SMU | Dedman School of Law

SMU Law Review

Volume 19 | Issue 2 Article 15

1965

Recent Decisions

RECENT DECISIONS

Conflict of Laws — Discovery — Law Determining Existence of Privilege

Plaintiff instituted suit in California claiming that defendant-publisher had libeled him in a magazine article. The California trial judge entered an order allowing plaintiff to take the deposition of the writer of the allegedly libelous article. The deposition was taken in defendant's New York office. During the deposition the writer refused to disclose the source of his information, claiming that such information was privileged. The plaintiff petitioned the federal district court in New York to obtain an order requiring the writer to answer. The court recognized that under the law of California the disputed matter was privileged but that under the law of New York no such privilege exists. *Held:* Although the law and public policy of the place of the deposition usually determines the existence and scope of a privilege, where the state in which the trial is being held has a strong public policy favoring a certain privilege and where the state in which the deposition is being taken recognizes no such privilege, the law of the place of the trial will govern. *Application of Cepeda,* 233 F. Supp. 465 (S.D.N.Y. 1964).

Although there has been much controversy and confusion over the issue in the past,[1] the most recent decisions are uniform in holding that the federal courts, when exercising diversity jurisdiction, will apply the state law in determining the existence of an asserted privilege.[2] When this rule is followed, as it was in the instant case, serious conflict of laws questions may be encountered. Often it is necessary to take a deposition in a state other than the one in which the suit is pending, and the privileges which are available to a deponent vary greatly from state to state.[3] The federal courts are, of course, required to follow the choice of law rule established by an authoritative state court decision if one is available,[4] but such precedents are, as yet, relatively few.

[1] 4 Moore, Federal Practice § 26.23[9] (1963); Louisell, *Confidentiality, Conformity and Confusion: Privileges in the Federal Court Today,* 31 Tul. L. Rev. 101 (1956).

[2] See *e.g.,* Krizak v. W. C. Brooks & Sons, 320 F.2d 37 (4th Cir. 1963); Massachusetts Mut. Life Ins. Co. v. Brei, 311 F.2d 463 (2d Cir. 1962); Boyd v. Wrisley, 228 F. Supp. 9 (W.D. Mich. 1964); United States v. Becton Dickerson & Co., 212 F. Supp. 92 (D.N.J. 1962).

[3] 8 Wigmore, Evidence § 2286 (McNaughton Rev. 1961).

[4] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

Most of the courts which have been faced with the problem have held that in the usual case the law of the state in which the deposition is being taken will be applied.[5] The holding of the court in the instant case represents a departure from this rule on public policy grounds. The court reasoned that since the state in which the suit was pending had a strong public policy favoring the privilege being invoked by the deponent and since the state where the deposition was being taken had no policy either opposing or favoring such a privilege, the policy of the state in which the trial was being held should be recognized and applied. The court felt that this holding had support in the well-established general principle that the law of the place of the trial governs the admissibility of evidence.[6]

Although the holding in the instant case may not constitute a substantial precedent for future adjudications, it does deal with a recurring problem which must be considered in selecting the most favorable forum for the institution of suit and the taking of depositions.[7]

R.B.L.

Constitutional Law — Trial by Jury — Right of Waiver Conditional

Petitioner, the defendant in a federal mail fraud prosecution, waived trial by jury. Federal criminal procedure rule 23 (a)[1] allows a nonjury trial if three conditions are met: (1) waiver by the defendant in writing, (2) approval by the court and (3) consent of the government. Here the government refused consent, and defendant was tried by a jury and convicted. He appealed, contending that the Constitution guarantees not only an unconditional right to jury trial but also an equal right to waive jury trial. *Held:* The Constitution does not confer a right upon the accused to elect between a jury and a nonjury trial and rule 23 (a) sets forth a reasonable procedure for waiver of jury trial. *Singer v. United States*, 85 Sup. Ct. 783 (1965).

Unconditional right to trial by jury is embedded in this country's

[5] Palmer v. Fisher, 228 F.2d 603 (7th Cir. 1955), *cert. denied*, 351 U.S. 965 (1956); *Ex parte* Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953); Application of Franklin Washington Trust Co., 1 Misc. 2d 697, 148 N.Y.S.2d 731 (Sup. Ct. 1956); *but see* Metropolitan Life Ins. Co. v. Kaufman, 104 Colo. 13, 87 P.2d 758 (1939).

[6] 1 Wigmore, Evidence § 5 (3d ed. 1940); Restatement, Conflict of Laws § 597 (1934).

[7] For a discussion of the problems presented by the principal case, see Comment, 23 U. Chi. L. Rev. 704 (1956).

[1] Fed. R. Crim. P. 23 (a).

organic law,[2] and it is a right to be interpreted and applied as it was at common law in this country and in England when the Constitution was adopted.[3] The Court conceded that there was evidence of optional jury trial in six of the colonies prior to independence and to a very limited extent in pre-nineteenth century England.[4] Nevertheless, it felt that the framers of the Constitution intended not to provide an option but to insure "a man's right to a jury *when he asked for it.*"[5] Indeed, early cases and writings seemed to view jury trial as the only permissible mode in criminal cases.[6] It was not until 1930, in *Patton v. United States,* that the Supreme Court held that jury trial is a "right of the accused which he can forego at his election."[7] *Patton,* however, did not let down all barriers to waiver by defendants. The Court emphasized that "the jury . . . has such a place in our traditions, that, before any waiver can become effective, the consent of the government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant."[8]

In the instant case petitioner urged that situations may arise in which "passion, prejudice" and "public feeling" would render an impartial jury trial unlikely.[9] This claim was not considered since in the trial court petitioner's only stated reason for waiver of the jury right was to save time. The Court also refused to consider whether "federal prosecutors would demand a jury trial for an ignoble purpose"[10] and noted that motion for change of venue[11] and *voir dire* examination[12] are available to help a defendant avoid prejudiced jurors. Expressly left for another day and case is the question "whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial."[13]

R.G.R.

[2] "The trial of all crimes, except in cases of impeachment, shall be by jury . . . ." U.S. Const. art. III, § 2. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

[3] Patton v. United States, 281 U.S. 276 (1930).

[4] See Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases,* 20 Va. L. Rev. 655 (1934). See also Bond, *The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries,* 11 A.B.A.J. 699 (1925); Grinnell, *To What Extent Is the Right to Jury Trial Optional in Criminal Cases in Massachusetts?,* Mass. L.Q., Aug. 1923, p. 7.

[5] 85 Sup. Ct. at 787, quoting from Grinnell, *supra* note 4, at 33. Italics in original.

[6] Thompson v. Utah, 170 U.S. 343, 354 (1898).

[7] 281 U.S. 276 (1930).

[8] *Id.* at 312.

[9] 85 Sup. Ct. at 791.

[10] *Ibid.*

[11] Fed. R. Crim. P. 21(a).

[12] Fed. R. Crim. P. 24(a) and (b).

[13] 85 Sup. Ct. at 791.

Contribution — Consent Judgment as Basis for Right

In a previous tort suit, Callihan Interests, Inc., had consented to a judgment in favor of an injured party. In the instant case Callihan sought contribution from Duffield, a joint tortfeasor who had not agreed to the judgment. Duffield contended that a consent judgment, not being judicially determined, was not within the language of article 2212;[1] and, therefore, Callihan was not entitled to contribution. The trial court granted Duffield's motion for a summary judgment and Callihan appealed. *Held, reversed:* Payment of a consent judgment by the defendant gives rise to a right of contribution against a nonconsenting joint tortfeasor. *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586 (Tex. Civ. App. 1964) *error ref.*

Contribution is a device used to equalize the burden on solvent joint tortfeasors.[2] The Texas courts have allowed contribution in third party actions,[3] cross actions,[4] and separate actions where the contributor was not a party to the first suit.[5] Essential to an action for contribution is that the injured party had a cause of action against the party from whom contribution is sought and that the claim of the injured party has been fully paid.[6]

Several prior cases based on unique fact situations have indicated that a tortfeasor may even obtain contribution after he settles with the injured party out of court and pays the claim in full.[7] Professor Hodges relied on these cases in stating that out of court settlements would give rise to a right of contribution.[8] The instant case supports his conclusions and represents the first clear holding allowing contribution against either a non-consenting or non-settling joint tortfeasor after a full settlement has been made. Since in the context of

---

[1] "Any person against whom, with one or more others, a judgment is rendered in any suit on an action arising out of, or based on tort . . . shall, upon payment of said judgment, have a right of action against his co-defendant . . . ." Tex. Rev. Civ. Stat. Ann. art. 2212 (1964).

[2] Union Bus Lines v. Byrd, 142 Tex. 257, 177 S.W.2d 774, 776 (1944).

[3] Lottman v. Cuilla, 288 S.W. 123 (Tex. Comm. App. 1926).

[4] Goldstein Hat Mfg. Co. v. Cowen, 136 S.W.2d 867 (Tex. Civ. App. 1938) *error dism., judg. cor.*

[5] Union Bus Lines v. Byrd, 142 Tex. 257, 177 S.W.2d 774 (1944).

[6] Austin Road Co. v. Pope, 147 Tex. 430, 216 S.W.2d 563 (1949); City of Houston v. Watson, 376 S.W.2d 23 (Tex. Civ. App. 1964).

[7] Bradshaw v. Baylor University, 126 Tex. 99, 84 S.W.2d 703 (1935) (injured party assigned his cause of action to settling tortfeasor, who in turn sued his joint tortfeasor for contribution); Westheimer Transfer & Storage Co. v. Houston Bldg. Co., 198 S.W.2d 465 (Tex. Civ. App. 1946) *error ref. n.r.e.* (settling tortfeasor sued joint tortfeasor for indemnity); Wm. Cameron Co. v. Thompson, 175 S.W.2d 307 (Tex. Civ. App. 1943) *error ref.* (express contract preserved right of contribution between the joint tortfeasors).

[8] "One who has paid an injured party and secured a release without action or judgment may assert contribution or indemnity against his co-tortfeasors." Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 Texas L. Rev. 150, 168 (1947).

the contribution statute, there is no substantive difference between a settlement and a consent judgment, it now seems clear that in both situations contribution will be allowed.

In *Palestine Contractors, Inc. v. Perkins*,[9] the supreme court held that a covenant not to sue given by an injured party to one tortfeasor would reduce the damages recoverable by the injured party by one-half. Therefore, the instant case and *Perkins* leave the settling or consenting joint tortfeasor with an election. He may obtain a covenant not to sue from the injured party thereby relieving himself from further liability and restricting the injured party to recovering one-half of the compensation for his injuries from the other tortfeasor, or he may consent to a judgment or settle with the injured party for the full claim and upon payment of the claim, enforce his right of contribution against his joint tortfeasor.

G.M.L.

Estate Taxation — Marital Deduction — Life Estate With a Power of Appointment

Decedent's wife was to receive a specified amount per month for life out of the income or corpus of a testamentary residuary trust created by her husband's will. In addition, she was given a general testamentary power of appointment over the entire corpus of the trust. Plaintiff, the trustee, claimed that all or at least part of the value of the trust qualified as a marital deduction.[1] The trust could so qualify only if the surviving spouse was entitled to (1) all of the income from the trust, or (2) the income from a "specific portion" of the trust. The government contended that the wife's right to receive a fixed sum did not qualify under either of these criteria. The plaintiff asserted that the wife's right to a fixed sum did constitute income from a specific portion of the trust, the value of which could be computed actuarially. *Held:* Plaintiff may take as a marital deduction the value of that portion of the total trust corpus which

[9] 368 S.W.2d 764 (Tex. 1964).

[1] Int. Rev. Code of 1954, § 2056(b)(5). This section provides, in part: "In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion . . . the interest or such portion thereof so passing shall . . . be considered as passing to the surviving spouse. . . ."

would yield the amount of income to which the surviving spouse was entitled. *Northeastern Pennsylvania Nat'l Bank & Trust Co. v. United States*, 235 F. Supp. 941 (M.D. Pa. 1964) (appeal pending 3d Cir.).

The Internal Revenue Code does not define what constitutes a "specific portion" of a trust corpus, but the Treasury Regulations define it as a "fractional or percentile share of a property interest."[2] This restrictive definition was disapproved by the Second Circuit in *Gelb v. Commissioner*.[3] In *Gelb*, a determinable portion of the trust corpus was given to the decedent's daughter for her support and education. The surviving spouse was entitled to all of the trust income and had the sole power to appoint all of the trust corpus except the portion which would be paid to the daughter. The court held that the value of the daughter's interest could be computed actuarially and carved out of the trust corpus, thereby leaving the widow a specific portion of the trust corpus which would qualify for the marital deduction.

In the instant case, the issue presented was the converse of that in *Gelb*. Here, the wife had a power of appointment over the entire corpus but a right to only a fixed sum of the trust income. A portion of the trust corpus, the value of which would yield a fixed sum, was carved out of the total trust principal and held to qualify for the deduction. The holding in this case, if upheld and followed, establishes that a "specific portion" includes not only an interest in the corpus which will yield a stated fractional or percentile share of the income, but also embraces an interest in the corpus of a trust which may be computed actuarially to yield a stated dollar amount of income to the wife.

The impact of this broadened definition of "specific portion" on the availability of the marital deduction is significant. If the wife is granted a general power of appointment over the entire or a determinable portion of the corpus of the trust and is given a right to any of the income from the trust, the estate of the decedent will be allowed to claim a marital deduction for the portion of the corpus which will yield the income to which the wife is entitled up to a maximum of the amount of corpus over which the appointment power is granted. Both the amount of the corpus over which the wife has a general power of appointment and the amount of the corpus which will yield the wife's income right will be allowed to be computed actuarially. Under these rules the estate planner may grant the spouse a certain dollar amount payable out of income and corpus,

[2] Treas. Reg. § 20.2056(b)-5(c) (1964).
[3] 298 F.2d 544 (2d Cir. 1962).

thereby insuring payment of the stated amount if the trust income is low and at the same time providing for accumulation if trust income exceeds the amount of the income right of the wife, while still retaining the maximum benefits of the marital deduction.

R.B.L.
G.M.L.

Habeas Corpus — Federal Prisoners — Exhaustion of Remedies

Appellant was convicted of importation and concealment of heroin and of failure to register and pay the special tax thereon. He did not appeal. Later, he sought federal habeas corpus relief under section 2255 of the Judicial Code,[1] alleging that his being forced to take an emetic that caused him to regurgitate heroin which he had swallowed subjected him to compulsory self-incrimination in violation of the fifth amendment.[2] The district court ruled against appellant on the merits, finding that he had voluntarily swallowed the emetic upon a physician's advice that harm could result to him from the heroin. On appeal, appellant raised the additional contentions of illegal arrest, detention and search and seizure. *Held:* Under section 2255, (1) The failure of a federal prisoner to appeal from his conviction does not automatically foreclose habeas corpus relief, (2) *Fay v. Noia*[3] and *Johnson v. Zerbst*[4] furnish the controlling standard in waiver situations for federal prisoners seeking post-conviction relief, and (3) a federal prisoner seeking habeas corpus relief must demonstrate that he has not waived his contentions by deliberately failing to appeal from his original conviction. *Nash v. United States*, 342 F.2d 366 (5th Cir. 1965).

Section 2255 governs federal prisoners seeking habeas corpus relief. Prior to the instant decision, the general rule regarding convictions obtained in the federal courts, as stated in *Sunal v. Large*,[5] was that the writ of habeas corpus would not be allowed to do service for an appeal. An analogous situation existed concerning state prisoners

[1] 28 U.S.C. § 2255 (1958).
[2] U.S. Const. amend. V.
[3] 372 U.S. 391 (1963), noted in 18 Sw. L.J. 475 (1964).
[4] 304 U.S. 458 (1938).
[5] 332 U.S. 174 (1947).

applying for federal habeas corpus. Section 2254[6] requires the state prisoner to exhaust his state remedies before seeking federal habeas relief; and, until the decision in *Fay v. Noia,* the federal courts frequently denied relief to a state prisoner who failed to appeal his state court conviction on the ground that he had not exhausted his state remedies.[7] *Fay* held that the limitation in section 2254 applied only to remedies presently available to the prisoner, and that a prior failure to appeal did not bar federal habeas corpus relief. But the Court in *Fay* also held that the writ could be denied on the ground of waiver when it was shown that the defendant had deliberately bypassed the state appeal procedures. *Johnson v. Zerbst* was held to furnish the controlling definition of waiver—"an intentional relinquishment or abandonment of a known right or privilege."[8]

In the instant decision, the court reasoned that the remedy should not be more liberal for state prisoners than for federal prisoners and extended the deliberate bypass test to federal prisoners by reading an implied mitigation of the holding in *Sunal v. Large* into the Supreme Court's opinion in *Fay v. Noia.* Thus, if the federal prisoner can affirmatively show that "he has not waived his . . . contentions by deliberately failing to appeal from his original conviction,"[9] a federal district court will inquire into the question of whether the errors alleged are properly cognizable in a section 2255 proceeding. Finally, if he meets these prerequisites, the court will proceed to the merits of his claim.

In the instant case, the court did not state appellant's reason for his failure to appeal and did not indicate what facts would constitute a deliberate failure to appeal, but denied him relief on the ground that he failed to meet his burden of proving that he had not waived his contentions under the *Johnson v. Zerbst* standard. Nonetheless, the decision is significant in that it establishes a more efficacious collateral remedy for federal prisoners in the future.

J.P.F.

[6] 28 U.S.C. § 2254 (1958).
[7] See, *e.g.,* Darr v. Burford, 339 U.S. 200 (1950).
[8] 304 U.S. 458, 464 (1938).
[9] 342 F.2d at 367.

Insurance — Forfeiture for Breach of Covenant Against Change of Title or Interest — Conveyance to Controlled Corporation

Plaintiff was the sole owner of a building insured by the defendant under a Texas standard fire insurance policy. The defendant insurance company also insured fixtures and machinery in a building owned by a partnership consisting of the plaintiff and his two sons. Both policies provided that the insurance company would not be liable for any loss occurring "following a change in ownership of the insured property." On March 11, 1963, the plaintiff transferred the building, and the partnership transferred the fixtures and machinery, to a corporation. The plaintiff received 66.25 per cent of the stock and the remainder went to his sons. The day after the transfers the insured property was destroyed by fire. The plaintiff instituted suit to recover for his loss under the two policies. The defendant moved for a summary judgment claiming that it was not liable because there had been a change in ownership. *Held:* A transfer of insured property to a controlled corporation is such a change in ownership as will enable the fire insurer to avoid liability on the policy. *Weisfeld v. St. Paul Fire & Marine Ins. Co.*, 236 F. Supp. 496 (S.D. Tex. 1964).

Fire insurance is issued to a particular person. The insurance company must consider not only the risk of the property being destroyed by fire, but also the character of the owner and his desire to protect the property. Since the question of ownership is material to the risk, a fire insurance contract is considered personal and not in rem.[1] The covenant against change in ownership is a standard one and is construed strictly against the issuer because it involves a forfeiture.[2] Under Texas law, to come within the provision, the change of ownership must be one which will either increase the motive to destroy or diminish the desire to protect the insured property.[3] If the change of title or interest does not meet this test, the insurer may not take advantage of this clause. Examples of transfers which will not effect a forfeiture include interspousal transfers[4] and transfers to an agent for the purpose of selling the property.[5]

The question of whether a transfer to a controlled corporation is

[1] National Fire Ins. Co. v. Carter, 257 S.W. 531 (Tex. Comm. App. 1924).

[2] Lowe v. Michigan Fire & Marine Ins. Co., 236 S.W.2d 168 (Tex. Civ. App. 1950).

[3] Insurance Co. of America v. O'Bannon, 109 Tex. 281, 206 S.W. 814 (1918); National Fire Ins. Co. v. Carter, 257 S.W. 531 (Tex. Comm. App. 1924).

[4] Mercury Fire Ins. Co. v. Dunaway, 74 S.W.2d 418 (Tex. Civ. App. 1934) *error ref.*; British General Ins. Co. v. Stamps, 57 S.W.2d 638 (Tex. Civ. App. 1933).

[5] Walters v. Century Lloyds Ins. Co., 154 Tex. 30, 273 S.W.2d 66 (1954).

recognized as a change in ownership had not previously been considered in Texas. In a New Jersey case, the court held that a transfer of insured property to a wholly owned corporation would be a breach of the covenant.[6] The reasoning in that case was that the corporation is a distinct legal entity and that the owner's interest in the property is not equivalent to a sole shareholder's interest in the same assets in the hands of the corporation. Also, the court pointed out, if a transfer to a solely owned corporation were not condemned immediately, at what point in time, if the sole shareholder were to divest himself of some of the corporate stock, would the covenant against transfer of title come into operation?

The instant case does not hold that a transfer to a wholly owned corporation would act as a forfeiture. Here, there was no doubt that the plaintiff's 66.25 per cent stock interest was a significant change in ownership from his sole ownership of the building and his partnership interest in the fixtures and the machinery. The court's reasoning in this case is in line with similar Texas authorities[7] and should provide an excellent stepping stone to the holding that even a transfer to a wholly owned corporation constitutes a breach of the covenant against a change in ownership when that case should arise.

G.M.L.

Labor Law — National Labor Relations Act — Layoff of Employees Resulting From Employer's Unfair Labor Practice

Various employers, in response to a strike by the union of one chain of retail stores, locked out their store employees. As a result of the lockout the work load of the service employees in other departments was substantially decreased, and the employers were forced to layoff certain of these employees for financial reasons. The union petitioned the NLRB claiming that the lockout and the resultant layoffs constituted unfair labor practices under sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.[1] The Board held in favor of the union on both contentions[2] and petitioned the court of

[6] White v. Evans, 117 N.J. Eq. 1, 174 Atl. 731 (Ct. Err. & App. 1934).
[7] *E.g.*, cases cited *supra* notes 1-5.

[1] 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(1) and (a)(3) (1958).
[2] 145 N.L.R.B. 361 (1963).

appeals for enforcement of its order. *Held, enforcement granted in part and denied in part:* Discharging employees due to a decreased work load does not constitute an unfair labor practice even though the decreased work load is the foreseeable result of the commission of an unfair labor practice by the employer. *NLRB v. Great A. & P. Tea Co.*, 340 F.2d 690 (2d Cir. 1965).

It was admitted by the employers for the purpose of appeal that the locking out of the store employees under the conditions here presented was an unfair labor practice. The employer's main contention was that the Board had erred in holding that the consequential layoffs of other employees also constituted an unfair labor practice. The Board, on the other hand, contended that since the layoffs were the foreseeable result of the unlawful lockout the employees should be held to have discouraged wrongfully the service employees from union membership.[3] The court rejected the Board's contention on two grounds. First, an essential requisite to the commission of an unfair labor practice under section 8(a)(3) is that the employer's motive in committing a certain act be to encourage or discourage membership in a labor organization.[4] The court in the instant case found that although the employer may have reasonably foreseen that the lockout would cause the layoffs, this did not of itself establish the essential improper motive. The court, after pointing out that the Board had stipulated that the layoffs were due solely to the lack of work and were entirely unrelated to the participation of the employees in union activities, held that the motive to discourage union membership would not be implied merely because the employers committed an act which constituted an unfair labor practice in relation to some union employees even though it would foreseeably result in the discharge of other union employees.[5] Secondly, the court also found that the Board had not produced any direct evidence tending to show that the layoff of the service employees actually had the effect of discouraging future union activities. The Board's contention that this effect was the only reasonable conclusion which could be made from the facts was rejected.

The reasoning of the court on the motivation issue is supported

[3] 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1958): "It shall be an unfair labor practice for an employer . . . by discrimination in regard to . . . tenure of employment . . . to encourage or discourage membership in any labor organization."

[4] NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961).

[5] The court recognized that in some cases the motive to discourage union membership will be presumed but held that such a presumption would be indulged in only where the practice of the employer was of a type to be inherently discriminatory which was not the case here. See *e.g.*, Radio Officer's Union v. NLRB, 347 U.S. 17 (1954).

by the Third Circuit's opinion in *Philadelphia Marine Trade Ass'n v. NLRB*,[6] which was decided after the Board's decision in the instant case. Considering the great significance which the foreseeability rule could have upon labor law if adopted, the time would seem ripe for a determination of this issue by the Supreme Court.

R.B.L.

Oil and Gas — Field Allowables — Acre-Feet/Surface Acres as Basis

The Fairway (James Lime) field is located in a single structure; the oil-bearing stratum is slightly elevated in the center where it is thickest and tapers off to thinner sections at the edge. The spacing unit for the field is 160 acres per well, and no small tracts are present. The Railroad Commission's most recent order prorating the field allowable among the wells in the field was based fifty per cent on the surface acreage assigned to each well and fifty per cent on the number of acre-feet of productive sand underneath the surface acreage of each well. Appellant, whose wells are located in the thick, center portion of the reservoir, appealed from the Commission's order, contending that it discriminated against landowners having the most oil in place under their tracts. Appellees presented expert witnesses who expressed the opinion that, because of water encroachment at the edges of the reservoir and lower pressure at the center of the structure, oil would drain from the thin sections at the edges toward the thick section in the center. *Held:* The Railroad Commission's order for an allowable based fifty per cent on surface acreage and fifty per cent on acre-feet of producing sand was reasonably supported by substantial evidence where there was expert testimony that, as the oil is removed, the wells favored by the formula will suffer drainage by the wells not so favored. *Pickens v. Railroad Comm'n*, 387 S.W.2d 35 (Tex. 1965).

Beginning in 1961, three iconoclastic decisions[1] have divorced Texas from formulas tied to a per-well factor in prorating oil and gas pro-

[6] 330 F.2d 492 (3d Cir.), *cert. denied sub nom.* International Longshoremen's Ass'n, Local 1242 v. NLRB, 379 U.S. 833, 841 (1964).

[1] Railroad Comm'n v. Shell Oil Co., 380 S.W.2d 556 (Tex. 1964); Halbouty v. Railroad Comm'n, 163 Tex. 417, 357 S.W.2d 364 (1962); Atlantic Ref. Co. v. Railroad Comm'n, 162 Tex. 274, 346 S.W.2d 801 (1961).

duction among the tracts in a field. The proposition that the small tract owner has a "property right" in reserves underlying large tracts to the extent necessary to yield a profit to the small tract owner has been rejected. *Pickens* indicates that these decisions did not end field proration problems.

In the previous cases, the formulas were struck down because they failed to afford each producer "an opportunity to produce his fair share of the minerals in the reservoir."[2] After the first two decisions, the Railroad Commission entered new orders allocating production in the Normanna Field on the basis of surface acres[3] and in the Port Acres Field on the basis of acre-feet of productive sand.[4] In the instant case, Pickens urged that only a formula based one hundred per cent on an acre-feet basis would afford him a fair opportunity to recover the minerals underlying his tracts. The expert witnesses were in agreement that the productive sand was thick in the middle (115 feet) and thin (fifteen feet) at the edges of the structure, creating wide discrepancies between the amount of the reserves underlying the various tracts. The disagreement was over whether there would be migration of oil from the thin, outer sections toward the thick, inner section. Five of the six witnesses testified they foresaw such movement based on their belief that (1) the formation is surrounded by water which is in contact with the oil so that, as the oil is withdrawn, the water moves in, pushing the oil updip toward the thicker, center section and (2) the pressure is lower in the center of the field than around the edges, and oil drains toward low pressure. Because of "voluminous" testimony on these points, the court had no difficulty in finding that the Commission's order was supported by substantial evidence.[5]

Theoretically, the rule of law applied in this case is no different from the three preceding cases: proration among wells is to be aimed at affording each landowner a reasonable opportunity to recover his fair share of the minerals. *Pickens,* however, indicates that, given the fugitive nature of oil and gas, if drainage within the field is foreseeable, a suggested proration formula based solely on the estimated in-place reserves under each tract at the time of the hearing will meet with disapproval by the Commission. To offset the effect of prospective migration and the rule of capture, the formula in such a

[2] 387 S.W.2d at 42.

[3] Special Order No. 2-46673, Tex. R.R. Comm'n Rules & Regs. § 7 at 917, 14 O. & G.R. 885 (1961).

[4] Special Order No. 3-51035, Tex. R.R. Comm'n Rules & Regs. § 4 at 585 (1963).

[5] At the time of the hearing before the Commission, owners of 88% of the field's production had agreed upon and recommended to the Commission the formula which was ultimately adopted.

case will be weighted in favor of tracts expected to suffer drainage to the extent necessary to compensate for the drainage.

R.G.R.

Procedure — Time Limit for Appeal — Requirements for Extension by Agreement

An employee obtained a judgment for $90,000 on June 26 against the defendant railroad company for personal injuries. An amended motion for a new trial was filed on July 22. On August 19, the parties entered into and filed with the court clerk a written agreement which, under the provisions of rule 329b,[1] prevented the defendant's motion for a new trial from being overruled as a matter of law on September 6. The agreement extended the date on which the trial court's determination could be made to September 23. The parties, at the request of the trial judge, orally agreed while in court on September 22, to extend the period eight additional days to September 30. This oral agreement was transcribed by the court reporter but was not filed with the court clerk until December 27. The trial court overruled the defendant's motion for a new trial on September 30. The defendant filed the trial court record in the court of civil appeals on November 27.[2] After the court of civil appeals affirmed, the plaintiff contested the defendant's appeal to the supreme court by alleging that it had no jurisdiction of the case since the defendant's appeal to the court of civil appeals had not been timely. *Held, appeal dismissed:* To effect an extension of the time in which a court must adjudicate a motion for a new trial, the parties must enter a written agreement and the agreement must be filed with the court clerk within forty-five days after the motion for a new trial is made. *Texas & N.O.R.R. v. Arnold,* 388 S.W.2d 181 (Tex. 1965).

Rule 329b-3 of the Texas Rules of Civil Procedure[3] permits a period of forty-five days from the filing date of the original or

[1] Tex. R. Civ. P. 329b-3.

[2] The losing party in the trial court has sixty days from the date on which a judgment not requiring a motion for a new trial is rendered or from the date a motion for a new trial is overruled by order of the judge or by operation of law in which to file the record in the court of civil appeals. Tex. R. Civ. P. 386. The sixty day period ends in this case either on November 29, if the period began to run when the judge overruled the defendant's motion for a new trial, or on November 22, if the period began to run on the expiration date of the first extension.

[3] Tex. R. Civ. P. 329b-3.

amended motion for new trial within which all such motions must be determined. If a determination is not made within this period, the motion is overruled by operation of law unless the parties have agreed within that period to extend the period to a definite date not more than ninety days after the filing of the last motion for a new trial. The section requires the extension to be effected by filing a written agreement with the clerk of the trial court.

The defendant in the principal case alleged that in determining whether the second extension was valid, rule 329b-3 should be considered in context with Rule 11.[4] Rule 11 provides that no agreement made by the parties in connection with a pending suit will be enforced unless it is either in writing and filed as part of the court record *or* made in open court and entered in the court record. The court decided that even if the rules were construed together the provisions of Rule 11 allowing an agreement to be made in open court could not be held to modify the specific restrictions of Rule 329b-3. The court then proceeded to hold the agreement made in the instant case invalid on two grounds. First, it held that the oral agreement between the parties, although transcribed into the court record, was not a "written agreement" within the meaning of the rule. To qualify under the rule, the agreement must be a separately drawn and executed document. Secondly, the agreement was invalid because it had not been properly filed with the clerk; rule 329b-3 was amended in 1961 to provide specifically for such filing. The court stated: "One seeking to determine the status of a pending appeal or a clerk who must determine whether an appeal is timely taken, should find his answers in the documents that are timely on file in the clerk's office, and not in the untranscribed notes of the court reporter."[5] Thus, the court held that to be effective the agreement not only had to be made within forty-five days after the motion for a new trial but also must be filed with the clerk within that period.

This decision illustrates the degree of strictness which the supreme court uses in interpreting the various rules concerning time limits for appeal. The parties in the instant suit were merely accommodating the judge by agreeing orally in open court to a second extension. The court holds, however, that regardless of the cause of the deficiency or the facts involved, an agreement extending the period in

[4] Tex. R. Civ. P. 11.
[5] 388 S.W.2d at 184.

which a motion for a new trial may be decided must precisely adhere to the provisions of rule 329b-3.[6]

J.W.C.

Real Property — Five-Year Statute of Limitations — Quitclaim Deed

Respondent brought a trespass to try title suit to recover title and possession of land situated in Randall County, Texas. Respondent alleged title by adverse possession and pleaded both the five[1] and ten[2]-year statutes of limitations. The trial court found for respondent on both the five and ten-year statutes. The court of civil appeals affirmed the judgment below on the basis of the five-year statute.[3] *Held, reversed:* Respondent failed to establish title under the five-year statute because a quitclaim deed is insufficient to constitute a "deed or deeds" under that statute. *Porter v. Wilson,* 389 S.W.2d 650 (Tex. 1965).

In *Cunningham v. Frandtzen*[4] the supreme court expressed the reasons for having several statutes of limitations fixing varying lengths of time required to gain title by adverse possession. "In fixing the different periods of limitation in our statute, the legislature regulated the force and effect to be given to adverse possession of land by the degree of merits in the title under which it was held and claimed, requiring the longer possession in proportion to the weakness of the

[6] The trial judge attempted to remedy the ineffective oral extension agreement by use of a nunc pro tunc order. He signed the order on September 29 and ordered the clerk to file it as of September 22, the day before the first extension expired. The supreme court rejected this attempt saying: "A judge's order which fails to meet the requirements for a written agreement signed by the parties and which is not timely filed with the clerk is not a compliance with Rule 329b." 388 S.W.2d at 185.

A dissenting opinion by Justice Greenhill points out the seeming inequity in the decision. "It is shocking to me that this gentlemen's agreement, made in open court, at the request and order of the court, should not be binding. I would construe Rule 11 with Rule 329b and would hold that the record was filed in time." 388 S.W.2d at 186.

[1] Tex. Rev. Civ. Stat. Ann. art. 5509 (1958), providing that:

> Every suit to recover real estate as against a person having peaceable and adverse possession thereof, cultivating, using or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after cause of action shall have accrued, and not afterward.

[2] Tex. Rev. Civ. Stat. Ann. art. 5510 (1958), providing a ten-year statute of limitations for actions brought to dispossess adverse possessors holding no recorded deed.

[3] 371 S.W.2d 611 (Tex. Civ. App. 1963).

[4] 26 Tex. 34 (1861).

title."[5] To have sufficient merit to succeed under the five-year statute an adverse possessor must claim under a "deed or deeds duly registered." It had been previously asserted that *Parker v. Newberry*[6] and *Rosborough v. Cook*[7] supported the position that a quitclaim deed was sufficient to qualify the holder under the five-year statute.[8] The court here considered the *Rosborough* and *Parker* decisions and held that neither constituted valid authority for that position. *Rosborough* held that in order to support a limitations title under the five-year statute it is not necessary that the deed under which the claim is made actually convey any title. The court in the instant case held that while that proposition may be accepted as valid, it could not be extended to uphold the contention that the deed need not at least purport to convey title. In *Parker*, the court stated, "The essential requisites of a deed necessary as the foundation of the plea are, that it shall, 'by its own terms, or with such aids as the law authorizes, assume or purport to operate as a conveyance.' "[9] The instant decision interprets this to mean a conveyance of the *land*. As the court pointed out, a quitclaim deed purports to convey only the *interest* in the land held by the grantor and, therefore, fails to meet the requirement of a supposed conveyance of the land itself.

The holding in the principal case establishes that, although a possessor may have received no actual title to the land whatever, if he is claiming under a deed which purports to convey the full title to the land to him he may establish good title to the land described in the deed by five-years adverse possession. If, on the other hand, the deed which he holds purports to convey only the grantor's "right, title and interest" in the land, he will be treated as an ordinary adverse possessor with no deed and required to prove ten-years adverse possession to establish good title. The court made it clear that merely because the words "quitclaim" or "right, title and interest" are used in the granting clause of a deed does not necessarily mean that the deed is a quitclaim deed. The court stated that whether a deed purports to convey the land or only the grantor's interest in the land must be determined from the instrument "as a whole."[10]

J.M.W.

---

[5] *Id.* at 40.

[6] 83 Tex. 428, 18 S.W. 815 (1892).

[7] 108 Tex. 364, 194 S.W. 131 (1917).

[8] Larson, *Limitations On Actions For Real Property: The Texas Five-Year Statute*, 18 Sw. L.J. 385 (1964).

[9] Parker v. Newberry, 83 Tex. 428, 430, 18 S.W. 815, 816 (1892).

[10] 389 S.W.2d at 654. See also Cook v. Smith, 107 Tex. 119, 174 S.W. 1094 (1915); Benskin v. Barksdale, 246 S.W. 360 (Tex. Comm. App. 1923).