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Recent Decisions

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RECENT DECISIONS

Constitutional Law — Reapportionment — Municipal and County Governments

Plaintiffs, taxpayers and citizens of Genesee County, Michigan, sought to enjoin county officials from entering into a contract authorized by the County Board of Supervisors for construction and installation of a county sewage disposal system. Plaintiffs claimed that the acts of the board were invalid because the members of the board did not each represent a proportionate number of the population of the county. Various large discrepancies in apportionment among the electoral units of the county were demonstrated, and plaintiffs alleged that the Michigan constitutional provision providing for the representation on the board[1] violated the equal protection clause of the fourteenth amendment.[2] *Held:* The fourteenth amendment to the Constitution of the United States does not require equal apportionment of municipal and county government commissions in accordance with population. *Johnson v. Genesee County, Michigan*, 232 F. Supp. 567 (E.D. Mich. 1964).

The court pointed out that the suit was not the usual apportionment case because it was an action to set aside an act of an allegedly malapportioned board, rather than to reapportion it. The court, however, did not base its decision on this distinction. Instead, it stated that although the fourteenth amendment requires the state legislatures to be apportioned in representation according to population,[3] it does not force state legislatures to apply equal apportionment principles to the municipal and county legislative bodies under their control and supervision. The court stated that the composition of local units of government is a "state matter," and under the present decisions of the Supreme Court, the fourteenth amendment does not limit the state legislatures' exercise of control over the local units.[4] The decision appears to be based primarily on the fact that the Supreme Court recently refused writ of certiorari and dismissed an appeal for want of jurisdiction in a similar case.[5] But that case cannot serve as a true precedent for this decision because it, as the Mississippi court itself pointed out,[6] turned on a decision of *when* reapportionment was to

[1] Mich. Const. art. VIII, § 7.
[2] U.S. Const. amend. XIV.
[3] Baker v. Carr, 369 U.S. 186 (1962).
[4] Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937); Risty v. Chicago, R. I. & P. Ry., 270 U.S. 378 (1926).
[5] Glass v. Hancock County Election Comm'n., 378 U.S. 558 (1964).
[6] —— Miss.——, 156 So. 2d 825 (1963).

take place and not *if* such reapportionment was to occur at all. Mississippi law requires equal apportionment of its county governments.[7]

The problem presented by the principal case undoubtedly will recur in the future, and ultimately the Supreme Court of the United States will be called upon to reconcile the policies presented by the reapportionment cases on one hand and the state control of local unit cases on the other.

R. B. L.

Corporations — Bylaw Restricting Alienability — Validity as to Nonconsenting Shareholder

A corporate bylaw as amended placed a restriction on the alienability of the corporation's stock. The bylaw stipulated that the shares could be transferred to an outsider provided that the owner of the shares had first offered them to the other shareholders, and if met with refusal, had then offered the stock to the corporation at the price and under the same terms as offered to the outsider. Defendant, owner of thirty-nine per cent of the corporation's stock, was given no actual notice of the amendment to the bylaw; but proper corporate procedure was followed by replacing the old stock certificates with new ones containing this amended bylaw. The corporation and the majority stockholder initiated this action seeking a declaratory judgment upholding the validity of the amended bylaw. The trial court held against the bylaw's validity, reasoning that the shares had been free of restrictions at the time defendant purchased them and that a vested right to keep the shares forever free of such restrictions had arisen at the time of purchase. *Held, reversed:* The restriction on alienation is a reasonable one, and a bylaw embodying such a restriction can be enforced against a nonconsenting shareholder who acquired his stock prior to the enactment of the bylaw. *Tu-Vu Drive-in Corp. v. Ashkins*, — Cal. 2d —, 391 P.2d 828 (1964).

The law is well established that absolute restrictions on the alienability of shares are invalid.[1] Many jurisdictions, however, will uphold as valid restrictions on alienability which are reasonable.[2]

[7] Miss. Code Ann. § 2870 (1957).

[1] See cases cited in Annot., 65 A.L.R. 1159, 1165 (1930); Comment, 18 Iowa L. Rev. 88 (1932).

[2] See cases cited in Annot., 61 A.L.R.2d 1318, 1324-45 (1958).

California courts have used two criteria to determine the reasonableness of a restrictive bylaw—whether the corporate purpose is fulfilled by the bylaw and the extent to which the rights of the shareholder are impaired.[3] A previous case held that bylaws which have the purpose of restricting the transferability of stock in closed corporations "are necessary for the protection of the corporation";[4] hence, the instant bylaw serves a valid corporate purpose. Secondly, the court reasons that defendant has not had his rights impaired to a great degree because he suffers no economic injury from this restriction. While insuring to him the same price and terms of sale for his stock, the bylaw merely dictates to whom the transfer shall be made. The court concludes that this restriction meets the criteria and, therefore, is reasonable.

The court does not appear bothered by the fact that this restriction was placed on the shares long after their purchase. Noting that the power to regulate the rights of corporate shareholders was reserved to the state by the California constitution,[5] the court said that this reservation formed a part of the contract between the shareholder and the corporation. Therefore, all shareholders acquire their shares subject to the power of the corporation to alter its contract with them pursuant to statutory authority.

Although it is clear that the present case reflects the California law in this area,[6] it remains to be seen whether other jurisdictions will follow where the case leads. The reasoning is logical, and the holding is supportable, but there are likely to be many who believe that it strips away an incident of ownership too valuable no matter what the justification.[7]

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[3] Bennett v. Hibernia Bank, 87 Cal. 2d 540, 305 P.2d 20 (1956); Spencer v. Hibernia Bank, 186 Cal. App. 2d 702, 9 Cal. Rptr. 867 (Dist. Ct. App. 1960).

[4] Mancini v. Patrizi, 87 Cal. App. 435, 437, 262 Pac. 375, 376 (Dist. Ct. App. 1927).

[5] Cal. Const. art XII, § 1.

[6] In an earlier case, Wilson v. Cherokee Drift Mining Co., 14 Cal. 2d 56, 92 P.2d 802 (1939), the California Supreme Court sustained a bylaw which levied a heavy assessment upon all shares, including those purchased prior to passage of the bylaw.

[7] For a discussion of the problems involved, see O'Neal, *Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting*, 65 Harv. L. Rev. 773 (1952).

The only Texas case on the point, Sandor Petroleum Corp. v. Williams, 321 S.W.2d 614 (Tex. Civ. App. 1959) *error ref. n.r.e.*, is very similar in its facts but reaches the opposite result. See Note, 14 Sw. L.J. 106 (1960) for an article criticizing the case and Note, 38 Texas L. Rev. 499 (1960), for an article defending the case.

Constitutional Law — Equal Protection Clause — Right of Servicemen to Vote

Plaintiffs, members of the armed forces of the United States, were stationed in San Antonio, Texas, but had enlisted in other states. Each had lived in San Antonio for more than a year and had purchased a home in which he lived with his family. On the basis of the same periods of residence, plaintiffs' wives were allowed to pay poll taxes. Texas officials refused to allow plaintiffs to vote in Texas because of the Texas constitutional provision[1] that allows servicemen to vote only in the county in which they resided at the time of enlistment. *Held:* The Texas constitutional provision insofar as it denies the right to vote in Texas to servicemen enlisting in other states but otherwise meeting Texas voting requirements violates the equal protection clause of the fourteenth amendment to the United States Constitution. *Mabry v. Davis*, 232 F. Supp. 930 (W.D. Tex. 1964).

Prior to 1954, and for more than 100 years, the Texas constitution disqualified all military personnel, native and nonresident alike, from voting in Texas. In 1954, article 6, section 2 was amended to provide that "any member of the Armed Forces of the United States . . . may vote only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces." Four months prior to the decision in the instant case the Texas Supreme Court in *Carrington v. Rash*[2] upheld the Texas restriction as applied to facts similar to those in the instant case. Treatment of military personnel as a separate class for voting purposes was justified by their status as "floating population." The Texas court found that, within the class, requirements were nondiscriminatory because they operated on all members of the class in a like manner and reasonable because they did not absolutely disqualify servicemen as voters.[3] In *Mabry* the three-judge federal court agreed with the dissent in *Carrington* that treating the military as a separate class in voting matters violates the fourteenth amendment. The court noted that large groups other than servicemen constantly move from place to place in today's highly mobile society. Despite the nonselective wording, the court also found the provision discriminatory within the class in "that it constitutes a *complete* abrogation of the right of

[1] Tex. Const. art. VI, § 2.

[2] ___ Tex. ___, 378 S.W.2d 304 (1964).

[3] The court relied on Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959), upholding a North Carolina requirement that voters be able to read and write any section of the North Carolina constitution and declaring, "The states have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Id.* at 50.

plaintiffs to vote in Texas under *any* circumstances while they are in military service."[4]

The conflict between the state and federal decisions soon should be resolved because the United States Supreme Court has granted certiorari in the *Carrington* case.[5] Even if the federal court is upheld, voting patterns in Texas "garrison towns" are unlikely to change significantly.[6] Plaintiffs in the *Mabry* case were able to show that transfer from San Antonio was unlikely because of their special classifications. The federal court said that servicemen, as such, are under no disability to form an intent to change their residence, but it noted that men living on a base or post likely would not meet the usual Texas residence requirements.[7]

R. G. R.

Trespass — Flight Over Land — Requirement of Proving Negligence to Recover for Resultant Damage

Defendant, while engaged in spraying an adjoining landowner's crops, passed over plaintiff's land and unintentionally dropped poisonous substances which caused considerable damage to plaintiff's crops and pasture lands. Plaintiff instituted suit claiming trespass to his land and resultant damage. No claim of negligence in operation of the airplane was made by plaintiff and no evidence as to the altitude of the flight was introduced. The trial court awarded plaintiff damages. *Held:* If an airplane unintentionally is flown over the property of another and an act is done which results in damage to the property, damages may be recovered without any showing of negligence. *Schronk v. Gilliam*, 380 S.W.2d 743 (Tex. Civ. App. 1964).

The court in the principal case pointed out that the rule is now well accepted that a temporary invasion of the air space over the land of another for any legitimate purpose is privileged if the flight is conducted at a reasonable height and does not unreasonably interfere

[4] 232 F. Supp. at 937.

[5] 85 Sup. Ct. 33 (1964).

[6] Defendants had emphasized fear of a "military take-over" of local affairs in areas of a large base under the guidance of a "strong-willed military commander, who was having trouble with local officials." 232 F. Supp. at 936.

[7] The court indicated no disapproval of the requirement of Tex. Election Code art. 5.02 (1952), which requires residence of one year in the state and six months in the county plus intent (shown by external evidence) to remain in that place indefinitely.

with the use of the property by the owner.[1] This privilege, however, may be lost if the flight is "conducted in such manner as to be dangerous to the land, or persons or things thereon."[2] Applying these principles, the court in the principal case held that, even though the flight would ordinarily have been privileged, the privilege was lost and the entry constituted a trespass because an act outside the scope of the privilege was committed by the defendant while upon the land. The court then applied the rule that negligence need not be shown in an action for resultant damages of a trespass,[3] and therefore allowed recovery.

The point which makes the principal case worthy of note is not the principles of property law stated; rather, it is the fact that the court allowed the plaintiff to use the trespass remedy. The courts previously have indicated that the proper remedy in similar cases is an action for negligence, not for trespass.[4] The court in *Schronk* distinguishes the previous cases on the ground that in the instant case the plane actually passed over the plaintiff's land whereas in cases heretofore decided the plane merely passed close to the plaintiff's land and the injurious chemicals were carried on the land by air currents. Therefore, under the distinction made, the plaintiff could recover without proving negligence in the spraying procedure because the plane had passed over his land. On the other hand, his neighbor, whose crops could have been damaged by the same chemicals, would be required to prove negligence in order to recover because air currents rather than the plane would have carried the chemicals across his property line. This situation stands as a vivid illustration of the incongruous results which often occur if trespass is allowed to be used as a remedy in a suit for resultant damages and property law principles are carried to their logical conclusion.[5]

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[1] United States v. Causby, 328 U.S. 256 (1946); Restatement, Torts § 159, comment f (1934).

[2] Restatement, Torts § 194, comment f (1934).

[3] McDaniel Bros. v. Wilson, 70 S.W.2d 618 (Tex. Civ. App. 1934) *error ref.;* Steger v. Barrett, 58 Tex. Civ. App. 331, 124 S.W. 174 (1909) *error ref.*

[4] Vrazel v. Bieri, 294 S.W.2d 148 (Tex. Civ. App. 1956) *error ref. n.r.e.*

[5] Upon motion for rehearing the court relied heavily upon Mountain States Tel. & Tel. Co. v. Vowell Construction Co., 161 Tex. 432, 341 S.W.2d 148 (1960), where similar principles where applied.

Federal Interpleader — Unliquidated Tort Claims — Limitations on Jurisdiction

Five members of an Ohio family were injured in an automobile collision with plaintiff's insured. Three of the injured persons filed suits against the insured in the Ohio state courts for a total of 698,298 dollars. Suits by other injured persons were expected. Plaintiff paid 25,000 dollars, its maximum liability under the policy, to the federal district court and asked for relief in the nature of interpleader. *Held:* Plaintiff was not entitled to sue under section 1335 of the Judicial Code[1] because of the lack of diversity among the claimants. Plaintiff was not entitled to relief under rule 22[2] because, even though the diversity requirements of rule interpleader were met, the unliquidated tort claims against plaintiff's insured did not meet rule 22's requirement that the "plaintiff is or may be exposed to double or multiple liability." *National Cas. Co. v. Insurance Co. of North America,* 230 F. Supp. 617 (N.D. Ohio 1964).

This restrictive interpretation makes interpleader under rule 22 unavailable to a casualty insurer until after at least one claim against its insured has been reduced to judgment. The requisite diversity of citizenship and amount in controversy for rule 22 jurisdiction were present here. Nevertheless, it was said that jurisdiction was lacking because suits against the company's insured were too remote to constitute the threat of "double or multiple liability" required by rule 22. The court said, "unless and until at least one of these claims is reduced to judgment, there is no evidence from which this court can conclude that the insurer is in danger of facing claims in excess of policy limits."[3] Other objections were that interpleader would (1) allow the insurer to evade its obligation to defend claims against the insured and (2) oust state court jurisdiction over a local matter.

Prior cases are conflicting. A federal district court in Missouri refused to allow a casualty company to interplead potential judgment creditors of its insured.[4] Later, a federal court in Louisiana allowed interpleader by a casualty insurer, emphasizing the unique Louisiana statute allowing a direct action against the insurer.[5] In contrast to

[1] 28 U.S.C. § 1335 (1958). Section 1335 only requires that there be "two or more adverse claimants, of diverse citizenship."

[2] Fed. R. Civ. P. 22. Because rule 22 makes no special jurisdictional requirements, 28 U.S.C. § 1332 (1958), applies. In a diversity case there must be complete diversity of citizenship between the stakeholder on one hand and all of the claimants on the other. John Hancock Mut. Life Ins. Co. v. Kraft, 200 F.2d 952 (2d Cir. 1953).

[3] 230 F. Supp. at 621.

[4] American Indem. Co. v. Hale, 71 F. Supp. 529 (W.D. Mo. 1947).

[5] Pan American Fire & Cas. Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960).

the instant case, both of these cases involved sufficient diversity for either equitable (rule 22) or statutory interpleader. The court in the instant case does not indicate whether it would also reject an attempt to interplead tort claimants if the action otherwise qualified under section 1335 (statutory interpleader). It only notes that the statutory requirement of minimal diversity[6] between claimants was not met. Whether the court would also withhold statutory interpleader from a casualty insurer until at least one claim was reduced to judgment is a question that must await presentation of the appropriate fact situation.

R.G.R

Conflict of Laws — Choice of Law Rule — Statute of Limitations

Plaintiffs, all crew members of an airplane manufactured by defendant in California, were injured in a crash allegedly due to defects in construction. Five years after the crash, which occurred in Florida, plaintiffs sued defendant manufacturer in the southern district of New York alleging breach of express and implied warranties of fitness. Jurisdiction was based on diversity of citizenship. Defendant claimed the action was barred by the applicable statutes of limitations of both California and Florida. Plaintiff claimed the action was founded upon the warranties in the written contract of sale of the plane and that the Florida contract in writing statute,[1] which allows five years in which to bring an action, was the applicable statute of limitations. The trial court granted defendant's motion for summary judgment. *Held, affirmed:* (1) Under the New York "borrowing" statute,[2] the action "arose" in California and therefore was barred.[3] (2) Even if the statute had been interpreted to designate Florida as the place where the action "arose," the five year contract in writing statute of Florida would not have been applicable because an action

[6] How very minimal this diversity may be is indicated by Haynes v. Felder, 239 F.2d 868 (5th Cir. 1957).

[1] Fla. Stat. Ann. § 95.11(3) (1960).

[2] N.Y. Sess. Laws 1949, ch. 855, § 13, which provided: "An action based upon a cause of action arising without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action arose. . . ." In 1962 the words "accruing" and "accrued" were substituted for "arising" and "arose" but this change would not seem to change the meaning of the statute. N.Y. Civ. Prac. Law § 202.

[3] Cal. Civ. Proc. Code § 340(3), provides for a one year statute of limitations for all personal injuries actions.

for breach of implied warranty is essentially an action in tort or upon an unwritten contract. *George v. Douglas Aircraft Co.*, 332 F.2d 73 (2d Cir. 1964).

The principal case is a very important one in two respects. First, the court, in applying the New York "borrowing" statute, holds that even though the substantive law of Florida would govern the existence of the cause of action, the California statute of limitations would be applicable. The court came to this conclusion by reasoning that even though the injury occurred in Florida, the policy of the state of New York established in the "borrowing" statute was to restrict the bringing of actions that were barred by limitations elsewhere. Therefore, although the court states the usual rule that in most cases the law of the place of the injury will determine whether liability exists, it holds that that same place will not necessarily be the place where the action "arose" for the purpose of determining the applicable statute of limitations. Under this interpretation it seems that the place where the action "arose" for the purpose of the "borrowing" statute will be the one state in some way connected with the action which has the most restrictive statute of limitations. The New York Court of Appeals has not yet so interpreted the "borrowing" statute,[4] and could adopt a wholly different approach which, under the Erie[5] doctrine, the federal, as well as the state courts, would be obliged to follow.[6]

The second important aspect of the case is the court's statement that even if the Florida statute of limitations were to be applied the action still would be barred because the action in the principal case was not one founded upon a contract in writing. The court overruled the plaintiffs' contentions that the cause of action for breach of implied warranty necessarily was founded upon the written contract of sale of the airplane and instead asserted that the cause of action, even though denominated as one based upon implied warranty, was in fact an action upon an unwritten contract or tort, and therefore was barred by the Florida statutes governing such actions. If followed by other courts, this characterization of the action on an implied warranty as an action in tort or as an action upon an unwritten contract could have important effects upon the entire field of products liability law.[7]

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[4] The New York Court of Appeals has expressed its willingness to apply the law of two sister-states in a single tort action in Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963), but there the court was not dealing with the borrowing statute.

[5] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

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

[7] See 2 Frumer & Friedman, Products Liability § 40.01(1) (2d ed. 1964).

Administrative Law — Interstate Commerce Act — Reparations Award a Reviewable, Final Order

The Interstate Commerce Commission awarded reparations to a shipper for unjust and unreasonable rates charged and collected by several carriers. The carriers initiated an action in district court to have the reparations order set aside. The ICC, acting for the shipper, moved to dismiss the suit, claiming that the carriers could not bring suit to set aside the reparations order but instead must wait and contest it when the shipper sues to enforce its award. The district court allowed the carriers to bring their own suit.[1] *Held, affirmed:* The carriers may sue to set aside a reparations order and are not restricted to challenging its validity as a defense to the shipper's enforcement suit. *ICC v. Atlantic Coast Line R.R.*, 334 F.2d 46 (5th Cir. 1964).

The Interstate Commerce Act provides a two-step procedure to receive and enforce a reparations order.[2] By the terms of section 16(1),[3] the ICC can award reparations to a party injured by a violation of the act. If the violator refuses to comply with the Commission's order, however, the party receiving the award must gain compliance through section 16(2),[4] which allows an enforcement suit to be brought in a United States district court. It was within this framework that the present controversy arose. There was, however, one significant variation. In the instant case the carriers which had been held in violation of the act by the Commission for charging unreasonable rates did not choose to wait and contest the validity of the Commission's order in the shipper's enforcement suit. Rather, for the first time in the seventy-five year history of the act, the carriers initiated their own suit. The suit was based on section 17(9),[5] which allows the bringing of a suit to set aside a reviewable, final "order" of the Commission.

Having no case precedent to follow, the court was forced to make an initial interpretation of the applicable sections of the act. The ICC contended that its reparations award was not such a reviewable, final order as would allow the bringing of a suit under section 17(9). The court found that a reparations award differs from the regular, reviewable, final order in only one respect—it is not self-executing. Because a governmental agency has no procedure by which a party can be forced to comply with its order to pay money, the order must be enforced by bringing suit in the proper court. This judicial enforce-

[1] Atlantic Coast Line R.R. v. United States, 213 F. Supp. 199 (M.D. Fla. 1963).
[2] 24 Stat. 379 (1887), as amended, 49 U.S.C. § 1 (1958).
[3] 43 Stat. 633 (1924), as amended, 49 U.S.C. § 16(1) (1958).
[4] 43 Stat. 633 (1924), as amended, 49 U.S.C. § 16(2) (1958).
[5] 54 Stat. 913 (1940), 49 U.S.C. § 17(9) (1958).

ment, the court said, does not alter the nature of the order. It was the Commission's findings that the carriers had violated a provision of the act and were accountable therefore that constituted a final and reviewable "order," as that word is used in section 17(9).

Furthermore, the court believed that to allow the carriers to bring their own suit is to assure fair and equal treatment of the parties. It has never been questioned that if a party seeking a reparations award has his complaint denied by the Commission, he may obtain judicial review.[6] Therefore, symmetry is served by permitting the carriers to do likewise if they are the losing parties at the Commission level.

This same court reached an opposite result in a case[7] with similar facts arising under the Railway Labor Act.[8] An employee had obtained an award from the National Railroad Adjustment Board, but before he filed an enforcement suit his employer filed a declaratory judgment suit to set aside the Board's order. This employer's suit was dismissed on the ground that the employee's statutory right could not be circumvented. However, in the court's mind, the highly specialized aspect of carrier regulation is sufficient to distinguish the present case and to justify its precedent-setting decision.[9]

J. W. C.

Labor Law —National Labor Relations Act — Employee's Right to Reinstatement

Two of respondent's employees, Davis and Harmon, were attempting to organize a union in respondent's shop. Pate, another employee, told respondent that the organizers had told him the union would use dynamite to get control of the shop if the proper recognition was not received. Respondent discharged Davis and Harmon who later filed claims under sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act,[1] claiming the discharges constituted unfair labor prac-

[6] United States v. ICC, 337 U.S. 426 (1949).

[7] New Orleans Public Belt R.R. Comm'n v. Ward, 182 F.2d 654 (5th Cir. 1950).

[8] 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-163 (1958).

[9] It is important to note that while the Railway Labor Act provides for unlimited judicial review of an award made by the National Railroad Adjustment Board, that act has no other statutory grant of review comparable to that provided in section 17(9) of the Interstate Commerce Act.

As a further distinguishing factor (but in connection with the foregoing one), the actions of the National Railroad Adjustment Board are not subject to the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-1011 (1958), as are the actions of the Interstate Commerce Commission.

[1] 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(1) and (a)(3) (1958). The applicable portions of these sections are as follows: "It shall be an unfair labor practice for

tices. The NLRB found that the statements attributed to the two employees had not in fact been made and, therefore, that the discharges constituted unfair labor practices, requiring an order for reinstatement with the usual back pay from the time of the wrongful discharges.[2] The court of appeals refused to enforce the Board's order,[3] and the Board petitioned for writ of certiorari. *Held:* An unfair labor practice is committed by the employer under section 8(a)(1) if it is found that he discharged an employee engaging in a protected activity; that the basis of the discharge was an alleged act of misconduct in the course of that activity; and that the employee was not, in fact, guilty of that misconduct. *NLRB v. Burnup & Sims, Inc.*, 85 Sup. Ct. 171 (1964).

The holding in the principal case settles a conflict among the courts of appeals upon the question of whether an employer is justified in discharging an innocent employee who he, in good faith, believes is employing unlawful and coercive means in carrying on ordinarily protected activities.[4] As a result of this holding, the employer must be ready to reinstate the employees with full back pay if it is later discovered that the organizational activities of the employees were not outside the scope of the protection afforded such activities under the act. The Court stated: "A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith."[5]

The disregarding of the employer's good faith and the requiring of payment of full back pay from the date of discharge was protested by Mr. Justice Harlan in his separate opinion. He stated that "it is hardly fair that the employer should be faced with the choice of risking damage to his business or incurring a penalty for taking honest action to thwart it."[6] His opinion suggests that the correct ruling would be one ordering reinstatement with back pay from the time the employer knew or should have known that the employees had been wrongfully discharged.[7]

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an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . [or] (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

[2] 137 N.L.R.B. 766 (1962).

[3] 322 F.2d 57 (5th Cir. 1963).

[4] *Compare* the court of appeals opinion in the principal case *with* NLRB v. Cambria Clay Prods., Inc., 215 F.2d 48 (6th Cir. 1954); NLRB v. Industrial Cotton Mills, 208 F.2d 87 (4th Cir. 1953); *and* Cusano v. NLRB, 190 F.2d 898 (3d Cir. 1951).

[5] 85 Sup. Ct. at 173.

[6] *Ibid.*

[7] *Ibid.*

Wills — Testamentary Capacity — Restoration to Sanity

Deceased, who previously had been adjudged insane, was held to be restored to sanity. Thereafter, on the same day, she executed a will in conformity with section 59 of the Texas Probate Code,[1] which sets out the requirements for a self-proved will. Contestant at the probate of the will alleged lack of testamentary capacity. Proponents asserted that the order of restoration was conclusive as to testamentary capacity at the time entered and for the remainder of the day. The trial court granted a summary judgment for proponents on the issue of capacity; the court of civil appeals affirmed.[2] *Held:* In a will contest, a judgment of restoration to sanity is not conclusive and raises no presumption on the question of testamentary capacity, even as to wills executed during the day on which the judgment was entered. *In re Price's Estate*, — Tex. —, 375 S.W.2d 900 (1964).

The instant case is the first to deal with the question of what testamentary capacity effects, if any, flow from an adjudication of restoration to sanity. At first glance the holding may seem to be unwarranted because the court gave no recognition to the adjudication of restoration to sanity. In cases determining a resoration order's effect upon the tolling of a statute of limitation, it has been held that the order creates a conclusive presumption of sanity on the day it is rendered and a rebuttable presumption thereafter.[3] In a suit brought to have a deed which was executed on the day of a restoration order declared invalid, the court held that the order created a rebuttable, but not a conclusive, presumption of sanity on the day rendered.[4] But the court in the principal case distinguished these cases by an appeal to the legislative policy expressed in section 88 of the Texas Probate Code.[5] That section places the burden on the proponent of a will to prove that the testator was of sound mind when the will was executed unless the will is self-proved, whereas in the usual case a person executing any other instrument is presumed sane. Therefore, if the will in the principal case had not been self-proved, there would have been the usual burden on the proponent to prove sanity. Because the will in question was self-proved, however, a presumption of sanity existed; but the court held that this presumption, without more, was

[1] Tex. Prob. Code Ann. § 59 (1956).
[2] 369 S.W.2d 647 (Tex. Civ. App. 1963).
[3] Holt v. Hedberg, 316 S.W.2d 955 (Tex. Civ. App. 1958); Starnes v. Campbell, 119 S.W.2d 116 (Tex. Civ. App. 1938) *error dism.*; Mitchell v. Inman, 156 S.W. 290 (Tex. Civ. App. 1913) *error ref.*
[4] Tipton v. Tipton, 140 S.W.2d 865 (Tex. Civ. App. 1940) *error dism., judgm. cor.*
[5] Tex. Prob. Code Ann. § 88 (1956).

not enough to justify a summary judgment for the proponents on the issue of testamentary capacity.

The effect of the court's decision, therefore, is that the order of restoration merely removes the testamentary disabilities created by the prior adjudication of insanity. It places the testator in no better position than he would have been had his soundness of mind never been questioned.

R. L. C.