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Recent Decisions

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RECENT DECISIONS

Constitutional Law — Voluntariness of Confession — Rules for Determining

Petitioner, a prisoner sentenced to death in a Texas prosecution, applied to a federal district court for a writ of habeas corpus. Relying on *Jackson v. Denno*,[1] petitioner contended his constitutional rights had been violated because the trial judge did not make a preliminary finding, out of the presence of the jury, that petitioner's confession was voluntary. The federal court examined the trial record and found that petitioner had not requested to be allowed to testify in regard to voluntariness of his confession out of the presence of the jury. At an evidentiary hearing held by the federal court, the state trial judge testified he would not have admitted the confession unless he had been satisfied in his own mind that it had been voluntarily given. *Held:* Constitutional requirements for admission of confessions are met if the trial judge makes a clear-cut, preliminary determination that the confession was voluntarily given and, absent a request by the defendant to testify out of the presence of the jury, presence of the jury during the judge's determination does not invalidate the proceeding. *Smith v. Texas*, 236 F. Supp. 857 (S.D. Tex. 1964).

Convicted prisoners, hopeful of freedom, will find *Smith* one of the more discouraging of the recent cases forming the "fall-out" from *Jackson v. Denno*. In *Jackson*, the United States Supreme Court examined the three prevailing modes for admitting confessions—the New York rule,[2] the Massachusetts rule[3] and the orthodox

[1] 378 U.S. 368 (1964), noted 18 Sw. L.J. 729 (1964).

[2] Under the New York rule, the trial judge must make a preliminary determination regarding a confession offered by the prosecution and exclude it if in no circumstances could the confession be deemed voluntary. But if the evidence presents a fair question as to its voluntariness, as where certain facts bearing on the issue are in dispute or where reasonable men could differ over the inferences to be drawn from undisputed facts, the judge "must receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness." *Id.* at 377, quoting from Stein v. New York, 346 U.S. 156 (1953).

[3] [T]he judge himself hears the confession evidence, himself resolves evidentiary conflicts and gives his own answer to the coercion issue, rejecting confessions he deems involuntary and admitting only those he believes voluntary. It is only the latter confessions that are heard by the jury, which may then, under this procedure, disagree with the judge, find the confession involuntary and ignore it. Jackson v. Denno, 378 U.S. 368, 378 (1964).

In *Smith*, the federal district court said: "Under the Massachusetts procedure, it is immaterial that the jury is present when the predicate for admissibility of the confession is laid, for once the confession is found voluntary and admitted, the jury only hears what it would have heard anyway." 236 F. Supp. at 861 n. 9.

rule[4]—and found the New York rule inadequate to protect a defendant's constitutional right not to be convicted on the basis of a coerced confession. The orthodox rule was expressly and the Massachusetts rule impliedly approved.[5] In *Smith,* the federal court looked at Texas precedents and found that, before *Jackson,* it was within the discretion of the trial judge to determine which of the two procedures (New York or Massachusetts) he would follow. This opened the door for examination of the record and the taking of testimony by the trial judge as to which procedure was, in fact, followed. The court, upon finding that the Massachusetts rule had been used and that no request had been made by the defendant to conduct the hearing under that rule outside the presence of the jury, dismissed the petition.

A recent decision of another federal district court also enunciated this rule. In *Rudolph v. Holman*[6] the writ of habeas corpus was granted where it was shown that the state trial court had denied defendant's timely request to conduct the hearing in the absence of the jury.

Also in apparent accord are the instructions given to trial courts by the Texas Court of Criminal Appeals in two cases[7] which were remanded to the Texas appeals court at the same time *Jackson* was decided.[8] It was held that in future Texas trials the judge should make a clear-cut determination on voluntariness of confessions, including disputed fact issues. "Upon request," said the court, "such hearing shall be held . . . in the absence of the jury."[9]

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The court noted that a defendant might be reluctant to testify to coercion in the presence of the jury because of his vulnerability to cross-examination and impeachment by proof of prior convictions. But it said the defendant could not claim error on this account unless he had requested to testify out of the presence of the jury and been denied. *Id.* at 862.

[4] "In jurisdictions following the orthodox rule . . . the judge himself solely and finally determines the voluntariness of the confession . . . ." Jackson v. Denno, 378 U.S. 368, 378 (1964).

[5] "We raise no question here concerning the Massachusetts procedure . . . . Given the integrity of the preliminary proceedings before the judge, the Massachusetts procedure does not, in our opinion, pose hazards to the rights of a defendant." *Id.* at 378 n. 8.

[6] 236 F. Supp. 62 (M.D. Ala. 1964).

[7] Lopez v. State, 384 S.W.2d 345 (Tex. Crim. App. 1964); Harris v. State, 384 S.W.2d 351 (Tex. Crim. App. 1964).

[8] Lopez v. Texas, 378 U.S. 567 (1964); Harris v. Texas, 378 U.S. 572 (1964).

[9] Lopez v. State, 384 S.W.2d 345, 348 (Tex. Crim. App. 1964).

Insurance — Omnibus Clause of Liability Policy — Coverage of Buyer Under Conditional Sales Contract

Smith agreed to purchase an automobile from Bailey and Carpenter, Inc. and entered into a sales contract with that firm which was to become effective upon payment by the bank of a check which Smith gave as a down payment. Smith took possession of the car. Upon dishonor of the check, the seller telephoned Smith and verbally cancelled the contract and demanded return of the car. A few days later, Smith, while on his way to return the automobile to the seller, negligently collided with the plaintiff's automobile. Plaintiff, after obtaining a judgment against Smith, sued Bailey and Carpenter and its insurer claiming that Smith was using the car with the permission of the seller and therefore was covered by the omnibus clause of the liability policy issued by the insurer to Bailey and Carpenter.[1] The trial court awarded a judgment for the plaintiff but the court of civil appeals reversed.[2] *Held, affirmed:* The possessor of property who retains possession after the recission of a sales contract to him is not a party using the property with the "permission" of the insured even though a demand for immediate return of the property has been made by the seller and the injury occurred when that demand was being satisfied. *Weatherford v. Aetna Ins. Co.*, 385 S.W.2d 381 (Tex. 1964).

The sales contract in the principal case provided for immediate possession by the buyer but retention of title in the seller until the check was honored by the bank. It is clear that a seller who is induced by fraud to give up possession of his property is entitled to rescind the sales contract under which he lost possession and to demand return of the property.[3] The problem answered in the present case is in what status does a fraudulent possessor act when he is acting under the rightful owner's direction to return the property after recission of the fraudulent contract of sale.

Although several courts have uniformly held the omnibus clause not applicable to conditional buyers,[4] this seems to be a case of first impression on the question of applicability of the clause after the sales contract has been rescinded by the seller but possession has not yet been regained by the seller. The majority of the court based its

[1] The policy contained a standard "omnibus" or additional insured clause covering all persons using the automobile with the permission of the insured.

[2] 370 S.W.2d 100 (Tex. Civ. App. 1963).

[3] Guinn v. Lokey, 151 Tex. 260, 249 S.W.2d 185 (1952).

[4] Farm Bureau Mut. Ins. Co. v. Emmons, 122 Ind. App. 440, 104 N.E.2d 413 (1952); Home Indem. Co. v. Bowers, 194 Tenn. 560, 253 S.W.2d 750 (1952). See also Annot., 36 A.L.R.2d 673 (1954).

opinion upon the theory that, although the buyer had a continuing duty to return the automobile to the seller, the seller had no actual physical control over it and, therefore, should not be held to have given "permission" to Smith to drive the automobile when, in fact, he was merely asserting his rights. The court stated that in order for the owner to give his permission to another to drive the automobile, thereby exposing his insurer to liability, he must have actual control over the property and voluntarily relinquish it to another. In a dissenting opinion, Justice Greenhill asserted that the seller could have acted to repossess the property himself but instead elected to demand that the buyer return it and, therefore, should be held to have given his permission by making that election.[5]

R.B.L.

Labor Law — Jurisdiction of NLRB Not Ousted by Private Agreement

An agreement between the employer and the union to arbitrate reinstatement rights of certain employees contained a clause making the decision of the arbitration board final and binding. Recourse by the parties to any appeal or review given by state or federal law was specifically prohibited. Following an arbitration award in favor of the employer, the union disregarded the terms of the agrement by filing unfair labor practice charges with the National Labor Relations Board. The company subsequently petitioned a federal district court requesting an order that the union withdraw its unfair labor practice charges and be enjoined from attacking the arbitration award in any other way. The court refused to grant the company relief. *Held, affirmed:* The NLRB is granted jurisdiction by statute over unfair labor practices, and such jurisdiction may not be preempted by private agreement. *Lodge 743, Int'l Ass'n of Machinists v. United Aircraft Corp.*, 337 F.2d 5 (2nd Cir. 1964), *cert. denied*, 33 U.S.L. Week 3286 (U.S. Mar. 1, 1965).

Section 10(a) of the National Labor Relations Act[1] empowers the NLRB to prevent any person from engaging in unfair labor practices and expressly states that this power is not to be affected by any other law or agreement. The United States Supreme Court has re-

[5] 385 S.W.2d at 384.

[1] 61 Stat. 146 (1947), as amended, 29 U.S.C. § 160(a) (1958).

flected its affirmation of this section's mandate in this way: "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices."[2] The company acknowledged that heretofore, due to the public interest involved, the power vested in the NLRB to prevent unfair labor practices could not be foreclosed by private agreement. It contended, however, that three recent judicial trends demanded reconsideration of this previously well-settled proposition.

The first trend was illustrated by cases in which parties were allowed to waive by private agreement certain other rights given to them by the National Labor Relations Act.[3] The court agreed that some of the rights could be waived but said that they were not of the magnitude of the one involved here and had not been given express statutory protection.

As the second trend, the company pointed out the impressive line of Supreme Court cases which demands that courts in reviewing arbitration awards give great deference to them.[4] Although the court acknowledged the importance of enforcing contract rights and reiterated the policy of encouraging private settlement of labor disputes, it reasoned that if the broad powers granted to the NLRB by Congress were to be preserved, its jurisdiction must be protected. The court also said that these cases, which set the tone for the courts to follow in considering arbitration awards, did not apply to the NLRB "which, unlike the courts, is charged with vindicating a body of public rights set forth in the National Labor Relations Act."[5]

Finally, the company cited several cases which hold that enforcement of private agreements under section 301(a) of the Labor Management Relations Act[6] is not barred merely because the suit is also

[2] National Licorice Co. v. NLRB, 309 U.S. 350, 364 (1940).

[3] A union may waive its right to obtain wage data and other employee information from the employer for use in collective bargaining. NLRB v. Perkins Mach. Co., 326 F.2d 488 (1st Cir. 1964); Timkin Roller Bearing Co. v. NLRB, 325 F.2d 746 (6th Cir. 1963), *cert. denied*, 376 U.S. 971 (1964).

A union, through a "no-raiding" agreement with another union, may waive its right to petition the NLRB for certification as a collective bargaining agent. United Textile Workers v. Textile Workers Union, 258 F.2d 743 (7th Cir. 1958); Local 2608, Lumber & Sawmill Workers v. Millmen's Local 1495, 169 F. Supp. 765 (N.D. Cal. 1958). *Contra*, International Union of Doll & Toy Workers v. Metal Polishers Union, 180 F. Supp. 280 (S.D. Cal. 1960).

[4] The line was originated by the famous Steelworkers Trilogy. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). It has been continued in the last two terms of the Court by John Wiley & Sons v. Livingston, 376 U.S. 543 (1964), and Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

[5] 337 F.2d at 10-11.

[6] 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958). This section gives the federal district courts the power to hear suits for violation of contracts between an employer and a union or between two unions.

within the jurisdiction of NLRB.[7] The court points out that although these cases show that the jurisdiction given to the NLRB by section 10(a) will not always be exclusive, they do not mean that such jurisdiction has been preempted entirely.

The court in the instant case, in upholding the letter of section 10(a) of the act, indicates certain outside limitations upon the trend to encourage settlement of labor disputes through bargaining and arbitration which is established in the cases cited by the employer. The court suggests that the NLRB, especially in the extreme circumstances of this case, should weigh heavily the merits of the arbitration award. It quickly adds, however, that the Board shall retain the power to make the final determination in *all* cases, including those in which a private arbitration agreement would dictate otherwise.

J.W.C.

Oil and Gas — Abandonment of Lease — Lessee's Duty of Care

Plaintiff, fee owner of a large tract of land in an oil producing area, leased to defendant under a standard form oil and gas lease. Some problems had been experienced with wells on adjoining tracts due to the influx of salt water. Pressure tests were being conducted by the defendant on those tracts to determine the extent of damage done to the pool. Before the results of these tests could be obtained, defendant proceeded to clear the plaintiff's tract in preparation for drilling thereon. The day after clearing procedures had been commenced the results of the tests were made known to the defendant, who then temporarily ceased operations on the plaintiff's tract. Approximately two months later, defendant resumed operations and completed the preparation for drilling. While this work was being done, the wells on the adjoining tracts again began producing excessive amounts of salt water. Defendant then decided to completely abandon the plaintiff's tract, and drilling operations were never commenced. Plaintiff instituted the principal case to recover the loss in value of his tract as a result of the clearing operations. *Held:* A lessor may hold his lessee liable for damages to his tract caused by lessee's

[7] Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962); Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962). See also Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), which gives state courts concurrent jurisdiction in this area.

negligence in clearing the tract after he knew or should have known that he would probably later abandon the lease without drilling. *Sun Oil Co. v. Nunnery,* 170 So. 2d 24 (Miss. 1964).

This case presents a seemingly often raised but rarely litigated problem. The lessee in the principal case was admittedly justified in abandoning or refusing to abandon the lease and for that act alone could not be held liable for negligence under the well-established prudent-operator test.[1] The court makes it clear, however, that the lessee may violate that test by not abandoning operations at the proper time. Lessee here, therefore, had the right to clear the lessor's land and the right to abandon the lease, but was held to have no right to clear the lessor's tract when he knew or should have known that he *probably* would not drill.

The holding in the principal case represents a new approach to the long-settled principle that a lessee under an ordinary oil and gas lease has only those implied rights to use the surface as are reasonably necessary to oil and gas production.[2] The court rejected the holding in the only case cited as dealing with the same problem[3] and based liability in the principal case on the jury's finding of negligence. The court, therefore, limited recovery to the amount which would restore the premises to its previous condition and compensate plaintiff for the loss in productivity of the land during the period in which the damage existed, thereby expressly rejecting the contention of the lessor that the proper measure of damages should have been the loss in the market value of the tract.

R.B.L.

Products Liability — Implied Warranty — Necessity of a Sale

Defendant, a manufacturer of fork-lift trucks, provided plaintiff's employer with a new model fork lift as a demonstrator for the purpose of encouraging future sales. Plaintiff, while operating the lift, was injured when an overhead guard collapsed. The plaintiff instituted suit claiming that the defendant had been negligent in

[1] See 5 Williams & Meyers, Oil and Gas Law § 861 (1964).

[2] Union Producing Co. v. Pittman, 245 Miss. 427, 146 So. 2d 553 (1962); Pure Oil Co. v. Gear, 183 Okla. 489, 83 P.2d 389 (1938); Warren Petroleum Corp. v. Martin, 153 Tex. 465, 271 S.W.2d 410 (1954).

[3] Coffindaffer v. Hope Natural Gas Co., 74 W.Va. 107, 81 S.E. 966 (1914) (holding that the abandoning operator committed a trespass *ab initio* when he entered the leased property and constructed an access road and then abandoned the lease).

affixing the guard to the lift and for breach of implied warranty of the product. The jury found no negligence but held the defendant strictly liable for breach of implied warranty. Defendant appealed. *Held, affirmed:* A manufacturer may be held strictly liable for a breach of the implied warranty of fitness of his product even though it reached the public by some means other than sale. *Delaney v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964).

It has been often held in the jurisdictions accepting the implied warranty theory of products liability that once an original sale of a product is effected the warranty implied by law in the sale runs to any subsequent purchasers,[1] users,[2] lessees[3] or bailees[4] of the product. The principal case eliminates the requirement of an initial sale. The court stated:

> We can see no sensible reason why Delaney's rights against Towmotor should be less extensive on the facts here than if Towmotor had first sold the [product] . . . to its distributor, or than if it had sold the machine to [plaintiff's employer], . . . for a nominal down payment, subject to return if [he] . . . was not satisfied after a trial period.[5]

The holding in the instant case makes it clear that the court, although speaking in terms of implied warranty, applies tort and not traditional contract principles in a products liability case.[6] In doing so it follows, in theory though not in words, the lead of the California Supreme Court which has expressly adopted strict liability in tort as the proper remedy in these cases.[7] In applying that remedy, the basic question to be answered by the court is one of proximate cause, and questions of initial or subsequent sale become immaterial.[8] The court in the principal case, construing New York law, based its opinion on a statement in the majority opinion in *Goldberg v. Kollsman Instrument Corp.*,[9] to the effect that strict liability in tort was a more accurate phrase to describe the duty now being imposed upon the manufacturer. In applying these principles, the court gives a very

[1] Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958).

[2] Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963); Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[3] Simpson v. Powered Prods, Inc., 24 Conn. Supp. 409, 192 A.2d 555 (C.P. 1963).

[4] Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962).

[5] 339 F.2d at 6.

[6] The future application of tort principles in implied warranty cases was also indicated in George v. Douglas Aircraft Co., 332 F.2d 73 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964), noted in 18 Sw. L.J. 756 (1964).

[7] Greenman v. Yuba Power Prod. Inc., 59 Cal.2d 67, 377 P.2d 897 (1963), noted in 17 Sw. L.J. 669 (1963). The New Jersey Supreme Court also recently adopted the strict liability in tort doctrine in Santor v. A. & M. Karagheusian, 33 U.S.L. Week 2446 (N.J. Feb. 17, 1965).

[8] See 1 Frumer & Friedman, Products Liability § 16A [2] (2d ed. 1964).

[9] 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963).

significant interpretation to the language of section 402A(1) of the *Restatement of Torts*.[10] That section provides for the strict liability of one who *sells* a defective product for injuries caused by that product. The court holds that this is "a description of the situation that has most commonly arisen rather than a deliberate limitation of the principle to cases where the product has been sold."[11]

The vast majority of jurisdictions now apply the implied warranty theory of products liability to at least some products.[12] In these jurisdictions the holding in the principal case can be used as a significant precedent by courts attempting to evade traditional notions of contractual warranty in products liability cases.

R.B.L.

Products Liability — Implied Warranty — Nonfood Products

Plaintiff, while using a wheel chair rented from a local retail druggist, suffered personal injuries when the chair collapsed due to a defective fork stem connecting the wheel to the chair. The defendant-manufacturer, a Pennsylvania corporation, purchased the defective fork stem from a supplier, and assembled the stem into the wheel chair sold to the retail druggist. The plaintiff alleged both negligence and breach of implied warranties of fitness and merchantability. After the district court granted defendant's motion to strike the pleadings based on implied warranties because of lack of privity of contract, the case was tried on the issue of negligence. Upon a jury finding that the defendants were free from negligence, the district court entered judgment for the defendants. *Held, reversed:* A manufacturer or assembler of an imminently dangerous defective product is strictly liable to the user for an injury caused by the defect, even though the product is not a food for human consumption, there is no proof of negligence and there is no privity of contract between the user and the manufacturer or assembler. *Putman v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964).

The Fifth Circuit, interpreting Texas law, stated that this result was a logical extension of *Decker & Sons, Inc. v. Capps*.[1] The *Decker* case established that, as a matter of public policy in

[10] Restatement (Second), Torts § 402A(1) (Tent. Draft No. 10, 1964).
[11] 339 F.2d at 6.
[12] 1 Frumer & Friedman, Products Liability § 16.04 [2] (2d ed. 1964).

[1] 139 Tex. 609, 164 S.W.2d 828 (1942).

a food products case, a warranty of fitness for human consumption is implied by law and privity of contract is not a requisite to recovery. Although the doctrine of implied warranty in nonfood cases has not yet been expressly established by the Texas state courts, the reasoning presented in *Decker* for strict liability for food products was held in the instant case to be applicable to a wheel chair;[2] that is, the non-negligent manufacturer should bear the burden because of the inability of the consumer to inspect or analyze the product and the capacity of the manufacturer to best bear the cost of protecting the public from injury. Putting such an unreasonably dangerous product in the stream of commerce was held to be violative of a strong public policy to protect human life and health.

The Fifth Circuit, applying Texas law, in *Ford Motor Co. v. Mathis*,[3] held liable an automobile manufacturer-assembler who was not in privity with the purchaser and who could not have discovered the defect in an independently supplied part by reasonable inspection. Though the manufacturer's liability in *Mathis* was predicated on negligence, the opinion contained strong language of implied warranty heralding the result of the instant case. The court here, as in *Mathis*, held the imminently dangerous doctrine, which eliminates the necessity of privity of contract between the parties, to be applicable. Imminently dangerous products were defined as those which are not inherently dangerous when properly constructed.

Since 1958, nearly every court which has considered the question has extended the doctrine of strict liability to cover all imminently dangerous defective products, regardless of proof of negligence.[4] The court concluded, therefore, that "it would be 'gratuitous and unwarranted' to assume that the forward-looking Supreme Court of Texas, which in *Decker* was one of the leaders in the assault on the citadel of privity, would now hold that privity is required in nonfood cases. . . ."[5] It remains to be seen whether the Supreme Court of Texas will be so disposed.

C.W.M.

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[2] Though no Texas court has made this extension, the court noted that the Decker case had been extensively relied upon by the New Jersey Supreme Court in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), which applied strict liability to a nonfood product (a defective automobile). It was further noted that a federal district court in New York, applying the substantive law of Texas, could find no valid reason for distinguishing between food and imminently dangerous nonfood products, and held that privity was not a requisite for recovery. Siegel v. Braniff Airways, Inc., 204 F. Supp. 860 (S.D.N.Y. 1960).

[3] 322 F.2d 267 (5th Cir. 1963), noted in 18 Sw. L.J. 128 (1964).

[4] See cases cited 338 F.2d at 919-20 n. 19. *But see* Berry v. American Cyanamid Co., 341 F.2d 14 (6th Cir. 1965) (applying Tennessee law).

[5] *Id.* at 923.

Substitution of Parties — Statute of Limitations — Relation-Back Doctrine

Plaintiff's decedent, a nonresident, was killed October 18, 1959, in Yamhill County, Oregon. Plaintiff was appointed administrator of decedent's estate in Multnomah County, Oregon, and brought a wrongful death action on April 26, 1961. On November 9, 1961, defendants moved in the Multnomah County probate court to set aside plaintiff's appointment as administrator on the grounds that decedent was a nonresident and left no assets in that county. After the appointment was set aside, plaintiff was appointed administrator in Yamhill County and amended his complaint in the wrongful death action to reflect this change. *Held:* Where plaintiff was appointed administrator in a county in which the nonresident decedent had no assets, such appointment was a nullity, and where an original complaint had been filed prior to the running of the statute of limitations which had to be amended after the statute had run when the plaintiff was appointed in the proper county, the cause of action was barred. *Richard v. Slate,* 396 P.2d 900 (Ore. 1964).

Under the strict common law rule, if plaintiff made a mistake in the persons he named as parties to a suit, any attempt to rectify this by amendment constituted initiation of a new suit.[1] Modern statutes and rules of procedure generally allow amendments to be made so long as the real parties in interest and the cause of action remain the same.[2] Also common today is the application of the "relation-back" doctrine. Under this doctrine, acts of a personal representative of a decedent, prior to his valid appointment, which were beneficial to the estate and would have been within the scope of his authority had he been duly qualified, are validated upon his appointment.[3] Despite the apparent weight of authority to the contrary,[4] the Oregon court held in the instant case that, before his appointment as administrator in the proper county, the plaintiff was a "stranger to the [wrongful death] action."[5] His amended pleading after proper appointment was, thus, the "commencement of a new action,"[6] then barred by the

[1] See Annot., 8 A.L.R.2d 6 (1949).

[2] See, *e.g.,* Fed. R. Civ. P. 15 (a) and (c); Tex. R. Civ. P. 63.

[3] Globe Acc. Ins. Co. v. Gerisch, 163 Ill. 625, 45 N.E. 563 (1896).

[4] Petsel v. Chicago, B. & Q.R.R., 202 F.2d 817 (8th Cir. 1953) (applying Fed. R. Civ. P. 15); Williams v. Missouri Valley Bridge & Iron Co., 111 Kan. 34, 206 Pac. 327 (1922); King v. Solomon, 232 Mass. 326, 81 N.E.2d 838 (1948); Ghilain v. Couture, 84 N.H. 48, 146 Atl. 395 (1929); Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963); Douglas v. Daniels Bros. Coal Co., 135 Ohio St. 641, 22 N.E.2d 195 (1939); Cockerham v. Potts, 143 Ore. 80, 20 P.2d 423 (1933).

[5] 396 P.2d at 902.

[6] *Id.* at 905.

two-year statute. The wrongful death action, the court emphasized, is a new liability unknown at common law, and conditions for bringing it are limitations on the substantive right.

One justice dissented at length, deploring the majority's refusal to apply the relation-back doctrine. By this approach he said, "the courts deem that the amended complaint was filed on the day of the original complaint . . . [and] the plaintiff is given a day in court and is not rejected on a mere technicality."[7] "The development which bars the running of the limitation period," it was insisted, "is not the appointment of an administrator but the filing of a complaint which avers in the plaintiff a cause of action against the defendant."[8]

R.G.R.

Wills — Ademption of Specific Devises

Testator executed a will in 1949 when he owned various undivided interests in five tracts of land. He therein devised all of these interests to his six children. Two of testator's sons were the cotenants with him in the tracts. In 1950 and 1957, testator and his sons made various cross-conveyances by which he became the fee owner of the two tracts in which he had previously held a one-third interest in exchange for his interests in the other three tracts and the assumption of certain debts. He did not thereafter revise his will. Upon probate of the 1949 will, the trial court held that the children received only the one-third interest in the two remaining tracts which the testator owned when he executed the will and that the two-thirds interest in the two tracts received in the conveyances passed to the testator's widow under the residuary clause. The children appealed. *Held, affirmed:* (1) The devise of the interests was a specific devise of the parcels of realty, (2) the conveyances of 1950 and 1957 were not mere voluntary partitions of the realty, (3) parol evidence of the testator's intent is not admissible to prevent ademption, and (4) the devises to the children of the interests in the three torts were adeemed when the cross conveyances took place. *Rogers v. Carter*, 385 S.W.2d 563 (Tex. Civ. App. 1964).

The principal case goes far to clarify the doctrine of ademption by extinction of specific bequests and devises in Texas.[1] The court recog-

[7] *Id.* at 906.
[8] *Id.* at 908.

[1] Previous Texas cases concerning ademption have been few and have established only that the most basic concepts of the doctrine would be recognized. See, *e.g.*, Smith v. Good,

nizes the well-established rule that for an ademption of a devise to be effected the devise in question must be of "specific" property and not merely "demonstrative" of the wishes of the testator.[2] The devise in the principal case was of the testator's intrests in five particularly-described tracts which clearly constituted a specific devise. The appellants' main contention was that the cross-conveyances of the testator and his sons were only voluntary partitions of undivided interests in realty among cotenants and, therefore, were not actual conveyances of a kind which would cause ademption.[3] The court recognized the validity of this exception to the ademption doctrine but noted that the conveyances here involved where not merely exchanges of an undivided interest in an entire single tract for a fee in a portion of that tract. The court considered as determinative the facts that in the conveyances other consideration in addition to the land passed between the parties and that the testator did not take merely a portion of each separate tract in fee but instead exchanged his undivided partial interest in three tracts for a fee interest in the other two.

The appellants also claimed that certain statements made by the testator which indicated his intent that the devises to the children should not be adeemed should have been admitted into evidence in the trial court. This contention was also rejected by the court in accordance with the modern view that the testator's intention as to the ademption of a devise is immaterial[4] and that extrinsic or parol evidence is not admissible to vary the terms of a will.[5]

R.B.L.

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119 S.W.2d 593 (Tex. Civ. App. 1938) *error ref.*; Burch v. McMillin, 15 S.W.2d 86 (Tex. Civ. App. 1929).

[2] 6 Bowe & Parker, Page on Wills § 54.4-7 (1962). For a definition and discussion of these terms see Houston Land & Trust Co. v. Campbell, 105 S.W.2d 430 (Tex. Civ. App. 1937) *error ref.*, and Annot., 64 A.L.R.2d 778 (1959).

[3] Brady v. Paine, 391 Ill. 596, 63 N.E.2d 721 (1945); *In re* Mullendore's Estate, 297 P.2d 1094 (Okla. 1956). These cases hold that if a partition occurs the devisee will receive the full partitioned interest.

[4] 6 Bowe & Parker, Page on Wills § 54.15 (1962).

[5] Huffman v. Huffman, 161 Tex. 267, 339 S.W.2d 885 (1960).