, at his own price, and on his own terms.

In cases involving such contracts as those in the *Sinclair* and *Humble* decisions the usual defense is the one relied on in those cases. The tendency of the courts apparently is to find that the operator is a servant or employee of the oil company rather than an independent contractor.¹² This result is generally reached as it was in the *Sinclair* case, and to a lesser degree in the *Humble* case, by interpreting the contract in the light of the acts and conduct of the parties and concluding that the company in actual practice retained power to subject the operator and his employees to its will and direction. But the defense is sometimes made that even though the operator was the servant of the company, he had no authority to employ servants for whose torts the company would be liable. If such authority is not expressly given, it may be implied from the nature of the work to be performed and from the general course of conducting the business by the employee for so long a time that knowledge and consent on the part of the

¹¹ 140 Tex. 468, 168 S. W. 2d. 632 (1943).

¹² See annotation, 116 A.L.R. 457, 462 (1938).