



January 1955

Recent Case Notes

Hal Bateman

Fred R. Disheroon

George M. Cunyus

Walter P. Zivley Jr.

Recommended Citation

Hal Bateman et al., Note, *Recent Case Notes*, 9 Sw L.J. 120 (1955)

<https://scholar.smu.edu/smulr/vol9/iss1/5>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

RECENT CASE NOTES

CONTRACTS—ATTORNEY'S RECOVERY FOR DISCHARGE
WITHOUT CAUSE

Plaintiff, an attorney, was hired by C on a written contract for \$750 to defend C in a divorce suit by D, C's wife. Litigation was far more involved than had been anticipated, the trial lasting 29 days. At the close of the trial, but before final judgment, C told plaintiff he was dissatisfied with him and wished to discharge him at once. Plaintiff said he was prepared to complete the case and appeal, but if C discharged him he expected the reasonable value of his services, equivalent to the fee of D's lawyer. C had paid plaintiff \$450, and replied that he would not pay "a cent more." C then discharged plaintiff and has since died. Plaintiff sued C's estate in quantum meruit for the reasonable value of his services. The trial court found the reasonable value to be \$5,000, but held that plaintiff's only remedy was damages on the contract, which he had failed to plead. The California District Court of Appeal in 265 P. 2d 926 (1954) said that whether the contract had been rescinded was a question of fact and reversed for a finding thereon. On appeal to the Supreme Court of California, *held* (in a 5-2 decision) for plaintiff for \$300. *Oliver v. Campbell*,Cal....., 273 P. 2d 15 (1954).

The higher court said that one injured by the breach of a contract may (1) treat the contract as rescinded and recover the reasonable value of his services in quantum meruit; (2) keep the contract alive by remaining at all times ready and able to perform; or (3) sue for the profits he would have realized under the contract as damages for the breach. One who has partially performed under a contract of employment and is prevented from further performance by the principal may recover the reasonable value of services rendered, even if that exceeds the full amount he would have received under the contract. The compensation fixed in the contract may be used as evidence in determining the reasonable value of the services, but it does not limit that value. Although some jurisdictions limit recovery to the contract amount,

the court said the better rule and the California rule is to allow the real value of the services regardless of the amount named in the contract. Since the contract had been breached and plaintiff was treating it as rescinded, it was sufficient for him to plead only a common count in quantum meruit, and it was not necessary for him to offer to restore the \$450, since he would be entitled to it in any event.

But in applying these rules the court said that here the trial was at an end and the plaintiff had virtually performed his obligation. The only thing still to be done under the contract was the payment of a liquidated sum by C. Therefore, since plaintiff's part of the contract was complete, the court held that he could no longer recover on quantum meruit but only on the liquidated debt under the contract.

The dissent fully agreed with the principles of recovery on quantum meruit announced by the court, but said that they should apply here. They argued that the contract included taking the case to final judgment and appealing, which plaintiff clearly intended to do. Thus the contract was not fully performed, and by the court's own principles, concluded the dissenting justices, plaintiff should recover \$5,000. *Cf. Lessing v. Gibbons*, 45 P. 2d 258 (Cal. 1935), where the court said the attorney discharged without cause could recover the reasonable value of his services even if it was more than the contract amount.

The question of whether an attorney's suit for fees under a contract when he has been discharged without cause is based on damages for breach of the contract or the reasonable value of services rendered on quantum meruit has had considerable litigation in the more usual case where the contract value is the greater, quantum meruit generally being allowed. But in the present case, where the reasonable value is greater than the contract amount, there is more uncertainty. See WOODWARD, QUASI CONTRACTS, secs. 260, 262, 268, and 269. Since the two situations are essentially the same, it would seem that on theory the same rule should apply in each without regard to which amount is greater. Logically, if

the contract is held to be rescinded by discharge without cause, it is rescinded as to both parties and neither is bound by it.

In *Re Montgomery's Estate*, 272 N.Y. 323, 6 N.E. 2d 40, 109 A.L.R. 669 (1936), the leading case in the country on this point, the New York court reasoned that since the New York rule was that a client is not liable for damages on the contract when he discharges his attorney, since he has a right to do so at any time, so the attorney discharged without cause should not be limited by the contract when the client is not. Lehman, J., dissenting, argued that a client is not liable for damages on the contract because he is exercising a right in discharging his attorney, not a mere power, and thus is doing nothing wrongful. But the attorney should not be able to recover more than he contracted for when he has done less work than the contract called for. *Cf. Tillman v. Komar*, 259 N.Y. 133, 181 N.E. 75 (1935), where the court indicated that the contract amount could only be used as evidence of reasonable value and not to limit the attorney's recovery in quantum meruit. However, some jurisdictions hold that recovery cannot exceed the amount fixed in the contract. *Breathitt Co. v. Gregory*, 25 K.L.R. 1507, 78 S.W. 148 (1904); *Cotzhausen v. Central Trust Co.*, 79 Wis. 613, 49 N.W. 158 (1891).

The leading case in Texas, *Thompson v. Smith*, 112 Tex. 634, 248 S.W. 1070 (Tex. Comm. App. 1923), reversing 233 S.W. 876 (Tex. Civ. App. 1921) which had held that the attorney was limited to the amount of the contract, held that when an attorney sued on quantum meruit the amount fixed in the contract was "not germane" to the amount of his recovery. The court reasoned that once the contract is breached it is no longer binding on either party, and therefore the attorney may recover the reasonable value of his services even if that exceeds the contract amount. *Cf. Young v. Tian*, 150 S.W. 2d 317 (Tex. Civ. App. 1941), *error dismiss.* where the court said that if both parties agree to abandon the contract, there arises an implied contract whereby the client is to pay the reasonable value of the attorney's services.

Hal Bateman.

CRIMINAL LAW: AIDING AND ABETTING

In *United States v. Moses*, 122 F. Supp. 523 (E. D. Penn. 1954), a woman who introduced a pair of government agents to a dope peddler, and who recommended the agents to the peddler as safe persons with whom to deal, was convicted as a principal in the subsequent sale of dope under 18 USC §2(a), as amended October 31, 1951, which provides that “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission,” is a principal to the crime, and punishable as such.

The court stated unequivocally that an abetter need have no stake in the commission of the crime. This rule is followed by all but one of the federal Courts of Appeal. The court of the second circuit has followed an opposite rule.

In *U. S. v. Falcone*, 109 F. 2d 579 (2d Cir. 1940), Judge Learned Hand first enunciated the rule that a person had to have “a stake” in the outcome of a crime before he could be convicted as an abetter to such crime. In *U. S. v. Di Re*, 159 F. 2d 818 (2d Cir. 1947), the court, again speaking through Judge Hand, said at page 819 that “the prosecution must prove that the accused had so associated himself with the principals in the sense that he had a stake in the success of the venture,” or he was not an aider and abetter.

Judge Hand stated the policy behind such a rule by saying in the *Falcone* case at page 581 that it is “especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offender. That there are opportunities of great oppression in such a doctrine is very plain, and its only by prescribing the scope of all such indictments that they can be avoided.”

The case most diametrically opposed to this doctrine, *Backun v. U. S.*, 112 F. 2d 635 (4th Cir. 1940), stated that “guilt depends not upon having a stake in the crime, but on aiding the perpetrators. Those who sell to criminals the means to carry on their

nefarious undertakings, aid them just as if they were actual parties to the crime, having a stake in the fruits of the enterprise." In *U. S. v. Harrison*, 121 F. 2d 930 (3d Cir. 1941), it was said that the doctrine had been modified by the court of the second circuit in the case of *U. S. v. Pandolfi*, 110 F. 2d 736 (2d Cir. 1940) and the rule of the *Falcone* case confined to the particular circumstances of that case. On the strength of this reasoning, the third circuit refused to apply the test of a "stake in the venture." The court was mistaken in its assumption, however, since the *De Ri* case was decided six years later.

Most of the cases which have decided what constitutes aiding and abetting have not mentioned the necessity of a "stake" at all, but have applied the test laid down in *U. S. v. Peoni*, 100 F. 2d 401 (2d Cir. 1938), which is that the party must have "associated himself with the venture in some way, participated in it as something he wished to bring about, and sought by his actions to make it succeed." *Nye & Nissen v. U.S.*, 336 U.S. 613 (1946).

The U. S. Supreme Court has never squarely decided this issue. The only case in point is *Direct Sales Co. v. U.S.*, 319 U.S. 703 (1943), in which it said, "and there is also a stake in the venture, which, if it may not be essential, is not irrelevant to the question of conspiracy."

Judge Hand's statement of the public policy sought to be protected by his rule undoubtedly expresses a valid public interest. Whether requiring a "stake" in the crime is necessary to the protection of that public interest, and whether it is the proper criterion for culpability is more questionable. Furthermore, the phrase is one which, as many other general "tests," lends itself more to use as a statement of result than as an aid to a solution. At any rate, the cases do not show that the use of, or failure to use, this test would result in substantially different results in the individual cases.

Fred R. Disheroon.

DEEDS: SUFFICIENCY OF DESCRIPTION AND PROBLEMS
IN RECORDATION

S conveyed to P for consideration "all oil and gas and mining leases, royalties . . . located within the United States, most of which are located within the states of New Mexico, Kansas, Oklahoma, Louisiana, and Texas . . . owned by S." P recorded in Scurry County. Later S conveyed parcel in Scurry County owned at time of execution of deed to D. Held: in trespass to try title action, description in deed sufficient to convey all interests of S within Texas, and when recorded in Scurry County, gave constructive notice of P's rights as to all property within Scurry County. *Texas Consolidated Oils v. Bartels*, 270 S.W. 2d 708 (Tex. Civ. App. 1954) *error ref.*

That a deed describing the subject matter as "all grantor's property" or "all" in a given locality is sufficient description to identify and convey property in Texas was early established and is consistently followed. *Smith v. Westall*, 76 Tex. 509, 13 S.W. 540 (1890); *Merrill v. Bradley*, 102 Tex. 481, 119 S.W. 297 (1909); *Hatcher v. Stipe*, 45 S.W. 329 (Tex. Civ. App. 1898) *error ref.* The general American weight of authority is in line with the Texas view, see annotations, 55 A.L.R. 162.

Non-recorded conveyances are void as to subsequent purchasers for value without notice. Art. 6627, TEX. REV. CIV. STAT. 1925. Record is constructive notice to subsequent purchasers for value when the description of the property is sufficient to identify and convey. *Wilkerson v. Ward*, 137 S.W. 158 (Tex. Civ. App. 1911), *error ref.*

Thus, under the requirement for sufficiency, the broad description to "all" property within Texas is sufficient to convey and to permit constructive notice to attach from recording. But a problem of some difficulty is encountered with regard to the place of recording. Art. 6630, TEX. REV. CIV. STAT. 1925, provides that "all deeds . . . shall be recorded in the county where such real estate, or a part thereof, is situated." If an instrument affects title to several distinct or separate tracts of land which are situated in

different counties, recording in a county in which some of the tracts are situated is not notice with regard to lands not situated in the county of record. *Hancock v. Tram Lumber Co.*, 65 Tex. 225 (1885). Recordation of the instrument in county in which no part of the land is situated is actually worthless as to notice in counties where the land actually lies. *Adams v. Hayden*, 60 Tex. 223 (1883); *Huff v. State*, 93 S.W. 2d 231 (Tex. Civ. App. 1936). But when one tract is situated in two or more counties, recording in only one of these counties is sufficient to give constructive notice to subsequent purchasers in all counties in which the one tract lies. *Brown v. Lazarus*, 25 S.W. 71 (Tex. Civ. App. 1893).

Notice by recording is imputed only to those persons who are bound, under the circumstances, to search the record for such an instrument. *Leonard v. Benford Lumber Co.*, 110 Tex. 83, 216 S.W. 382 (1919).

A purchaser of one or these broad "all" grants would, at his peril, have the burden of ascertaining the exact location of each and every parcel and interest owned by the grantor, and recording in each and every county in which such property is located. Failure to locate and record a parcel in a particular county would open the purchaser to dangers of new bona fide purchasers who would cut off his title. One recording in a county would give the requisite notice for any and all property of the grantor in that county. The one exception would seem to be where one tract crosses county lines, as in *Brown v. Lazarus, supra*. Thus it is manifest that such a broad general description as in the main case is sufficient in law to identify and convey, and thereby is sufficient to give constructive notice when recorded properly where the land is situated. Practical difficulties are encountered, such as the grantee locating all the parcels, but under the settled law, once located and recorded in that county of situs, the grantee is fully protected by all the recording acts.

George M. Cunyus.

FEDERAL INCOME—TAXATION—ASSIGNMENT OF INCOME—
GIFT OF AN OIL PAYMENT

Taxpayer in December, 1949, conveyed to a church by deed of gift an undivided $\frac{1}{8}$ interest to all his right, title and interest in certain oil land until the total sum of \$115,000 was reached. The church sold this right to a third party who received the \$115,000 during 1950. Taxpayer claimed a charitable deduction in 1949 (under INT. REV. CODE OF 1939, §23(o) or INT. REV. CODE OF 1954, § 170) in the amount of \$111,925 (the fair market value of the property at the date of the gift). The Commissioner contended the gift was, in fact, an assignment of future income and thereby taxed the oil runs to the donor in 1950 and gave him a similar charitable deduction at that time plus allowances for depletion. *Held*, the income accrued after the date of the gift and the taxpayer was therefore entitled to the full deduction claimed in 1949 as he had given the property and retained only a reversionary interest. *Nordan v. Commissioner*, 22 T.C. (No. 137), (August 31, 1954) (CCH Dec. 20, 535-1954; P-H T.C. ¶ 22, 137).

The *Nordan* case was based on a 1932 Board of Tax Appeals case, *Nail v. Cunningham*, 27 B.T.A. 33, which held that an undivided interest in oil property may be assigned and the income arising from such property after the assignment is not taxable to the grantor. The *Nail* case was undisputed until 1949 when the Commissioner withdrew his prior acquiescence (1949-1 CUM. BUL. 6) and held that such "short lived in-oil payments" were assignments of future income (I. T. 3935, 1949-1 CUM. BUL. 39). The *Nail* decision was based on the fact that under the law locally applicable, such conveyance passed a property right, as the several property rights embraced in a fee title may be severed and separately dealt with, *Stephen Co. v. Mid-Kansas Oil and Gas Co.*, 113 Tex. 160, 254 S.W. 290 (1932) and such severance may be accomplished by a conveyance of oil and gas in place, *Hager v. Stokes*, 116 Tex. 453, 294 S.W. 835 (1927). Such reasoning seems unwarranted in the light of the decision in *Burnet v. Harmel*, 287 U.S. 103 (1932), where it was held that the bonus paid for an oil and gas lease is ordinary income even though the local

law treats it as income derived from the sale of a capital asset. It expressly holds that, "state law may control only when the operation of the federal taxing act, by express language or necessary implication, makes its own operation dependent on state law." Therefore the decision in the *Nail* case, where only cases involving substantive law, oil and gas points were cited, seems to be based on a weak foundation.

The *Nordan* decision expressly approves of the *Nail* decision and adds that cases where the right to receive income in the future was transferred or where title to income producing property is retained are not in point. Such reasoning was severely questioned by the Commissioner as early as 1946, when he stated in G.C.M. 24849, 1946-1 CUM. BUL., that subject to certain exceptions, considerations for "short lived in-oil" payments is ordinary income and the fact that they are capital assets in the hands of the grantee does not change the situation as ordinary income would have been realized from the oil by the grantor had he not assigned the property. In 1950 the Commissioner went all the way and stated in I.T. 4003, 1950-1 CUM. BUL. 10 that all assignments of "in-oil" payment rights, except those pledged for development, lasting less than the life of the depletable property, are assignments of future income. The Commissioner's contention was backed up by judicial approval in *Rudco Oil and Gas Co. v. United States*, 82 F. Supp. 746 (C.C. 1949), where it was held that oil payments granted by the taxpayer corporation to its stockholders in proportion to their stock ownership were an assignment of future income which was therefore taxable income to the corporation.

However, it must be pointed out that the consistent reasoning of the fifth circuit has been to consider assignments of oil payments to be an assignment of a property interest rather than future income. This is based in part on the fact that Texas substantive law has long considered all oil and gas interests to be interests in realty, *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717 (1915). This type of thinking which has been followed in both the *Nordan* and *Nail* decisions has been sustained by the fifth circuit in *Ortiz Oil Co. v. Comm.*, 102 Fed. 508 (5th Cir. 1939),

affirming 37 B.T.A. 656, *certiorari denied* 308 U.S. 556 (1939), where the grant of an oil payment was held to preclude the grantor from taking depletion on that interest as the grantees had acquired an interest to the oil and gas in place. In *Lee v. Commissioner*, 126 F. 2d 825 (5th Cir. 1942), the fifth circuit treated an oil payment as property interests analogous to royalties even though the proceeds from both are income rather than a conversion of a capital asset.

By virtue of the *Nordan* decision the holder of oil and gas interests may give oil payments to charitable institutions and thereby receive increased total income after taxes. For example, a married taxpayer with \$300,000 oil income per year may give a \$50,000 oil payment and have \$18,073 more after taxes than had he not been so charitable. For taxpayers in lower brackets, the same principle would give the donor \$600 more after taxes if he gave a \$5000 oil payment out of a \$70,000 yearly oil income. These savings arise out of a "double deduction" which the taxpayer gets, that is, (1) the oil payment would not be included in gross income and (2) the gift gives rise to a charitable deduction. (See discussion note following the principal case in 3 OIL AND GAS REPORTER 1936.)

It is thought by this writer that the *Nordan* reasoning will be reversed by the United States Supreme Court whenever the problem is squarely presented before that body. However it is submitted if this is not done, Congress will enact legislation analogous to INT. REV. CODE OF 1954, § 170 (b)(1)(D) for property not granted in trust. By virtue of this code section, the charitable deduction is denied where property is transferred in trust with the grantor retaining a reversionary interest which exceeds 5% of the value of the property.

Walter P. Zivley, Jr.

FEDERAL INCOME TAXATION—REALIZATION OF INCOME FROM THE
DISCHARGE OF AN OBLIGATION PAYABLE IN FOREIGN FUNDS AFTER
DEVALUATION OF SUCH FUNDS

In *Willard Helburn, Inc. v. Commissioner of Internal Revenue*, 214 F. 2d 815 (1st Cir. 1954) the taxpayer, a U. S. corporation, financed purchases from a foreign vendor by borrowing pounds sterling from a third party issuing to negotiable 120-day sight paper payable in pounds sterling.

The taxpayer recorded these purchases in its books in U. S. dollars based upon the rate of exchange prevailing at the time the purchases were made. Subsequently, but prior to maturity of the 120-day sight paper, the pound sterling was devalued. This devaluation permitted the taxpayer in the taxable year in question to discharge certain of these obligations payable in pounds sterling with \$84,047.36 less U. S. dollars than had been recorded in its books.

The taxpayer, in its federal income tax return, treated the cost of the raw materials purchased in the same manner as it had in its books, but excluded the \$84,047.36 from gross income. The Commissioner of Internal Revenue determined that the \$84,047.36 was includible in gross income and determined a deficiency in the taxpayer's income taxes accordingly. The case was tried in the Tax Court upon stipulated facts. Inasmuch as the Commissioner and the taxpayer agreed that the taxpayer's method of accounting in costing the purchases was proper, the only question before the Tax Court was whether the \$84,047.36 was properly includible in the taxpayer's gross income. The Tax Court sustained the Commissioner's finding and the U. S. Court of Appeals affirmed.

The question of whether income is realized upon the discharge of an obligation payable in foreign funds had been before the Tax Court several times, and its decisions are not easily reconcilable. See *B. F. Goodrich Co.*, 1 T.C. 1098 (1943); *North American Mortgage Co.*, 18 B.T.A. 418 (1929); *Joyce-Koebel Company*, 6 B.T.A. 403 (1927); *Bernuth Lembcke Company, Inc.*, 1 B.T.A. 1051 (1925).

The Court of Appeals, after distinguishing *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170 (1926), an early Supreme Court decision which in the opinion of the Court of Appeals did not lay down any clear-cut principle concerning foreign exchange, considered the case one of first impression. It then theorized that such transactions in foreign funds could be treated taxwise in either of two ways:

(1) The purchases and the discharge of the related obligations to pay pounds sterling could be considered as a single integrated transaction. If so considered, the cost of the purchases would be the total U. S. dollars ultimately expended by the taxpayer in discharging the related obligations, and consequently there would be no income realized merely by the discharge of an obligation in pounds sterling after devaluation.

(2) The purchases and the discharge of the related obligations to pay pounds sterling could be considered separate and independent transactions. If so considered the costing of the purchases would be based upon the rate of exchange prevailing at the time such purchases were made and would not be affected by a subsequent devaluation of the pound sterling. A subsequent change in the pound sterling would be a separate financial transaction giving rise to income or loss upon the discharge of the obligation.

The Court of Appeals concluded that the taxpayer was governed by the second method and therefore was required to recognize the \$84,047.36 as being within the "gross income" definition of Sec. 22(a) of the Internal Revenue Code of 1939. The fact that the taxpayer had costed its purchases with reference to the old exchange rate and had stipulated with the Commissioner that such costing was proper was considered as a rejection by the taxpayer of the method permitting nonrealization of gross income. The Court of Appeals considered that the taxpayer had put itself in the impossible position of asking to have the transaction treated both ways in costing the purchases with reference to the old exchange rate while recognizing the extent of loan to be repaid only on the basis of the new exchange rate.

The *Helburn* decision may settle some of the conflict among

previous Tax Court decisions by apparently giving the taxpayer an election to follow either the single integrated transaction theory or the separate-and-independent-transactions theory, but it leaves unanswered certain questions. For example:

(1) What action by the taxpayer will constitute an election to use either of the two methods?

(2) When will such an election become irrevocable?

(3) Must the taxpayer follow the same method for all foreign funds or may he exercise the election as to each foreign fund involved independent of his accounting treatment of other foreign funds? This might be important where the exchange rates of certain funds were relatively unstable.

(4) If the borrowed foreign funds are used for a personal expenditure, should the taxpayer be required to realize income regardless of elections permitted?

Taxpayers who resort to loans of foreign funds should carefully note the *Helburn* decision and its possible implications.

David P. Smith

JURIES—THE EFFECT OF A WAIVER TO THE RIGHT OF TRIAL BY JURY ON A SUBSEQUENT TRIAL.

In the case of *Spaulding v. Cameron*, 274 P. 2d 177, (Cal. App., 1954) the defendant, Cameron, undertook leveling operations on his property in preparation for construction. In doing this he removed the tops of three knolls and cast the earth into the mouth of an adjoining canyon. As a result of heavy rains, large quantities of mud were washed down the canyon onto plaintiff's property. The trial court awarded damages for future injury and also granted injunctive relief. The Supreme Court remanded the case with instructions to:

Determine on the basis of evidence previously presented and such additional evidence as may be presented by the parties or not the nuisance is in fact permanent.

Upon retrial, the defendant demanded a jury and was refused by the trial court. Thus the California District Court of Appeal was presented with the novel question of whether waiver of a jury in the original trial precluded the defendant from demanding a jury upon retrial, where, as here, the appellate court had not reversed but simply remanded for additional determinations of fact.

The court held that had the Supreme Court reversed the case, then the parties would have stood as if no trial had taken place. They would not be bound on a subsequent trial by prior waiver of a jury.

The court further held that since the issue of liability had been determined and the trial court's only duty was to determine the type and amount of damages, which should have been determined originally, the defendant would be bound by a prior waiver of jury.

The first holding is in line with the majority opinion today. The weight of authority is to the effect that, unless otherwise provided by statute, the waiver of a jury trial is applicable only to that trial and does not affect the right to demand a jury on a

subsequent trial after a case has been reversed. *Northern Pac. Ry. v. Van Dusen Harrington Co.*, 34 F. 2d 786 (D. Minn. 1929); *F. M. Davies & Co. v. Porter*, 248 F. 397 (8th Cir. 1918).

The minority view, largely represented by New York, is that having waived the right to a jury trial a party cannot retract such waiver after reversal of the trial court by the appellate court. The waiver remains good during the life of litigation. *Laventhall v. Firemans Ins. Co. of Newark*, 266 App. Div. 756, 41 N.Y.S. 2d 302 (2nd Dep't. 1943).

Texas courts have been presented with this precise question only once. In that case they held that, because of the strict constitutional provision that the right to trial by jury shall remain inviolate, and because of Art. 3061, TEX. REV. CIV. STAT. (now rule 216, TEX. RULES CIV. PROC.), the right to a jury would not be affected by a prior waiver. *E. L. Dunlap v. Brooks & Case*, 3 Willson. 425 (Tex. Ct. App. 1888).

It should be borne in mind, however, that the novel question before the California court was not as to the effect of a jury waiver if the appellate court *reversed* the case. The question seems well settled. It was as to the effect of a prior jury waiver if the appellate court only remanded the case to the trial court in order that it might determine other facts necessary to the disposition of the case. This issue has been before American courts only twice. The first case was *Park v. Mighell*, 7 Wash. 304, 35 P. 63 (1893), in which it was held that a trial jury having once been waived, a party cannot demand a jury trial when the judgment on the report has been reversed for failure of the referee to state items allowed and disallowed, and the case re-referred for the purpose. The second case was *Raleigh Banking & Trust Co. v. Safety Transit Lines Inc.*, 200 N.C. 415, 157 S.E. 62 (1931), in which the court said at p. 64:

The hearing by Judge Daniels was for the purpose of finding additional facts, in accordance with the direction of this court. The waiver of a jury trial at the first hearing continued in force until the final determination of all matters involved in the proceeding.

The California Court is in accord with the above two cases. It would seem to be a safe assumption that when other courts are presented with this issue a majority of them will also recognize a distinction in the effect of a prior jury waiver when the appellate court only remands for further proceedings rather than reversing the case.

It is submitted by the author that Texas courts will not follow this lead. TEXAS CONSTITUTION, Art I, § 15 states:

The right of trial by jury shall remain inviolate. The legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.

Article V, Section 10 of the Constitution contains the further provision:

In the trial of all cases in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury . . .

In view of these two sections of the Constitution, TEX. RULES CIV. PROC. rule 216 and the rather strong opinions of our courts upholding the right of trial by jury, it is probable that Texas will not follow the majority in this distinction.

E. A. Cole

WILLS: EFFECT OF THE PRETERMISSION STATUTE ON THE
RIGHTS OF POSTHUMUS CHILD

Testator, father of six living children and fully aware of the prospective birth of his seventh child, executed his will devising all his real and personal property to his wife without any reference whatsoever to the living children or unborn child. Testator died 38 days after executing the will, and the child was born a short time later. Wife of the deceased brought action as executrix of estate to determine the rights of the posthumous child of the testator. *Held*, an intention to disinherit the child was implied from the language of the will, and the Ohio pretermission statute was inapplicable. OHIO REV. CODE § 2107.34 (1953), *Spieldenner v. Spieldenner*, 122 N.E. 2d 33 (Ohio Probate 1954).

Sec. 2107.34 provides that a testator's will is not revoked by a pretermitted after-born child, "but unless it appears by such will that it was the intention of the testator to disinherit such pretermitted child," then such omitted child takes from the estate as if such testator had died intestate as to the omitted child. Without precedent within the jurisdiction, this court, in interpreting Sec. 2107.34, determined the testator's intent need not be expressly written in the will, but that it could be implied from the language of the will construed in connection with the facts and circumstances surrounding the testator at the time of execution. Where the testator failed to provide for the six living children in the will and believed that his wife would provide for all his children, the court decided the pretermitted child had been disinherited.

The court resorted to the construction placed on similar statutes by Illinois, Kentucky, and Tennessee courts, and relied heavily in its opinion on an Illinois decision. ILL. REV. STAT. c. 3, § 192.3 (1951), *Hedlund v. Miner*, 395 Ill. 217, 69 N.E.2d 862 (1946). The *Hedlund* opinion stated that testamentary intent was the controlling factor; the intent need not be expressly declared, but is drawn from the language of the will construed with circumstances surrounding the testator when he made the will. Where the testator, with living children at the time of executing the will, disinherits

these children, little short of an express provision in the will for an after-born child will be sufficient to give such after-born child a share in the estate. *Hawhe v. Chi. and Western I. R. Co.*, 165 Ill. 561, 46 N.E. 240 (1897), a landmark decision based on the same facts as the *Spieldenner* case, concluded it was not reasonable to believe the testator intended to exclude living children and not at the same time exclude a child born to his pregnant wife after the will was executed. Evidence as to circumstances surrounding the testator was admitted, and the court concluded if the testator had wanted to make any distinction between his children, he would have inserted a provision doing so.

All American jurisdictions allow testamentary freedom in which a parent can disinherit his children; therefore, pretermission statutes have been passed to provide for unintentionally or inadvertently omitted children or heirs, and their application can only be avoided by usage of proper language in the testator's will. The statutes are of quite varied phraseology, and it appears impractical to set out general rules as to their avoidance. See note 170 A.L.R. 1320 (1947). However, two broad groups are distinguishable — the "Massachusetts" and "Missouri" types. The former type is more frequently found and includes those statutes of Ohio, Illinois, Massachusetts, Michigan, and Oklahoma. These pretermission statutes emphasize and are primarily concerned with intent, and create partial intestacy unless it appears from the will that the omission of the children was "intentional and not occasioned by accident or mistake." GEN. LAWS OF MASS. c. 191, § 20 (1932). Extrinsic evidence is usually admissible to determine the intent in construing ambiguous wills under the "Massachusetts" type. ATKINSON, WILLS 143 (1953). Where the will is uncertain as to the intention to omit children, the testator's intent may be ascertained by interpreting his words in light of attendant circumstances under which the will was made. OKLA. STAT. tit. 84, Sec. 132 (1951), *Dilks v. Carson*, 197 Okla. 128, 168 P. 2d 1020 (1946).

All the "Massachusetts" type states listed above allow this extraneous evidence. Where the omission is unintentional, and the statute is applied, the omitted child takes an intestate share with the beneficiaries contributing to provide such share.

The "Missouri" type, including Missouri, Arkansas, Oregon, and Washington, involves a minority of states and is mandatory in nature. Testator's intention to disinherit a child must be expressed in clear and unambiguous language. Unless the children are expressly mentioned within the will individually or as a class, the statute is applied, and such children take an intestate share. The will is in effect construed as being unambiguous, and extrinsic evidence is inadmissible to show that the testator had his children in mind and intended to disinherit them. ARK. STAT. tit. 60-119, 120 (1947), *Yeates v. Yeates*, 179 Ark. 543, 16 S.W. 2d 996 (1929); MO. REV. STAT. § 468:290 (1949), *Lawnick v. Schultz*, 325 Mo. 294, 28 S.W. 2d 658 (1930).

Texas' pretermission statutes, taken largely from those of Mississippi, do not apply where the "surviving wife is the principal beneficiary in the testator's last will . . . to the entire exclusion, by silence or otherwise, of all of said testator's children." TEX. REV. CIV. STAT. arts. 8291-93 (Vernon 1948 and Vernon, Supp. 1950). Articles 8291 and 8292, infrequently litigated, concern after-born and posthumous children when the testator has living children at the time the will is executed. Article 8293, involving the situation where the testator has no living children at the time his will is made, and there are after-born or posthumous children, provides the will shall be void unless the children die before reaching 21 years of age and without having been married. TEX. REV. CIV. STAT. arts. 8291-93 (Vernon 1948 and Vernon, Supp. 1950), *Hill v. Joseffy*, 259 S.W. 2d 760 (Tex. Civ. App. 1953) *error ref.*, is a notable decision holding that where Article 8293 applies, the entire will is void and wholly inoperative subject to a contingency that it becomes good if the pretermitted children die under 21 years of age and unmarried. Justice Norvell's dissent stated the will is valid *pro tanto* as are wills under Articles 8291 and 8292, and the shares of the beneficiaries are not affected as long as the children's shares would not be hindered; the will is subject to probate as to the beneficiaries.

It is submitted that the Probate Court reached the correct result in the *Spieldenner* case. Where the testator gave all his estate to

his surviving wife, and failed to provide for his living children, sound reasoning shows that the testator intended to disinherit his posthumous child in the belief that his wife would provide for the welfare and needs of all his children.

Larry E. Golman

