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Recent Decisions

R. B. L.

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RECENT DECISIONS

Texas Sunday Closing Law — Certificates of Emergency — Duty of Seller to Inquire

Petitioner filed suit seeking to enjoin respondent from violating the Texas Sunday Closing Law[1] by selling prohibited merchandise on both Saturday and Sunday. Respondent claimed he had complied with section 4a of the statute[2] which allows such sales if the purchaser certifies in writing that an "emergency" exists and that the purchase is an "emergency" purchase. The respondent provided a written form for this purpose and required each purchaser of prohibited goods to execute one; however, he made no further inquiry into the purchaser's good faith or into the kind of "emergency" that existed. The trial court held that the statute places a duty of inquiry upon the seller in addition to the use of the certificate, and that unless the seller believes, "after inquiry, on reasonable grounds, in the exercise of good faith" that the purchase is an emergency purchase, the sale is prohibited by the statute. The court of civil appeals dissolved the injunction imposed by the trial court;[3] the supreme court affirmed the action. The certificate used by the respondent complied with the statute and no duty is placed upon the seller to determine whether such certificate is executed in good faith. *State v. Shoppers World, Inc.* — Tex. —, 380 S.W.2d 107 (1964).

The court in the principal case applied the universally accepted rule of constitutional law that a statute, if susceptible of two interpretations, will be given the one which is constitutionally acceptable. It stated that if section 4a were given the interpretation adopted by the trial court and by the state, it would be unconstitutional because of failure to provide sufficient guides or criteria for the seller to follow when making the "good faith" test of purchaser's motives.

The majority opinion expressly recognized the fact that: "It is difficult to conceive of any set of circumstances under which a purchase listed in section 1 of art. 286a could be an 'emergency purchase' as one would normally interpret that phrase. . . ."[4] Therefore, the court strictly construed the language of the section to place upon the seller only the ministerial duty of obtaining the proper certificate.

The Texas Sunday Closing Law, even as interpreted by the court

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[1] Tex. Pen. Code Ann. art. 286a (1952).

[2] Tex. Pen. Code Ann. art. 286a, § 4a (1952).

[3] Shoppers World, Inc. v. State, 373 S.W.2d 374 (Tex. Civ. App. 1963).

[4] 380 S.W.2d at 112.

in the principal case, though constitutional, contains such vague language that its terms are, for the most part, unenforceable. While the statute requires the retailer to obtain a certificate from each buyer of prohibited items, it sets forth no clear standard by which buyers or courts are to judge whether the purchase is an "emergency" one. The buyer is required only to state that the purchase is for his own "welfare", "health", and "safety".[5] Such standards obviously emasculate the original intent of the so-called Blue Laws. Therefore, Penal Code article 286a, unless re-examined and clarified by the legislature, will remain in the statute books only as a nuisance to the retailer and as a burden to the conscience of the week-end shopper.

R. B. L.

Contracts — Acceleration Clauses in Notes — Waiver of Rights

Plaintiffs were holders of four promissory vendor's lien notes on hotel properties. The contract of sale contained an "acceleration clause" allowing the note holder, at his option, to accelerate the maturity of the notes if the purchaser corporation failed to perform any of the agreements in the note or in the accompanying deed of trust, chattel mortgage, and pledge agreement. The chattel mortgage contained a provision barring the sale of any of the personal property of the hotel without the consent of the plaintiff mortgagee. The defendant mortgagor later sold all of the hotel properties and began dissolution procedure. Plaintiff brought suit to enjoin the dissolution of the defendant corporation, accelerate the maturity of the notes, and foreclose the liens. The trial court and the court of civil appeals[1] held that the plaintiffs had waived their rights under the contract of sale by accepting the monthly interest payments on the notes after the alleged breach of contract took place. *Held, reversed:* The acceptance of installments due on a note is not a waiver of the right of acceleration if the right arises out of some breach *other than* the failure to make an installment payment when due. *A. R. Clark Inv. Co. v. Green,* — Tex. —, 375 S.W.2d 425 (1964).

The Court in the principal case adopts a rule which is well settled

[5] The certificate signed by the purchaser need not even be signed under oath. A.M. Servicing Corp. v. State, 380 S.W.2d 747 (Tex. Civ. App. 1964).

[1] Green v. A. R. Clark Inv. Co., 363 S.W.2d 802 (Tex. Civ. App. 1963).

in some other jurisdictions[2] but which had not been determined clearly in Texas. The Court carefully noted and emphasized that acceptance of installment payments is not a waiver of acceleration rights only if the breach giving rise to the right is something other than failure to meet an installment payment. It is well settled in Texas and elsewhere that acceptance by the mortgagee of past due installments will act as a waiver of the mortgagee's rights to accelerate the notes which arose because of the mortgagor's failure to meet the payment at the proper time.[3]

At first, the holding in the principal case seems to allow noteholders in Texas to collect regular installment payments after a breach, yet to maintain a right to accelerate at any time. Such is not the case, however. The noteholder is estopped from asserting the right to accelerate if he expressly or impliedly gives his permission to the breach, or if he delays for more than a reasonable time in exercising the right.[4] The most that can be said for the principal case as a benefit to noteholders is that it relieves them of the obligation of making an immediate decision whether or not to accelerate.

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Federal Estate Tax — Charitable Deduction — Property Passing by Escheat

This was an action for refund of estate taxes paid by the administrator of an estate. Decedent died intestate and left no living relatives to whom his estate could pass under the laws of Pennsylvania. Therefore, his entire estate escheated to the state. Decedent's administrator claimed that the estate was exempt from federal estate tax because all the property therein had been "transferred" to the state within the meaning of section 2055.[1] *Held:* Property passing to the state by escheat is not a "transfer" to the state by the decedent and will not qualify for the charitable deduction. *Senft v. United States,* 319 F.2d 642 (3d Cir. 1963).

Section 2055(a)(1) of the 1954 Internal Revenue Code provides

[2] Federal Land Bank v. Mulhern, 180 La. 627, 157 So. 370 (1934); Freund v. Weisman, 101 N.J. Eq. 245, 137 Atl. 885 (1927); Luke v. Patterson, 192 Okla. 631, 139 P.2d 175 (1943).

[3] Cofer v. Beverly, 184 S.W. 608 (Tex. Civ. App. 1916); 36 Am. Jur. Mortgages § 402.

[4] 375 S.W.2d at 434; 36 Am. Jur. Mortgages § 399.

[1] Int. Rev. Code of 1954, § 2055.

for exemption from estate taxation all "bequests, legacies, devises, or transfers . . . to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia for exclusively public purposes." The principal case was one of first impression in interpreting this provision with respect to property passing by escheat.

Because there existed no direct authority on the point, the court followed the Treasury Regulations[2] which provide that in order to qualify for the exemption the property must pass by intervivos gift or by will. The reasoning in the principal case is comparable to that in other recent cases; it seems to be a mandatory prerequisite for claiming the deduction that the decedent actually *intend* to make a direct and exclusive testamentary transfer of the property to the public, charitable, or religious institution and that he *express* that intention in the will.[3] The court does not discuss the possibility that the decendent might have known his property would pass to the state and intended for it to do so, but the language of the opinion indicates that even in this case, in the absence of a will making a direct devise, the property would not be exempt.[4]

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Service of Process — Texas Long-Arm Statute — Concept of Doing Business

Plaintiff administratrix sued defendant manufacturer for wrongful death, alleging negligence and breach of implied warranty of fitness in the manufacture of products purchased from a distributor by decedent's employer. Defendant was a foreign corporation licensed to do business in Texas, but it had designated no agent for service of process in the state. Service was perfected under the Texas out-of-state service of process statute, article 2031b.[1] Defendant specially appeared to contest the jurisdiction of the court over its person and alleged that it was not "doing business"[2] in Texas within the meaning

[2] Treas. Reg. § 20.2055-1 (1958).

[3] City Nat'l Bank & Trust Co. v. United States, 312 F.2d 118 (6th Cir.), *cert. denied*, 373 U.S. 949 (1963); Cox v. Commissioner, 297 F.2d 36 (2d Cir. 1961).

[4] See a discussion of the problem in Cox v. Commissioner, 297 F.2d 36 (2d Cir. 1961).

[1] Tex. Rev. Civ. Stat. Ann. (1964).

[2] Tex. Rev. Civ. Stat. Ann. art. 2031b, § 4 (1964) states: "For the purpose of this Act . . . any foreign corporation . . . shall be deemed doing business in this State by . . . the committing of any tort in whole or in part in this State."

of article 2031b; in the alternative, defendant contended that article 2031b is unconstitutional as a violation of due process to the extent that it provides for service of process on the defendant. *Held:* (1) section 4 of article 2031b, defining the term "doing business," includes within its terms a tortious act committed outside the state if the injury caused by that act occurs in Texas; (2) the partial commission of a single tort within the State of itself is a sufficient "minimum contact"[3] with the state to make constitutionally valid statutory substituted service of process upon a state official in an in personam action. *Hearne v. Dow-Badische Chem. Co.*, 224 F. Supp. 90 (S.D. Tex. 1963).

This decision places the broadest interpretation to date upon the Texas long-arm statute. The court stated that, even though the tortious act was committed outside of the state, the injury occurred in Texas; and thus the act was sufficient to constitute doing business under section 4 of article 2031b, because it was a partial commission of a single tort within the state. This interpretation greatly extends the jurisdiction of the Texas courts to allow service on manufacturers who neither have sold to nor have had any direct contact with residents of Texas.

Although it gives a broad interpretation to section 4 of the statute, the principal case sustains the constitutionality of article 2031b. In contrast, in *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*[4] another federal district court sitting in Texas held that article 2031b was too comprehensive and that the application of the "letter" of the statute would not meet the constitutional "minimum contracts" requirement. Although the court in the principal case cites *Lone Star* with approval, the two decisions are contradictory in result and in interpretation. Unlike in *Lone Star*, article 2031b obviously was applied to its full extent in the principal case, and that application was upheld as fulfilling the requirements of due process. It seems almost certain that the Fifth Circuit will be forced to resolve the conflict in the application of article 2031b and to decide upon the constitutionality of such a broad interpretation of the terms of article 2031b. Also, it remains to be seen how the Texas state courts will interpret the long-arm provision.

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[3] Hanson v. Denckla, 357 U.S. 235 (1958); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[4] 185 F. Supp. 48 (S.D. Tex. 1960), *rev'd on other grounds*, 288 F.2d 69 (5th Cir. 1961).

National Labor Relations Act — Section 8(a)(1) — Employer's Grant of Benefit to Employees to Affect Outcome of Election

The International Brotherhood of Boilermakers, Iron Shipbuilders, Forgers and Helpers, AFL-CIO, notified the respondent employer that its employees had chosen the union as their bargaining representative and petitioned the NLRB for a representation election. The petition was granted and an election was ordered. Shortly before the election was scheduled, the employer announced the grant of an extra holiday for each employee which could be taken on his birthday and the institution of increased overtime and vacation benefits. A letter urging the employees to vote against the union in the forthcoming election accompanied the announcement. Subsequently, the union lost the election and petitioned the NLRB for redress, claiming that the employer had violated section 8 (a) (1) of the National Labor Relations Act.[1] The trial examiner found that the employer gave the benefits with the intent to induce the employees to vote against the union in the representation election, and held that the employer committed an unfair labor practice. The Board affirmed and petitioned the Fifth Circuit for enforcement of the order. The court of appeals refused to enforce the order on the grounds that even though the employer intended to induce the employees not to vote for the union the benefits given were permanent and were not conditioned upon the outcome of the election.[2] *Held, reversed.* The grant by an employer of any benefit to its employees with the intent to influence the outcome of a representation election is an unlawful interference with the employees' rights under section 7 of the National Labor Relations Act.[3] *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

The decision in the principal case settles a conflict between the courts of appeal on whether, in determining the existence *vel non* of an unfair labor practice under section 8(a) (1), it is of any significance that a wage increase or other benefit granted by an employer in an attempt to induce the employees to reject the union is permanent and final before the representation election. It has been well settled since the early days of the NLRB that the grant of a benefit to employees that is conditioned upon the employees rejection

[1] (a) "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . . " 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a) (1) (1958).

[2] NLRB v. Exchange Parts Co., 304 F.2d 368 (5th Cir. 1962).

[3] "Employees shall have the right to self-organization, to form, join, or assist labor organizations. . . . " 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958).

of the union as their bargaining agent is an unfair labor practice.[4] Here the Court extends that rule to include the situation in which the employees are given a permanent benefit which is not contingent upon, but which is given in an attempt to influence, the outcome of an upcoming representation election. This rule has been followed in several circuits for quite some time.[5]

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[4] Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944).

[5] NLRB v. Gorbea, Perez & Morell S. En C., 300 F.2d 886 (1st Cir. 1962); NLRB v. Pyne Molding Corp., 226 F.2d 818 (2d Cir. 1955); Indiana Metal Prods. Corp. v. NLRB, 202 F.2d 613 (7th Cir. 1953).