

NOT EVEN PAST



Dean Page Keeton and Academic Freedom at UT Austin: Three Archival Letters

Like 32

Tweet

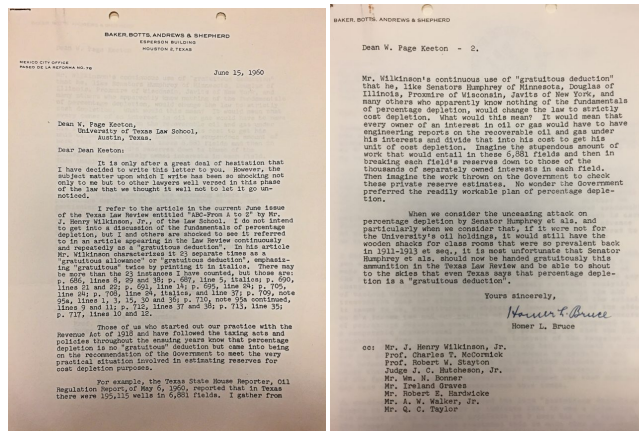
by Josiah M. Daniel, III

One bonus of archival research is to discover documents irrelevant to the topic but so evocative that they can't be ignored. In the State Bar of Texas archives, I found three letters from June 1960 between W. Page Keeton (1909-1999), Dean of the School of Law of The University of Texas and two lawyers. Those letters caused a detour from my project for a while.



W. Page Keeton, Dean of the UT Law School, 1949-1974 (via Law School Yearbook, 1959)

Homer L. Bruce, a tax-law partner of the Houston law firm Baker & Botts, sent the first letter to Keeton on June 15, 1960, with "carbon copies" to nine prominent members of the legal profession in Texas. Six days later, one of those nine recipients, a renowned oil and gas lawyer in a Fort Worth firm, Robert E. Hardwicke, also wrote Keeton. Both letters complained strongly about an article just published in the law school's Texas Law Review by a UT tax-law professor, J. Henry Wilkinson, Jr.. The article was titled "ABC—From A to Z" and the letter writers were outraged that Wilkinson criticized a tax benefit for oil and gas companies known as the "percentage depletion allowance." The third letter is Keeton's June 28 response.



Homer L. Bruce to Dean Keeton, June 15, 1960 (State Bar of Texas, Archives Dept., via author)

The challenged article seems unremarkable today. Wilkinson's topic was the "ABC" transaction, common in the oil-and-gas business. A producing property's owner may sell a "production payment," or a fixed quantity of the minerals to be produced, to a purchaser in a manner that takes advantage of the federal income-tax "allowance," or deduction, of 27-1/2% of the property's income, available to oil-producing taxpayers for the "depletion" resulting from extraction of the minerals in the ground. Through patient examples, Wilkinson demonstrated that the ABC deal was not always as tax-advantageous as was believed. The article did refer to the allowance as "gratuitous." And that observation drew the ire of Bruce and Hardwicke, who amplified their criticism by insisting that enemies of the depletion allowance—specifically, Hubert H. Humphrey—would use Wilkinson's characterization of the percentage depletion allowance as "ammunition."

**TEXAS
LAW REVIEW**
VOLUME 38 JUNE 1960 NUMBER 6

ABC—From A to Z

**A Critical Analysis of the Income Tax and Net Profit
Consequences Resulting from Reservation of an
Oil Payment upon the Sale of a Producing
Oil and Gas Lease**

J. HENRY WILKINSON, JR.*

The following excerpts from Webster are apt:

*"phantasmagoria . . . n. . . 1. An optical effect by which figures on a screen appear to dwell into the distance, or to rush toward the observer with enormous increase of size.
2. A shifting succession of things seen, imagined, or evoked in the imagination, as by a fever; a changing medley.
3. A phantasmagoria . . . 1. A picture of phantom; or a phantasmagoria, illusion. 2. A figure of the fancy or disordered mind; a phantasmagoria. 3. A mental image of a real object. 4. A deceptive or illusory appearance (of something) as, to follow phantasms of truth."*

I. INTRODUCTION

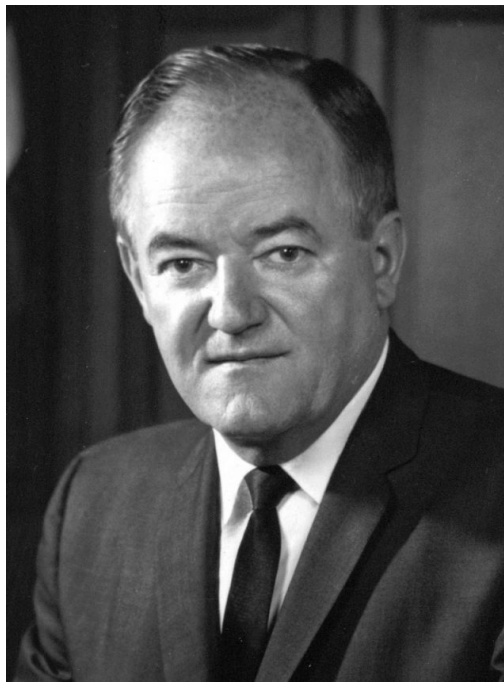
The principal purpose of this paper is to analyze the advantages and disadvantages of the ABC transaction from the standpoint of B, the purchaser of a developed oil and gas lease from A. It is assumed that consideration will be given to the effects of the ABC transaction upon other interested parties.

What is the ABC transaction? If A holds a developed oil and gas lease which B wishes to purchase there are two principal modes by which B may make the purchase. B may make a conventional purchase of the entire leasehold interest, which will be called a straight purchase, using either his own funds or financing it partly with a loan from his banker. Alternatively, he may use the ABC transaction, or plan, under which A will sell the leasehold interest to B subject to a retained oil payment which A will then sell to C to make up the balance of A's desired selling

* Professor of Law, University of Texas.
† Webster's New Concise Dictionary (3d ed. 1960).

Wilkinson's June 1960 article in Texas Law Review (via
www.heinonline.com)

In June 1960, when these letters were written, the Democratic Party's national convention was a month away, and one still-active candidate for the presidential nomination was indeed Humphrey, then a two-term Senator from Minnesota who had consistently fought the depletion allowance in Congress. His fight against that and other "tax loopholes" had been unsuccessful but earned him respect as a reformer. In Texas, however, the depletion allowance was a sacred cow. The *Texas Law Review* had published an earlier article defending the depletion allowance and the Chair of the Texas Railroad Commission, Ernest O. Thompson, wrote and spoke in favor of the allowance, and virtually all of the national legal literature and newspaper coverage in Texas about the allowance defended it. And Humphrey's rival from Texas, Lyndon B. Johnson, was a protector of it. Humphrey later became LBJ's vice-president but "never gave up" and, finally in 1975, was gratified to see Congress abolish this tax "loophole."



Hubert H. Humphrey (via WikimediaCommons)

The addressee of the two letters, Keeton, was well acquainted with the oil and gas industry and its issues. He had earned the LL.B. in 1931 at UT, was hired to teach there, and quickly gained recognition in the field of torts, the law of civil injuries and wrongful death. During World War II, he served in Washington as an executive of the Petroleum Administration for War. After a stint as dean of the Oklahoma University law school, he accepted the deanship of UT's law school in 1949, serving until 1974. He distinguished himself at both law schools by fostering racial integration and by continuing to teach torts as well as serving as dean. The law school grew during his deanship, and UT law alumni/ae revere Keeton. The city of Austin renamed the street alongside the law school for him and he is buried in the State Cemetery by gubernatorial proclamation.

Moreover, Keeton was stalwart and adept, in protecting academic freedom at the law school. One innovative key to his success there was to liberate the school from overreliance on legislative appropriations by creating the UT Law School Foundation to receive alumni/ae contributions. Important supporters of this initiative were law graduates who attained positions of power within the oil and gas industry. For instance, Rex G. Baker of Humble Oil was a key supporter of the Foundation—and also a staunch defender of the depletion allowance.

Those relationships did not deter him. Keeton formulated a masterful response to the two letters that foreclosed any further discussion. "You realize, of course," he began, "that I cannot act as any kind of a censor and do not even attempt to act as such with respect to what goes in the Review." Having matter-of-factly vindicated academic freedom, the Dean added that he did not read Wilkinson to make any judgment about "merits or demerits of the percentage depletion allowance." And by pointing out that the ABC structure does not always work as expected, "Wilkinson may have done a service to the oil industry." Keeton also observed that the challenged word "gratuitous" was simply "a descriptive term" indicating that the amount of the tax deduction was not tied to the cost of the property; the tax benefit was indeed essentially free to the oil and gas taxpayer.



Dr. Daniel V. Keeton
THE UNIVERSITY OF TEXAS
SCHOOL OF LAW
2500 RED RIVER
AUSTIN 5, TEXAS

June 28, 1960

Mr. Homer L. Bruce
Baker, Botts, Andrews & Shepherd
Esperon Building
Houston 2, Texas

Dear Mr. Bruce:

Communications concerning the activities of the Law School and those who are a part of it are always in order. Therefore, your critical comments about the article of Henry Wilkinson entitled "ABC-From A to Z" was in no way resented. Occasionally, mistakes made come to my attention only in this way.

You realize, of course, that I cannot act as any kind of a censor and do not even attempt to act as such with respect to what goes in the Review. It is our practice to have a faculty advisor for the Law Review who must approve for style, subject matter, and general accuracy, and competency, what goes into the Review. Neither he nor I attempt to do anything more than what is considered reasonably necessary for the purpose of giving assurance that the work is carefully and expertly done. I did not see the manuscript in advance of publication, but if I had, I doubt if it would have occurred to me to suggest a change in the phrase "gratuitous deduction."

I did not receive the impression from a reading of the article which you and others apparently got, that the writer was attempting to make any decision whatsoever regarding the merits or demerits of the percentage depletion allowance. There is no suggestion of any change to strictly cost depletion, but merely a careful analysis of various transactions for the purpose of showing that the ABC transaction does not always result in a tax saving, and the article, it seems to me, constitutes an objective demonstration of the effect on B's income tax and net profits of the fluctuation of the excess of percentage depletion over cost on the ABC plan as compared to a comparable conventional purchase. By pointing out that the ABC transaction does not always serve the interest of the taxpayer even with the depletion allowance, Wilkinson may have performed a service for the oil industry. The depletion allowance is certainly not the bonanza that some opponents to the depletion allowance have urged that it is as regards the purchase of oil interests, in view of the fact that under the conventional purchase the cost depletion may very well under some circumstances save taxes.

In reading the article, I regarded the term "gratuitous deduction" simply as a descriptive term to indicate that it was a deduction "in excess of the deduction available to B over his cost basis in the property." Anyone who construes this to mean that the writer is evaluating the soundness of the "depletion allowance" is making an inference that the writer did not intend, and his position can be demonstrated to be fallacious. Moreover, whatever position one might take about this article, there are other articles and other

Dean Page Keeton to Homer L. Bruce, June 28, 1960 (State Bar of Texas, Archives Dept., via author)

Academic freedom at UT has had a long history. In 1917, when Governor James E. Ferguson vetoed appropriations for UT because the President would not dismiss faculty to whom Ferguson objected, the Legislature, at the urging of UT alumni/ae, impeached and removed him. In his 1986 oral history interview, Keeton recounted less spectacular but nonetheless significant instances during his tenure of politicians and the Board of Regents seeking to meddle with the faculty and academic matters, efforts Keeton successfully repulsed. But Keeton's defense of academic freedom was not always public, as in the example of these previously unknown letters in the archive. Keeton's handling of that situation in June 1960 highlights the ongoing task of University leaders to protect academic freedom, and it burnishes both Keeton's legacy and the reputation of UT as a place for free exchange of knowledge and of viewpoints.



The State Bar of Texas's Archives Department, also known as the "Gov. Bill and Vara Daniel Center for Legal History," contains the Bar's permanent records. The Archives' professional archivist also manages and provides access to the collections of the Texas Bar Historical Foundation there. The archives are located in the Texas Law Center in Austin, Texas. See https://www.texasbar.com/AM/Template.cfm?Section=State_Bar_Archives. The three letters were contributed to this archive in 1992

by J. Chrys Dougherty, a historically minded lawyer; his father in law, Ireland Graves, was one of the nine cc recipients of the three letters.



Josiah Daniel (UT Law, J.D. 1978; UT History, M.A. 1986) is a Retired Partner in Residence of the international law firm Vinson & Elkins LLP in its Dallas, Texas office. After four decades of law practice, he now is focusing on the history of the legal profession in Texas and is writing a biography of Dallas congressman Hatton W. Sumners (1875-1962), based on his papers in the Dallas Historical Society's archive. His C.V. is on his blog: <http://blog-josiahmdaniel3.blogspot.com/2018/03/cv.html>. He may be reached at jdaniel@velaw.com.



Sources for this article include:

Lewis L.Gould, *Progressives and Prohibitionists: Texas Democrats in the Wilson Era* (Austin: UT Press, 1973).

"W. Page Keeton, An Oral History Interview" (Austin: UT Austin School of Law, Tarlton Law Library, Legal Bibliography Series No. 36 (1992) 49-52, 69-74.

Theodore H. White, *The Making of the President 1960* (N.Y., Harper, 1963)



You might also like:

[Hatton Sumners and the Retirement of Supreme Court Justices](#)
[The Racial Geography Tour at UT Austin](#)



Posted October 9, 2019

[More Texas](#)

19th century **20th Century** African American History american history Asia Asia & Middle East book review Brazil
British Empire China Civil War Cold War Colonialism communism cultural history digital history Early Modern Europe
Europe film gender history History of Science immigration India Islam Latin America Latin American History
Mexico Not Even Past Public History race religion Russia slavery Texas Texas History Texas History Day
Transnational Twentieth Century History United States **US History** USSR Womens History world history
World War II

NOT EVEN PAST is produced by
The Department of History
THE UNIVERSITY OF TEXAS AT AUSTIN
We are supported by the College of Liberal Arts
And our **READERS**

DONATE

CONTACT

All content © 2010-present NOT EVEN PAST and the authors, unless otherwise noted

Sign up to receive the monthly Not Even Past newsletter

Your email address

SUBSCRIBE

FEATURES

BOOKS

TEACHING

DIGITAL & FILM

BLOG

IHS & PUBLIC HISTORY

TEXAS

ABOUT

