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Recent Decisions

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RECENT DECISIONS

Administrative Law—No Trial De Novo From Order Of The Texas Liquor Board Cancelling A Private Club Permit

The Administrator of the Texas Liquor Control Board cancelled the private club registration permit of the Club Apache. An appeal from this action was perfected to a district court of Dallas County. The trial judge found that the statute granting a trial de novo on an appeal from the Administrator's ruling was unconstitutional. The district court applied the substantial evidence rule and over-ruled the Liquor Control Board's decision. *Held, reversed:* The Texarkana Court of Civil Appeals stated that since the action taken by the Liquor Control Board was administrative rather than judicial, the substantial evidence rule should be used in judicial review. The court found, however, that there was substantial evidence in the record to support the Administrator's cancellation of the private club registration permit. *Texas Liquor Control Board v. Longwill*, 392 S.W.2d 725 (Tex. Civ. App. 1965).

The Texas Legislature in 1961 enacted art. 666-15(e) of the Texas Liquor Control Act. This statute created a regulatory system for private clubs serving alcoholic beverages. The provision of this act pertaining to review[1] states that an appeal from a cancellation order of the Liquor Control Board shall be de novo under the rules governing ordinary civil actions, and that the substantial evidence rule shall have no application in the proceedings of the district court. This direction for a trial de novo conflicts with paragraph (d) of subdivision 7a which provides: "The order, decision or ruling of the Board or Administrator may be suspended or modified by the District Court pending a trial on the merits, but the final judgment of the District Court shall not be modified or suspended pending appeal. . . ."[2] This seems to imply that the Administrator's order will continue in effect during appeal unless it is suspended or modified by the district court pending a trial on the merits. The general rules established regarding a trial de novo are contra. "The sine qua non of a de novo trial . . . is the nullification of the judgment or order of the first tribunal and a retrial of the issues. . . . When jurisdiction

[1] TEX. PENAL CODE art. 666-15(e) subd. 7a (1961).
[2] *Ibid.*

of the second tribunal attaches, the judgment or order of the first tribunal is not merely suspended, but is nullified."[3] The provisions directing a trial de novo and implying a continuation in effect of the Administrator's order seem to require the district court to treat such orders as being simultaneously both valid and invalid.

The majority opinion resolves this difficulty by first determining that the Liquor Control Board's function in this area is administrative rather than judicial: "The conclusion that the Board's action in cancelling Club Apache's permit is an administrative act necessitates the further conclusion that a review of its order may only be made to determine whether substantial evidence supports it."[4] The statute that calls for a trial de novo rather than application of the substantial evidence rule conflicts "with the provisions of Section 1, Art. II, Texas Constitution, Vernon's Ann. St., dividing the functions of government and is void."[5]

J.M.W.

Common Carriers — Limited Motor Carrier's Certificate

Respondent held a Limited Common Carrier Motor Carrier's Certificate issued by the Railroad Commission of Texas which authorized him to transport only heavy construction materials.[1] Respondent was hauling building materials which, if handled individually, would be manageable by a regular carrier, but the commodities were strapped on 2000 pound shipping pallets in such a manner that the use of a fork lift was necessary to handle the unitized loads. The state sought a declaratory judgment that he was transporting unauthorized commodities. The trial court held that respondent was authorized to carry such a palletized unit because special handling equipment was required for loading and unloading. The court of civil appeals ruled that the palletized units were within respondent's authority only to the extent that an aggregation was required by

[3] Southern Canal Co. v. State Bd. of Water Engineers, 159 Tex. 227, 318 S.W.2d 619 (1958).

[4] Texas Liquor Control Bd. v. Longwill, 392 S.W.2d 725, 729 (Tex. Civ. App. 1965).

[5] *Ibid.*

[1] The certificate was issued pursuant to the authority in TEX. REV. CIV. STAT. ANN. art. 911b.

Heavy construction materials are only those which are inappropriate as cargo for regular common carriers and which generally require the use of special loading and unloading equipment.

the inherent nature of the commodities involved. Rolls of building paper, roofing and siding and bundles of shingles were found to possess such an "inherent nature."[2] *Held, reversed:* A carrier's authorization to transport materials is determined by the individual commodity unless the inherent nature of the commodity requires aggregation. There was insufficient evidence to warrant a finding that any of the commodities transported by respondent required such an aggregation. *State v. Bilbo,* 392 S.W.2d 121 (Tex. 1965).

The principal case effectively aligns Texas courts with the position of the Interstate Commerce Commission in determining the authority of a limited carrier. The general rule that the individual commodity is the controlling consideration has been clearly established by a series of ICC cases.[3] However, in recent years an exception to this rule has been developed which is not as clearly defined: if an aggregation is required by the inherent nature of the commodity, it is the character of the minimum bundle which determines if it is within the limited carrier's authority.

In a recent ICC decision, sheets of metal were held to require aggregation because individually they are "unstable, subject to bending or other damage, and . . . awkward or impossible to handle."[4] In a later case the Commission purported to confine the exception "within its strictest limits," and promulgated the rule of construction that a presumption against its application would inhere "in the absence of a sound basis for concluding to the contrary."[5] From these and other cases it is evident that an aggregation required merely for maximum economy or convenience does not qualify for the exception, whereas an aggregation to prevent certain destruction does. But it is not clear how this exception will be applied to situations falling between these two extremes.

The principal case does not establish clear guidelines. The court apparently endorsed the ICC's rules of construction, but it avoided their application because of the lack of evidence. Several shippers testified that, in general, palletization reduces the likelihood of damage to motor truck cargo, but no evidence was introduced to show that the specific commodities involved required aggregation. Hence, refinement of the courts' position must await future litigation. Meanwhile, the Texas limited carrier is on notice that aggregating cargo

[2] State v. Bilbo, 378 S.W.2d 871 (1964).
[3] W. J. Dillner Transfer Co., 79 M.C.C. 335 (1959); Jesse Coonrod Johnson, 61 M.C.C. 783 (1953); St. Johnsbury Trucking Co., Inc., 53 M.C.C. 277 (1951).
[4] R. Q. Black, 64 M.C.C. 443, 446 (1955).
[5] W. J. Dillner Transfer Co., 79 M.C.C. 335, 358 (1959).

normally transportable by a regular common carrier will not extend his authority unless he can meet a substantial burden of proof that aggregation is required by the inherent nature of the commodities involved.

E.L.Y.

Eminent Domain — Newspaper Publicity Prior to Trial — Award Set Aside

The day before a condemnation proceeding a newspaper article appeared entitled "City Offers $12,717, Owner Asks $400,000."[1] All the commissioners who were to decide the case had read the newspaper article. After polling the commissioners collectively as to any bias, the court instructed them to disregard completely any facts or figures contained in the article. Although they stated that they would not be prejudiced against either party, they were not polled separately or advised specifically what information was improper for consideration. *Held:* Lack of bias must be shown with reasonable certainty. The trial court abused its discretion in proceeding to trial over objection. *Seidfried v. City of Charlottesville,* —Va.—, 142 S.E.2d 556 (1965).

The Supreme Court of Appeals of Virginia recognized that it was within the discretion of the trial court to deny a motion for a new trial based on misconduct of a juror. However, the court noted:

> It cannot be overlooked that the article was published on the afternoon immediately preceding the trial and that the prejudicial information was freshly imprinted upon the minds of the commissioners. Under these circumstances, the mental processes of at least one of the commissioners could have been subtly influenced by the article during the trial of the case, and we cannot say with reasonable certainty whether or not the award was affected.[2]

In Texas, the burden is upon the movant or defendant to show "that there has been created in the public mind so great a prejudice as will prevent him from receiving a fair trial."[3] The determination of whether bias is present is largely within the discretion of the trial judge. The Court of Criminal Appeals has said: "Newspaper publicity and an opinion formed therefrom alone will not be sufficient

[1] Seidfried v. City of Charlottesville, — Va. —, 142 S.E.2d 556, 560 (1965).
[2] *Id.* at 561.
[3] Handy v. State, 139 Tex. Crim. 3, 138 S.W.2d 541, 546 (1940).

to disqualify a juror. . . . We are impressed with the soundness of the court's discretion."[4] Texas is in accord with the majority rule which requires proof of actual and present existence of an unfriendly sentiment traceable to the cause stated—something to indicate with a reasonable degree of directness that an adverse impression was made by the publication at the time and is still active in the minds of people.[5]

In recent years, pre-trial publicity has received much attention.[6] The applicable Texas statutes[7] seem to preclude a position as far-reaching as that held by the Virginia court. It is probable, however, that greater consideration will be given to claims of jury bias and prejudice in both civil and criminal cases.

G.B.R.

Estates — Property Settlement and Child Support Agreement

In a property settlement agreement, Warren Bates agreed to provide child support payments of $150.00 per month until his daughters reached the age of eighteen, and to pay his wife $50.00 per month for the same period in exchange for her homestead rights. The divorce decree adopted and confirmed the settlement agreement. Mr. Bates subsequently remarried and executed a will leaving all of his property to his new wife and appointing her independent executrix of his estate. After his death, his former wife, individually and as next friend of her daughters, sued his estate for the support and property payments due and for anticipatory sums equal to those provided for in the agreement. The trial court granted summary judgment for the plaintiff in the amount requested. The Corpus Christi Court of

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[4] *Id.* at 546, 547.

[5] 56 AM. JUR. VENUE § 71 (1947).

[6] *E.g.*, the Supreme Court remanded the conviction in Estes v. Texas, 381 U.S. 532 (1965), because of television coverage in the courtroom, an issue related to pre-trial publicity.

[7] TEX. REV. CIV. STAT. ANN. art. 2134 (1948).

> The following persons shall be disqualified to serve as jurors in any particular case. . . . 4. Any person who has a bias or prejudice in favor or against either of the parties.

TEX. R. CIV. P. 257.

> A change of venue may be granted in civil cases upon application of either party, supported by his own affidavit and the affidavit of at least three credible persons, residents of the county in which the suit is pending, for the following cause: (a) That there exists in the county where the suit is pending so great a prejudice against him that he cannot obtain a fair and impartial trial. . . .

Civil Appeals stated the issue as being: "whether or not a decedent's estate can be held liable for amounts accruing after his death by virtue of a written agreement for child support payments . . . and limited installment payments for renunciation and homestead rights."[1] *Held, affirmed:* Unless a contrary intention is clearly expressed in the contract, the estate of a deceased father is liable for the obligations created by a property settlement agreement. *Hutchings v. Bates*, 393 S.W.2d 338 (Tex. Civ. App. 1965).

At common law, a father's estate is not liable for support payments to his children in the absence of an agreement.[2] In many states, however, a parent may bind his estate by a settlement agreement, and a court, in a divorce decree, may create an enforceable obligation against the estate.[3] When suit is brought against the executor, it is the language of the agreement or decree which determines whether the estate is obligated to fulfill the decedent's duties.[4]

In the instant case, one of first impression in Texas, the court rested its decision upon the property settlement agreement rather than upon the divorce decree which incorporated the agreement. The case was tried on summary judgment. The trial court refused to admit evidence concerning the intention of the parties, and interpreted the contract within its four corners. The appellant argued that the lack of a provision expressly binding the estate, or a clear implication to that effect, indicated that it was the intention of the parties that the obligations under the contract would cease at the death of one of the parties. However, the court held that the agreement was enforceable against the estate because there was no clear language to the contrary.

The court's presumption apparently arises from the circumstances surrounding the making of the property settlement agreement.

> It seems to us that when a husband and wife who are faced with divorce in a pending action, undertake their solemn written agreement and set forth the terms of their property settlement, and the obligation of the husband and father as to support payments for little children, issues of such marriage, they do so impressed with the most poignant emotions and directed by the most solicitous of responsibilities. . . .[5]

> He knew he was mortal and that his death could intervene before his small daughters should attain the ages of eighteen years, but he did

[1] Hutchings v. Bates, 393 S.W.2d 338, 341 (Tex. Civ. App. 1965).
[2] 67 C.J.S. *Parent and Child* § 15, p. 691 (1950).
[3] Newman v. Burwell, 216 Cal. App. 608, 15 P.2d 511 (1932). See Annot., 18 A.L.R.2d 1126 (1951).
[4] Garber v. Robitshek, 226 Minn. 398, 33 N.W.2d 30 (1948).
[5] Hutchings v. Bates, 393 S.W.2d 338, 341 (Tex. Civ. App. 1965).

not qualify his agreement to terminate the payments should he not survive.[6]

While the court did not distinguish between the child support payments and the payments to the former wife, it may be argued that circumstances attending the formation of the contract would give rise to presumptions favoring the continuation of payments to the children, but not the continuation of payments to the wife. Ideally, however, the court should construe the instrument without resorting to inferences. Nevertheless, the mandate, if not the logic, of the case is certain—a property settlement agreement will bind a decedent's estate unless it contains a clear expression that the obligations shall cease at death.

G.M.L.

Estate Tax — Computation of Gift Tax Credit

In 1958, Thomas E. Greenaway made an inter-vivos transfer of securities on which he paid a gift tax of $5,103.10. In 1959, he paid gift taxes of $55,138.00 on five gifts of cash and securities. After Mr. Greenaway's death in 1959, the executor of his estate included the transfered property in the gross estate for estate tax purposes, and sought a credit against estate taxes for the gift taxes previously paid. Section 2012 limits the credit to the lower of the gift tax actually paid or the amount of the estate tax attributable to the inclusion of the gift property in the estate.[1] The executor claimed a credit of $52,581.46 which was the lower of the total gift taxes paid ($60,241.26) and the estate tax attributable to the inclusion of all the gifts in the gross estate. The Internal Revenue Service separated the gifts made in 1958 from those made in 1959 and computed the limitations separately. The Service found that the gift tax paid in 1958 was $5,103.10, while the estate tax attributable to the inclusion of the gift property was $9,091.45. In 1959, the attributable estate tax would have been $43,490.01, and the gift taxes paid on the four separate transfers was $55,138.16. Totaling the lower figure for each year, the Service allowed a credit of $48,593.11, and assessed a deficiency. The executor paid the deficiency and sued for refund in the district court. *Held:* The execu-

[6] *Id.* at 343.

[1] INT. REV. CODE of 1954, § 2012.

tor's method of computing the gift tax credit did not conform to the regulations. Although the position adopted by the Revenue Service may have been inappropriate, the executor did not sustain his burden of showing that the tax was overpaid. *Burns v. United States*, 242 F.2d 947 (1965).

A third method for computing the gift tax credit, which was not used by either party, is the one required by the regulations: "When more than one gift is included in the gross estate, a separate computation of the two limitations is to be made for each gift."[2] Since there were six gifts, one made in 1958 and five in 1959, the credit would be the total of the lower of the gift tax paid on each transfer, and the estate tax attributable to the inclusion of each separate gift in the gross estate. This method would have reduced the allowable gift tax credit.

In 1946 the Tax Court in *Budlong v. Commissioner*[3] supported a method similar to that adopted by the executor in the instant case. Its validity was not raised again until *Chapman v. Commissioner*.[4] In that case the Tax Court refused to decide among the proposed methods of computation as the result was the same under each. In the instant case, the district court found that the 1948 revision of the Code superseded the result in *Budlong*. Since the method proposed by the regulations was not advanced by either party, the court did not have the opportunity to uphold that method. However, the court stated, "The regulation is obviously based on an unusually clear statement of Congressional intent and, therefore, is reasonable and consistent with the statute."[5]

G.M.L.

Procedure — Libel Defenses — Failure to Present Constitutional Issues

Wallace Butts, former athletic director at the University of Georgia, sued Curtis Publishing Company for libel and obtained a judgment, after remittitur, of $460,000. On motion for a new trial under federal rule 60(b),[1] Curtis asserted for the first time that the case

[2] Treas. Reg. § 20.2012-1(b)(2) (1953).
[3] 8 T.C. 284 (1946).
[4] 32 T.C. 599 (1959).
[5] Burns v. United States, 242 F.2d 947 (1965).

[1] Fed. R. Civ. P. 60(b).

was controlled by the constitutional principles established in *New York Times Co. v. Sullivan.*[2] The *Times* case was not decided until two and one-half months after the trial court had rendered judgment for Butts. However, the petition for writ of certiorari presenting identical constitutional claims as those raised by Curtis in its motion for a new trial had been filed and certiorari granted in the *Times* case prior to the filing of the complaint in the instant case. Butts argued that Curtis' constitutional claims were not timely raised or preserved in the trial court. The trial court denied Curtis' motion. On appeal, the Fifth Circuit observed that Curtis, in another libel suit arising out of the same magazine article, was represented by the same law firm which represented the New York Times Company in the *Times* case. Therefore, Curtis should have known of the constitutional arguments presented in *Times. Held:* Curtis clearly waived any right it may have had to challenge the verdict and judgment on any of the constitutional grounds approved in *Times. Curtis Publishing Co. v. Butts,* 34 U.S.L. Week 2048 (5th Cir. Jul. 23, 1965).

The legal conclusion that a party may forfeit a constitutional right through failure timely to assert that right has long been established in our procedural law.[3] Generally, the test applied by the courts to determine if such waiver has occurred is "whether the defendant has had 'a reasonable opportunity to have the issue as to the claimed right heard and determined by the . . . court.' "[4] However, there is an exception to this established rule. If subsequent to a trial or hearing but before a final decision by the trial or appellate court the substantive law is changed, it is the duty of the court to apply the law as ultimately determined.[5] The exception has had a rather limited application. It has only been applied in those cases in which there was no express waiver and the court determined that application of the rule would result in a "miscarriage of justice."[6]

In the instant case, the court decided that Curtis "was charged with knowledge, through its interlocking battery of able and distinguished attorneys, of the issues involved in the *Times* case."[7] The test of "reasonable opportunity" was met, and silence on the issue

[2] 376 U.S. 254 (1964).

[3] Yakus v. United States, 321 U.S. 414 (1944); Kewanee Oil and Gas Co. v. Mosshamer, 58 F.2d 711 (10th Cir. 1932); *but see,* Reece v. State of Georgia, 350 U.S. 85 (1955) indicating that the right to make a timely assertion presupposes an opportunity to exercise that right.

[4] Michel v. Louisiana, 350 U.S. 91 (1955).

[5] See, *e.g.,* Ziffrin, Inc. v. United States, 318 U.S. 73 (1943); Hormel v. Helvering, 312 U.S. 552 (1941).

[6] Hormel v. Helvering, *supra* note 5.

[7] 34 U.S.L. Week 2048 (5th Cir. Jul. 23, 1965).

constituted waiver. However, the court's holding does not imply that a party is deemed to have notice of constitutional arguments presented in a petition for writ of certiorari before the Supreme Court. Therefore, the fact that the Supreme Court might have held contra to Curtis' allegations on the constitutional issues was not determinative. Rather, it was Curtis' failure to invoke a constitutional claim, of which it had peculiar knowledge, in a proper manner and at a proper time which was fatal and amounted to "an intentional relinquishment or abandonment of a known right or privilege."[8]

J.W.B.

Texas Dead Man's Statute — Transaction with Deceased — Automobile Passenger

Plaintiff was a guest in an automobile involved in a one car accident in which the driver was killed and the plaintiff severely injured. Plaintiff sued the administrator of the deceased driver's estate. The trial court ruled that she was barred by the Dead Man's Statute[1] from testifying to any events, including the accident, which occurred after she became a passenger in decedent's car. Since there were no other witnesses to the accident, the trial court granted judgment for the defendant at the close of the plaintiff's evidence. *Held, affirmed:* In an action against a deceased driver's estate, an injured passenger may not testify to decedent's conduct preceding and accompanying the accident. *Grant v. Griffin,* 390 S.W.2d 746 (Tex. 1965).

The issue in the instant case was the meaning of the word "transaction" as used in the Dead Man's Statute. The court distinguished its holding in *Harper v. Johnson,*[2] a case which involved a two-car collision. There the injured driver was permitted to testify to the deceased driver's conduct. A "transaction" was defined as a consensual relationship, and not an "impersonal, fortuitous and involuntary relationship."[3]

[8] Johnson v. Zerbst, 304 U.S. 458 (1938).

[1] TEX. REV. CIV. STAT. ANN. art. 3716 (1925) reads as follows:
> In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party . . . .

[2] 162 Tex. 117, 345 S.W.2d 277 (1961).

[3] *Id.* at 280.

In *Grant*, the court found that the plaintiff voluntarily entered the automobile and thereby agreed as a matter of law that the decedent's duty to her would be governed by the Guest Statute.[4] This was held to create a consensual arrangement and, therefore, the accident was a "transaction" between the parties.

The distinction made by the court overlooks the realities of the occurrence. While the plaintiff agreed as a matter of law to have her rights governed by the Guest Statute,[5] she did not consent to the accident. The Dead Man's Statute has been criticized as unsound both in theory and in practice.[6] The result in the *Grant* case reinforces the argument that the Dead Man's Statute should be repealed.

J.D.T.

[4] TEX. REV. CIV. STAT. ANN. art. 6701b (1960.) The statute provides that no person who is a guest without payment in a motor vehicle has a cause of action for death or injuries unless the accident was intentional on the part of the driver or caused by his heedlessness or his reckless disregard of the right of others.

[5] See note 4 *supra.*

[6] 1 MCCORMICK AND RAY, TEXAS LAW OF EVIDENCE § 337 (2d ed. 1956).