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Recent Developments

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RECENT DEVELOPMENTS

Adoption by Estoppel — Inheritance From the Adopted Person

Petitioners brought suit to establish that they were the heirs at law of X. Petitioners alleged: that they were the heirs at law of A and B, husband and wife, both of whom predeceased X; that X, as a child, was delivered by his natural mother to A and B under an agreement that they would legally adopt him (there was no allegation that X was formally adopted); that during a period of approximately twenty years the parties lived in a relationship in all respects consistent with that of parent and child; that as a result of the foregoing facts there was an equitable adoption of X; and that by provision of the Probate Code petitioners were entitled to inherit the estate of X. Held: The legal status of parent and child is not created by parties assuming and living in a relationship of parent and child pursuant to an unperformed agreement to adopt the child. The Texas doctrine of "equitable adoption" or "adoption by estoppel" operates in favor of the child against the adoptive parents and those claiming through them, but does not operate to allow the adoptive parents or those claiming through them to inherit from the adopted child. *Heien v. Crabtree*, —Tex.—, 369 S.W.2d 28 (1963).

Adoption was unknown at common law. Because the adoption statutes are in derogation of the common law, courts have applied the rule of strict construction and have demanded exact compliance with formalities. However, to mitigate the harshness of this rule and to afford protection to the child, a large number of states, including Texas, have developed the doctrine of equitable adoption. The majority of jurisdictions granting this form of relief base it upon specific performance of the contract to adopt. Other jurisdictions classify

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5 See authorities cited in notes 7, 8 infra.
6 Cavanaugh v. Davis, 149 Tex. 173, 235 S.W.2d 972 (1951); Jones v. Guy, 135 Tex. 398, 143 S.W.2d 906 (1940); Cheney v. Coffee, 131 Tex. 212, 113 S.W.2d 162 (1938); Cubley v. Barbee, 123 Tex. 411, 73 S.W.2d 72 (1934).
7 Representative of the cases applying the remedy of specific performance are: Prince v. Prince, 194 Ala. 455, 69 So. 906 (1915); Toler v. Goodin, 200 Ga. 527, 37 S.E.2d 609
the remedy as estoppel *in pais*. Although language can be found that indicates the remedy of specific performance is available in Texas for this type of contract, in *Cubley v. Barbee* the Texas Supreme Court said: "[W]e are of the opinion that the real classification of the remedy is that of estoppel." In Texas, the person asserting the estoppel has the burden of proving: (1) an agreement to adopt, (2) reliance by the child upon the adoptive status, and (3) performance by the child at filial duties.

Although equitable adoption was developed primarily to protect the interests of the child, it was inevitable that attempts would be made to extend the use of the doctrine. Courts have been almost unanimous in the view that a decree of equitable adoption does not create the same legal status of parent and child as does a legal adoption. The question whether the heirs of the adoptive parent may inherit from the equitably adopted child was answered negatively by the Missouri Supreme Court in *Rumans v. Lighthizer*. The same question was presented in an earlier Texas case, but was not answered because the proof necessary

(1946); Crawford v. Wilson, 139 Ga. 654, 78 S.E. 10 (1913); Malaney v. Cameron, 98 Kan. 620, 159 Pac. 19 (1916); Fiske v. Lawton, 124 Minn. 85, 144 N.W. 435 (1913); *In re Garcia's Estate*, 45 N.M. 8, 107 P.2d 866 (1940); Barney v. Hutchinson, 25 N.M. 82, 177 Pac. 890 (1918); see Annot., 171 A.L.R. 1315 (1947); Annot., 142 A.L.R. 84 (1943); Annot., 27 A.L.R. 1323 (1923).

*In re Painter's Estate*, 246 Iowa 307, 67 N.W.2d 617 (1954); Thompson v. Mosely, 344 Mo. 240, 121 S.W.2d 860 (1939); Milligan v. McLaughlin, 94 Neb. 171, 142 N.W. 675 (1913); Cheney v. Coffey, 131 Tex. 212, 113 S.W.2d 162 (1938); Cubley v. Barbee, 123 Tex. 411, 73 S.W.2d 72 (1934).

Id. at 83. The principal case reaffirmed that classification. 369 S.W.2d at 31.

No binding Texas authority can be found which would support permitting any person other than the adopted person to assert the estoppel. On the other hand, the cases (including the principal case) have not used language which would definitely so limit the person capable of asserting the estoppel. The question whether the descendants of the adopted person might claim the benefit of the estoppel against the proper persons has not been decided.

"Cavanaugh v. Davis, 149 Tex. 573, 235 S.W.2d 972 (1951). Generally, this is required in jurisdictions basing relief upon specific performance as distinguished from estoppel. Texas courts have also made this a requirement to establish an adoption by estoppel. Analysis of the purpose of this requirement is beyond the scope of this Note. See generally Bailey, Adoption "By Estoppel," 87 Texas L. Rev. 30 (1957); Comment, Adoption by Estoppel: History and Effect, 15 Baylor L. Rev. 162 (1963); Comment, The Doctrine of Equitable Adoption, 9 Sw. L.J. 90 (1957).

Cubley v. Barbee, 123 Tex. 411, 73 S.W.2d 72 (1934).

Ibid. An exact description of the performance required from the child cannot be found in the cases. "Performance by the child" and similar phrases appear to be shorthand methods of stating that the child has conferred love, affection, and other benefits upon the adoptive parents in reliance upon his adoptive status. See Jones v. Guy, 135 Tex. 398, 143 S.W.2d 906 (1940).

Cubley v. Barbee, 123 Tex. 411, 73 S.W.2d 72 (1934).


363 Mo. 121, 249 S.W.2d 397 (1952).
to establish equitable adoption was lacking. The concurring opinion in the Texas case expressed the belief that the evidence was sufficient to establish adoption by estoppel, but that the estoppel did not inure to the benefit of the adoptive parents or their kin.

The Texas Supreme Court, in deciding the instant case, reiterated that the better theory upon which to establish equitable adoption is estoppel in pais. However, the court pointed out that there could not be an estoppel raised in this case because (1) petitioners' rights can be no better or higher than the rights of those through whom they claim and (2) the adoptive parents (through whom petitioners claim) could not have asserted an estoppel against the adopted child because there would be no basis in promises, acts, or conduct on his part upon which to erect the estoppel. In support of its reasoning, the court quoted with approval from the Rumans case: "An equitable adoption functions to enforce the rights of the child under the agreement to adopt. . . . [T]he enforcement in equity of the agreement to adopt should not confer additional rights upon the adoptive parent."

Although the majority opinion in the principal case is in accordance with traditional principles of estoppel, the dissenting justices felt that the majority had "refused to recognize and carry out the plain provisions of the [Probate Code]." Pertinent portions of the sections of the Probate Code referred to are:

§ 3 Definitions . . . .
When used in this Code, unless otherwise apparent from the context:
(b) "Child" includes an adopted child, whether adopted by any existing or former statutory procedure, or by acts of estoppel . . . . (Emphasis added.)
§ 40. For purposes of inheritance under the laws of descent and distribution, an adopted child shall be regarded as the child of the parent or parents by adoption, . . . such parent or parents by adoption and their kin inheriting from and through such adopted child.

The presence of this section specifically relating to the rights of adopted children shall in no way diminish the rights of such chil-

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20Id. at 951.
24Rumans v. Lighthizer, 363 Mo. 125, 249 S.W.2d 397, 401 (1952).
25369 S.W.2d at 32.
The dissenters were of the opinion that the legislature recognized an adoptive status created by acts of estoppel and provided for inheritance by and from the adopted child in such a situation.

Although the majority cited the Rumans case to support the holding, there is a significant difference between the applicable Missouri and Texas statutes. The Missouri statutes do not specifically refer to equitable adoption. Moreover, the Missouri statute that provides for inheritance by and from an adopted child, by express terms, applies only to children adopted in accordance with the statutory procedure and thus does not suggest an intention to provide for inheritance from an equitably adopted child. Despite the difference in statutes, the court's decision has placed the Texas “quasi adopted child” into almost the same status as his Missouri counterpart.

The decision in the principal case could have far-reaching effects. Those which are most important, and the easiest to foresee, concern intestate succession. The “quasi adopted child” has no status as a

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27 Rumans v. Lighthizer, 363 Mo. 125, 249 S.W.2d 397 (1952).
29 Tex. Prob. Code Ann. §§ 3(b), 40 (1956). For the applicable portions of these sections, see text accompanying note 26 supra.
33 To facilitate distinction in comparisons to be made in subsequent text, the adjective form of "quasi" will be coupled with the descriptive names of the parties to distinguish a relationship such as exists in the principal case from a true status of equitable adoption.
34 The extent of the equitably adopted child's status in Missouri is a right to share in the estate of the adoptive parent. Rumans v. Lighthizer, 363 Mo. 125, 249 S.W.2d 397 (1952); Menees v. Cowgill, 359 Mo. 697, 223 S.W.2d 412 (1949); Weber v. Griffiths, 349 Mo. 145, 159 S.W.2d 670 (1942); McIntyre v. Hardesty, 347 Mo. 805, 149 S.W.2d 334 (1941).
35 Texas cases have not limited the status to this extent, but, on the other hand, no controlling Texas authority can be found which has allowed a successful assertion of adoption by estoppel for any purpose other than to allow the child a share in the estate of an adoptive parent. In Price v. Price, 217 S.W.2d 905 (Tex. Civ. App. 1949) error ref. n.r.e., the child claimed a share in the adoptive parent's father's estate, but relief was denied on another ground. In Asbeck v. Asbeck, __ Tex., 369 S.W.2d 915 (1963), the court by way of dictum said that the "quasi adopted child" would be precluded by the holding of the principal case from asserting an adoption by estoppel against his adoptive parent's collateral heirs for the purpose of sharing in the adoptive parent's brother's estate as a descendant of the deceased adoptive parent.
legally adopted child except as to those persons who are estopped to deny that the child was adopted; *viz,* the adoptive parents or those claiming under or through them.24 Several unfortunate consequences could result from an application of the principal case. For example, upon the death intestate of the "quasi adopted child" without surviving spouse, children, or descendants of children: The "quasi adoptive parents" could not prevent the natural parents or their kin from claiming the estate including any property that the "quasi adoptive parents" may have given the deceased.25 Furthermore, if no natural heirs make claim to the estate, the "quasi adoptive parents" or the heirs of such adoptive parents (as was the situation in the principal case) can do nothing to prevent an escheat of the estate.26 If the deceased was survived by a spouse but no children or their descendants, one-half of the separate real property of the intestate would pass to his natural parents or natural brothers and sisters and their descendants.27 No problem would arise as to community estate.28

In addition to the important direct consequence in the area of descent and distribution, there may be several indirect ramifications of the instant case. The apparent modification of the definition of "child" as used in the Probate Code29 creates some inconsistency in the meaning of child; sometimes the definition will include a person not formally adopted and sometimes it does not, depending on whether an estoppel may be erected in accordance with the holding of this case. The modified definition may have an important bearing on sections of the Probate Code dealing with other matters, *e.g.,* whether administration of community property is necessary.30 There may be an important effect upon the interpretation of the word "child" in wills31 or even in a nonprobate document such as a trust instrument.32

24 The persons estopped have also been described as the "adoptive parents and their privies." Cubley v. Barbee, 123 Tex. 411, 425, 73 S.W.2d 72, 79 (1934). "Privies" was apparently used there as synonymous with persons claiming through the adoptive parent.
28 Tex. Prob. Code Ann. § 45 (1956) provides that all of the community estate will go to the surviving spouse if there are no children or descendants of children. If there are children or descendants of children, one-half goes to the surviving spouse and one-half passes to the children or descendants.
29 See text accompanying note 26 supra.
The consequences of the decision which are suggested here are not exhaustive, nor are they designed to intimate that a holding in accordance with the views of the dissenters would be free of far-reaching, and sometimes harsh, results. However, the decision apparently clashes with the Probate Code treatment of this subject, and the important consequences warrant further legislative enactment if the legislature intends to place the "quasi adopted child" in the same status as an adopted child.

James W. Brennan

Procedure — Res Judicata — Texas Wrongful Death Act

The plaintiff, as administrator of the estate of deceased, filed this suit under the provisions of the Texas survival statute to recover on behalf of the estate the amount of the deceased's funeral expenses and damages to the deceased's automobile. Previously, the plaintiff, as parent of deceased and next friend of deceased's minor children and not as administrator of the estate, had prosecuted a suit under the Texas wrongful death act against the same defendants and had obtained a judgment. At the time of this prior suit, the plaintiff had not qualified as administrator of the deceased's estate. In the present suit, the district court granted defendant's motion for summary judgment, and the court of civil appeals affirmed on the ground that under the principles of res judicata the judgment in the prior wrongful death action barred the claims asserted in the instant action because both suits were based upon the same negligent act. Held, reversed and remanded: A judgment in a wrongful death action, in which the plaintiffs were not entitled to assert a claim for property damages and had neither paid nor become legally responsible for funeral expenses, does not preclude a subsequent suit brought by the personal representative of the deceased against the same defendants for recovery of funeral expenses and damage to the property of the deceased. Landers v. B. F. Goodrich, — Tex. —, 369 S.W.2d 33 (1963).

With few exceptions, it was the common-law rule that tort actions did not survive the injured party's death. Similar to most other jurisdictions, Texas has abrogated this rule by enactment of what is

3 Prosser, Torts § 105 (2d ed. 1955).
commonly called a "survival statute." It was also a rule of common law that the death of a human being did not give rise to a civil action. However, Lord Campbell's Act, passed in 1846, changed the rule in England and created a cause of action for the death which was to be brought by the deceased's executor or administrator for the benefit of the surviving wife, husband, parent, and child. Again, following most American jurisdictions, Texas has adopted a wrongful death statute patterned after the English act.

The damages recoverable under the Texas survival statute are generally described as those which the deceased could have recovered had he lived, i.e., those which the deceased suffered up to the time of his death. Recovery has been granted for physical pain and mental anguish, reasonable medical expenses, reasonable funeral expenses, and property damages. On the other hand, the damages recoverable under the provisions of the Texas death act are limited to the pecuniary losses of the statutory beneficiaries as a result of the decedent's death. Here, recovery includes the present monetary value of the benefits which the statutory beneficiaries had a reasonable expectation of receiving from the deceased and reasonable medical and funeral expenses if paid by the statutory beneficiaries.

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4 Tex. Rev. Civ. Stat. Ann. art. 5525 (1958), which provides in part: "All such causes of action shall survive to and in favor of the heirs and legal representatives and estate of such injured party.

5 The most famous statement of this rule was expressed by Lord Ellenborough: "In a civil court the death of a human being cannot be complained of as an injury." Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (K.B. 1808).

6 9 & 10 Vict. c. 93.


An action for actual damages on account of the injuries causing the death of any person may be brought in the following cases: 1. When an injury causing the death of any person is caused by the wrongful act, neglect, carelessness, unskilfulness, or default of another person.

Art. 4675 provides:

Actions . . . shall be for the sole and exclusive benefit of and may be brought by the surviving husband, wife, children, and parents of the person whose death has been caused or by either of them for the benefit of all.


12 Tex. Rev. Civ. Stat. Ann. art. 4677 (1952) provides that the "jury may give such damages as they think proportionate to the injury resulting from such death." But see notes 13-15 infra.


15 Smith v. Farrington, 117 Tex. 459, 6 S.W.2d 736 (1928); Gulf, C. & S.F. Ry. v. Southwick, 30 S.W. 592 (Tex. Civ. App. 1895). There is an apparent overlap in allowing re-
If separate suits are brought under each statute—the survival statute and the death act—whether these statutes create one or two causes of action becomes a key issue. The courts have held consistently that the doctrine of res judicata will not permit a cause of action to be split to create the basis for successive suits between the same parties. However, the rule does not prevent litigation of different causes of action in separate suits, even though the actions properly could have been united in a single suit. The definitions of "cause of action" have been numerous and discordant. Because modern procedural codes have broadened the concept of what constitutes a cause of action, the res judicata rule against splitting a cause of action has a broader application than at common law. Various tests have been suggested to determine if a single cause of action exists: (1) the evidence in the two suits is identical; (2) a single right is violated; (3) a single act or contract is involved, without reference to its effect; (4) the same findings and judgment are involved. In commenting on the various tests, Judge Clark said:

These may be suggestive but are obviously not to be taken as conclusive tests in themselves. In fact the search for an automatic rule of thumb is illusory as in law generally, particularly procedural law. . . . The rule would seem more general and more vague than as indicated by such tests. . . . Where there is no prevailing standard otherwise, the controlling consideration in determining the extent of the cause should be trial convenience, with much discretion accorded the trial court.

To avoid the uncertainty of such tests, it has been said: "The only positive method of ascertaining what items are included in a single cause of action is to research the substantive law involved in any particular case."

covery of medical and funeral expenses under both statutes, but this does not violate the theories of recovery. If the statutory beneficiaries in a wrongful death action have paid or become legally obligated to pay the medical and funeral expenses, these items are properly included in the meaning of "pecuniary loss."


2. Maryland Cas. Co. v. Hendrick Memorial Hosp., 141 Tex. 23, 169 S.W.2d 969 (1943); Restatement, Judgments § 62, comment b (1942).


6. Id. at 420. For a discussion by the Texas Supreme Court of what constitutes a single cause of action, see both the majority and the dissenting opinions in Moore v. Snowball, 98 Tex. 16, 81 S.W. 5 (1904); for application of the "same evidence test," see note 40 infra.


As early as 1876, an English case held that a judgment recovered under the wrongful death act by a personal representative did not preclude a subsequent suit by the representative to recover for damage to the decedent's personal property. The court recognized separate causes of action resulting from the same wrongful act. Decisions in the United States are in conflict, but of the jurisdictions which have met the problem squarely, the majority have held that there are two causes of action which can be brought in separate suits. Previous to the principal case, the question had not arisen in Texas.

In the principal case, the Texas Supreme Court stated that two separate and distinct causes of action may arise if wrongfully inflicted injuries result in death. However, the court pointed out that neither claim asserted in the principal case—under the survival statute—could have been included in the prior suit—under the wrongful death act—because (1) the plaintiffs in that suit had neither paid nor become legally responsible for the funeral expenses and (2) the heirs were not entitled to assert a claim for property.

24 Leggott v. Great N. Ry., 1 Q.B.D. 599 (1876). It should be noted that in this case it was decided that the same person could bring both suits separately. This question was expressly unanswered in the principal case.

25 Hamel v. Southern Ry., 108 Miss. 172, 66 So. 809 (1915); Hindmarsh v. Sulpho Saline Bath Co., 108 Neb. 168, 187 N.W. 806 (1922); Mahoning Valley Ry. v. Van Altine, 77 Ohio St. 395, 83 N.E. 601 (1908); St. Louis & S.F.R.R. v. Goode, 42 Okla. 784, 142 Pac. 1181 (1914); contra, Lubrano v. Atlantic Mills, 19 R.I. 129, 32 Atl. 205 (1895). The existence of two causes of action is sufficient to preclude the application of the res judicata principles of merger and bar, but the principle of collateral estoppel may have a significant effect on the second suit if the real parties in interest are the same in both suits. Further discussion of collateral estoppel is beyond the scope of this Note. See generally Humble Oil & Ref. Co. v. Webb, 177 S.W.2d 218 (Tex. Civ. App. 1943) error ref. w.o.m.; Old River Rice Irr. Co. v. Stubbs, 168 S.W. 28 (Tex. Civ. App. 1914) error ref.; Annot., 88 A.L.R. 574 (1934); Restatement, Judgments § 92 (1942).

26 Marcus v. Huguley, it was held that the plaintiffs' recovery in a suit for their personal injuries did not preclude their bringing a subsequent action under the death statute for the loss due to their daughter's death which resulted from the same accident. The court said:

The former suit was the prosecution of a separate and distinct cause of action from the one now prosecuted; though both suits are based on the commission of the same wrongful act. The former suit accrued as purely a common-law cause of action and arose immediately when the injuries were inflicted on the parties; the instant suit is purely a statutory suit and did not accrue until the death of the daughter . . . therefore, the bringing of the two separate suits is not a splitting of a single cause of action. 37 S.W.2d 1100, 1104 (Tex. Civ. App. 1931) error dism.

The court further stated that the theory against splitting a cause of action "is a well-recognized rule . . . [but] has no reference to different causes of action accruing to the same parties in different rights, though the causes of action may have resulted from the same wrongful act." Ibid. Although the Marcus case did not present the question whether the survival statute and the wrongful death statute create separate causes of action, the court's reasoning seems adaptable to the problem of the principal case.

27 One is the common-law action for damages sustained by the decedent and his estate which survives to the heirs or legal representative under the provisions of the survival statute. The other cause of action is conferred by the wrongful death statute upon the deceased's surviving spouse, children, and parents to recover their damages as a result of the death.
damage to the automobile since there was a necessity for administra-
tion (which is assumed unless the contrary is shown). In refusing
to go as far as other jurisdictions that have allowed successive suits on
the broad theory that two distinct causes of action are created by the
two statutes, the court stated that the problem would be somewhat
different if the prior action had been prosecuted by the administrator
on behalf of the statutory beneficiaries or if there had been no
necessity of administration. The question whether the same person
could bring separate suits on the two causes of action was ex-
pressly left unanswered by the court. In conjunction with this
reservation, the court cited a Kentucky case which held that an
administrator could not bring a second suit for property damage after
having recovered for the death. However, it is important to note that
the Kentucky statutes have been construed to confer the death action
directly upon the administrator; he is then required to elect whether
he will seek remedy under the survival statute or under the death
statute. In light of this election, Kentucky cases should be weighed
accordingly by jurisdictions that subscribe to the separate-causes-of-
action theory.

By limiting the scope of the decision in the principal case, the
court makes it difficult to determine what its holding will be if claims
arising under the two statutes are capable of being joined, but are
asserted by the same person in different suits. In such a situation, the
court may hold that the claims create a single cause of action if all
the claims are owned by the same person. In order to harmonize such
a holding with the decision of the principal case, the court could dis-
tinguish the latter by reasoning that there are necessarily two causes
of action in a case in which the claims are owned by different indi-
viduals. The following factors suggest such a holding:

28 169 S.W.2d at 35. The court cited as authority for the last statement: Lee v. Turner,
71 Tex. 264, 9 S.W. 149 (1888); 19 Tex. Jur. 2d Decedents' Estates § 918.
29 See note 25 supra.
30 Tex. Rev. Civ. Stat. Ann. art. 4675 (1952) provides that the administrator may prose-
cute the action on behalf of the named beneficiaries if none of the beneficiaries do so within
three months after the death.
31 169 S.W.2d at 36.
32 Ibid.
34 Chesapeake & Ohio R.R. v. Banks' Adm'r, 142 Ky. 746, 135 S.W. 285 (1911);
Conner's Adm'x v. Paul, 75 Ky. 144 (1876).
37 In Southern Ry. v. King, 160 Fed. 303 (5th Cir. 1908), the court stated: "The rule
as to a single cause of action has no application where the injury is suffered in a different
capacity, or by different persons. In such cases there is [sic], of necessity, two causes of
action. . . ." Id. at 335; Restatement, Judgments § 80, comment b (1942).
1. The language of the opinion is cautious. The court said:
   A. Two separate and distinct causes of action may arise if injuries wrongfully inflicted result in death.
   B. Judgment in a wrongful death action does not necessarily bar a subsequent suit on behalf of the estate.\textsuperscript{38}

2. The Kentucky case, discussed above, was cited by the court in connection with its express reservation.\textsuperscript{39}

3. Substantially the same evidence is required to support both actions.\textsuperscript{40}

4. Recent Texas civil appeals cases\textsuperscript{41} have held that if an individual sustains both personal and property damage in the same occurrence, there exists only one cause of action. An analogy may be drawn by the court between those cases and the problem suggested here. In both situations, there is only one negligent act which causes property damage and personal injury to the same person.

On the other hand, there are good arguments in support of a holding that there are two causes of action, even though the same individual may sue:

1. The actions are conferred by two different statutes.
2. If the administrator brings both causes of action, it may be urged that his capacities are different in each.\textsuperscript{42} When suing under the survival statute, he acts on behalf of the estate; yet in the case of the wrongful death statute, the administrator maintains the action for the benefit of the beneficiaries named in the statute.\textsuperscript{43} However, this difference in capacity on the part of the plaintiff would not be

\textsuperscript{38} 369 S.W.2d at 35.
\textsuperscript{40} For Texas cases which have applied the "same evidence test", see Medley v. Brown, 202 S.W. 137 (Tex. Civ. App. 1918) error ref.; Whitney v. Parish of Vernon, 154 S.W. 264 (Tex. Civ. App. 1913) error ref.
\textsuperscript{42} Davis v. First Nat'l Bank, 139 Tex. 36, 161 S.W.2d 467 (1942); Pryor v. Krause, 168 S.W. 498 (Tex. Civ. App. 1914) error ref.; Restatement, Judgments § 80 (1942).
\textsuperscript{43} Houston & T.C. Ry. v. Hook, 60 Tex. 403 (1883), concerning the capacity of the administrator suing under the death statute:

It is a special power conferred upon the person who may be executor or administrator, not because the matter pertains to the estate, but because the legislature deemed the persons who might be executors or administrators, more likely than others, to be proper persons to maintain suits to preserve and enforce the right of the beneficiaries named in the act. The power might have been given to any officer of the county, without reference to whether they had any connection with the estate of the decedent or not, or might have been given to any other person. Id. at 407.
significant if the "real parties in interest" are the same in both suits," e.g., if the only statutory beneficiaries were the sole heirs.

3. As a corollary to the separate capacity distinction discussed above, it should be noted that the recoveries under the two actions flow into different channels. Damages recovered in the wrongful death action go directly to the statutory beneficiaries and are not subject to the debts of the deceased.44 Action under the survival statute is on behalf of the estate, and thus creditors are permitted to share in the recovery.

It is submitted that the stronger legal arguments favor the view that there are two separate and distinct causes of action conferred by the statutes. Therefore, the Texas courts should hold that the same person is not precluded by any rule of res judicata from prosecuting a separate suit on each cause of action. However, because of the flexibility of many of these concepts, the emphatic limitation on the scope of the decision in the principal case, and the vaguely announced policy against "multiplicity of law suits," it is strongly urged that the practitioner should avoid successive suits if claims under the death and the survival acts can possibly be joined.

James W. Brennan

Torts — Liability Insurance — Stowers

Doctrine and Duty to Settle

While in Mexico with two friends, the owner of an automobile purchased a $5,000 dollar public liability insurance policy from the defendant, a Mexican insurance corporation. Thereafter, the automobile collided with a bus on a Mexican highway and the plaintiff, one of the insured's passengers, sustained serious bodily injuries which resulted in his being a permanent quadriplegic. When notified by the insured of the accident, the defendant-insurer settled with the bus company for damages to the bus. After returning to the United States, the plaintiff wrote the defendant-insurer concerning his claim, but received no reply. The plaintiff then offered to settle with the insured for $5,000 dollars, but the offer was rejected for lack of funds; the defendant-insurer had no knowledge of this offer. After suit was filed against the insured, the insured contacted the defendant-insurer and requested that it defend the suit. The defendant-insurer refused

45 Houston & T.C. Ry. v. Hook, 60 Tex. 403 (1883).
to defend and disclaimed all liability under the policy to the plaintiff. Subsequently, the plaintiff obtained a judgment against the insured for $270,000 dollars. In the principal case plaintiff seeks to recover $270,000 dollars from the defendant insurance company in the United States District Court for the Northern District of Texas. The plaintiff alleges that defendant-insurer was negligent in failing to initiate and negotiate a settlement and that such negligence was the proximate cause of the judgment rendered against the insured. Plaintiff further alleges that he is entitled to recovery as a third party beneficiary to the contract of insurance between defendant and the insured. Held: Under the Stowers doctrine of Texas, an automobile liability insurer: (1) owes a duty to exercise ordinary care in initiating and negotiating for a settlement within policy limits and (2) may be sued directly by an injured third party for breach of that duty for the full amount of the judgment rendered against the insured, including that portion in excess of policy limits. Bostrom v. Seguros Tepeyac, S.A., 225 F. Supp. 222 (N.D. Tex. 1963).

The Stowers doctrine, as it is popularly known in Texas, had its origin in 1929 in G.A. Stowers Furniture Co. v. American Indem. Co. In that case the insurance company issued a $5,000 dollar automobile insurance policy. The provisions of the policy reserved to the insurer control and settlement rights in any suit or claim arising under the policy. The insurer assumed the defense of a suit against the insured. Before trial the injured party offered to accept $4,000 dollars in full settlement of the claim, but this offer was rejected by the insurer. The injured party subsequently obtained a judgment against the insured for an amount in excess of the policy limits. After paying the judgment, the insured brought suit against the insurer to recover the amount paid. The court held that: (1) the insurer, under the terms of the policy, acted as the exclusive agent of the insured in all matters pertaining to the suit; (2) as agent, a


2 The scope of this Note is limited to a discussion of duties involved in the Stowers doctrine, i.e., the nature of the duties and to whom they are owed.


5 In the principal case nothing had been paid by the insured on the $270,000 judgment rendered against him in the prior suit. If the policy involved in the principal case was an indemnity policy, as in Stowers, the insured would have a cause of action against the insurer only for the amount actually paid to the plaintiff. However, under a liability insurance policy, although there is no Texas case in point, the insured probably could bring his cause of action against the insurance company without having paid any portion of the judgment. See Universal Auto. Ins. Co. v. Culberson, 126 Tex. 282, 86 S.W.2d 727 (1935); American Indem. Co. v. Fellbaum, 114 Tex. 127, 263 S.W. 908 (1924).
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Duty was imposed to exercise ordinary care to protect the interest of the insured to the amount of the policy limits; and (3) if that duty was breached, the insured had a cause of action against the insurer for the total amount of the judgment, including the amount in excess of policy limits. However, the Stowers doctrine specifically deals with only that portion of the judgment in excess of policy limits. The Stowers case held that the negligence of the insurer was the proximate cause of the excess amount of the judgment against the insured.

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The situation in the principal case can be distinguished from that of the Stowers case in at least two respects. First, the negligence of the insurer consists of failure to initiate and negotiate for a settlement, rather than a rejection of an offer of settlement within policy limits as in the Stowers case. Second, the party claiming damages as a result of the insurer's negligence is the injured third party, rather than the insured.

The first distinction involves the scope of the duty placed upon the insurer in matters of settlement. The established standard of care in Texas requires the degree of care and diligence which an ordinarily prudent person would exercise in the conduct of his own business. In settling a claim, the insurer is required to protect its own interests, as well as those of the insured. Concerning this function of the insurer, the court commented in the Stowers case: "Where one acts as agent under such circumstances, he is bound to give the rights of his principal at least as great consideration as he does his own." In the Stowers case a duty was placed upon the insurer to exercise ordinary care in the consideration of a settlement offer. Such a duty was not in issue in the principal case. Although an offer of settlement within policy limits was made to the insured, the offer was not communicated to the defendant. The court found that the failure to communicate the offer did not bar plaintiff's recovery because plaintiff's allegation charged defendant with failure to initiate and negotiate a settlement, rather than rejection of the settlement offer.

The court found that the duty to use ordinary care to initiate and

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6 In Stowers the insurance company alleged that it was ready and willing to pay $5,000.00, which was the amount of the policy limit.
8 Ibid.
11 225 F. Supp. at 234.
negotiate a settlement within policy limits exists irrespective of any duty to defend the lawsuit.\textsuperscript{12} To support this holding, the court quoted a recent Texas case which stated: "It is our view that the duty to settle implies the duty to negotiate. These two duties cannot be separated as far as the basic obligation to the insured is concerned. It is difficult to see how any controversy could be settled without some measure of negotiation."\textsuperscript{13} Having found that the defendant had the absolute right to settle claims covered by the policy, the court held that a duty was imposed upon the defendant to exercise due care in the exercise of that right.\textsuperscript{14}

After finding a duty imposed upon the defendant and a breach of that duty,\textsuperscript{15} the court was then confronted with defendant's contention that plaintiff could not maintain an action upon a policy to which he was not an actual party.\textsuperscript{16} No Texas case directly supports the court's holding on this point, \textit{i.e.}, allowing an injured party to proceed directly against the insurer on a judgment held against the insured for an amount in excess of policy limits. The \textit{Stowers} case and other cases applying the doctrine have involved situations in which the plaintiff was the insured and the defendant was the insurer.\textsuperscript{17} A suit in a \textit{Stowers} fact situation actually involves both a cause of action in contract under the terms of the policy and a cause of action in tort for the amount of the judgment in excess of policy limits.\textsuperscript{18} Thus, the principal case can be viewed as a suit in contract under the terms of the policy for $5,000 dollars and as a suit in tort for defendant's negligence for $265,000 dollars. The holding in the principal case, that plaintiff may proceed directly against the defendant for the policy amount as a third party beneficiary to the insurance

\textsuperscript{12}Ibid.
\textsuperscript{14}225 F. Supp. at 233. The court relied upon a Mexican statute that was admitted into evidence as a part of the insurance contract. The statute, article 148 of "LAW GOVERNING INSURANCE CONTRACTS, of 1935, as amended" stated: No acknowledgment of indebtedness, compromise or any other act of legal significance of a similar nature, made or agreed upon without the consent of the insurance company, may be used against the latter. The admission of the existence of a fact cannot be deemed to be the acknowledgment of liability. See note 12 supra and accompanying text.
\textsuperscript{15}225 F. Supp. at 225.
\textsuperscript{16}The Texas cases following \textit{Stowers} have presented similar situations. The court in Fidelity & Cas. Co. v. Robb, 267 F.2d 473 (5th Cir. 1959), stated: "[The \textit{Stowers} case] has not been in anywise modified or departed from in the thirty years since, in 1929, it came down." \textit{Id.} at 477.
\textsuperscript{17}In Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc., 215 S.W.2d 904 (Tex. Civ. App. 1948) error ref. n.r.e., the court stated: "The petition asserts, in effect, two causes of action, one for the sums contracted to be paid and one (in tort) for the excess of the judgment above those sums . . . ." \textit{Id.} at 906.
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The duty of an insurance company to protect its insured against liability cannot consistently be extended to include protection to one who is seeking to hold the insured liable.

In short, conduct to be legally wrongful must contravene some duty which the law attaches to the relation between the parties and it is clear that no relationship here exists between [the injured third party] and the [insurer] which would permit the maintenance of the present action.25

19 225 F. Supp. at 232.
20 The court stated: "When Art. 147 of the Mexican federal statutes is read into the [insured's] policy, the [plaintiff] is in privity to the insurance contract so as to entitle him to sue the defendant insurance company." Ibid.
21 Womack v. Allstate Ins. Co., 156 Tex. 467, 296 S.W.2d 233 (1956); Commercial Standard Ins. Co. v. Ebner, 149 Tex. 28, 228 S.W.2d 507 (1950); Seaton v. Pickens, 126 Tex. 271, 87 S.W.2d 709 (1935).
22 88 Tex. 233, 31 S.W. 179 (1895).
23 Id. at 180-81.

The excess liability of company arises out of the relationship between insured and company. Claimant is a stranger to that relationship. Not only is company without any duty to claimant to accept claimant’s reasonable settlement offer, but also, if there is a sizable disparity between the settlement offer and the
This decision is based upon sound reasoning and is clear authority for holding that the duty imposed upon the insurer in settlement matters runs only to the insured. Since the suit in the principal case is primarily in tort for the amount of the judgment in excess of policy limits, the plaintiff (third party) must meet the requirements of duty and damage. Not only is there no duty owed to the third party, but also the third party actually sustained no damage by the insurance company’s breach of the duty it owed to the insured. Only the insured suffered any damage. It is submitted that the Texas courts would not allow such a suit under the Stowers doctrine.

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