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### Recent Decisions

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## RECENT DECISIONS

CIVIL PROCEDURE — FEDERAL DISTRICT COURTS — CHANGE OF VENUE — USE OF EXTRAORDINARY WRITS TO REVIEW AN ERRONEOUS 1404(a) TRANSFER NOT CONSTITUTING AN ABUSE OF DISCRETION. — Plaintiff brought suit against defendant Railway Company in a United States district court in Minnesota, where the defendant is incorporated. The latter moved to transfer the case under 28 U.S.C. § 1404(a) (1952), to the Western District of Washington, where the accident occurred and where most of the witnesses resided, but the court, on plaintiff's counter-motion, transferred instead to the Northern District of California. Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Defendant petitioned the Court of Appeals for issuance of writs of prohibition and mandamus under 28 U.S.C. § 1651(a) (1952), to review the proceedings and to compel a transfer to the district court in Washington. Section 1651 provides that "[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Defendant contended that the district to which the case was transferred was not the one most convenient and charged that the district court had erroneously exercised its discretionary powers. The only connection that the Northern District of California had with the action was the proximity of the district court, located in San Francisco, to the hospital, in Long Beach, in which plaintiff resided after the accident; the cause of action arose in Seattle, in the Western District of Washington, and it is there that most of the witnesses reside. *Held*, petition denied. An order of a district court under § 1404(a) to transfer an action to another district court where suit might have been brought is not reviewable by prohibition or mandamus, although the order to transfer was issued through an erroneous exercise of discretion. *Great Northern Ry. v. Hyde*, 238 F.2d 852 (8th Cir. 1956), *aff'd on rehearing*, 245 F.2d 537 (8th Cir.), *cert. denied*, 355 U.S. 872 (1957).

The rehearing was granted in the instant case after the Supreme Court had decided *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).

In *La Buy* the Supreme Court held that a Court of Appeals has power to issue a writ of mandamus where the reference of anti-trust cases to a master for trial pursuant to FED. R. Civ. P. 53(b) amounted to an abuse of discretion. The court in the instant case declined to apply the *La Buy* doctrine upon rehearing because there was no abuse of discretion but solely an erroneous exercise of discretion.

This case is the latest in which the federal courts have attempted to determine the proper use of extraordinary writs within the framework of judicial review. Extraordinary writs are to be issued by an appellate court only in aid of its jurisdiction. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943). They are to be issued only where ordinary remedies fail, *Henderson Tire & Rubber Co. v. Reeves*, 14 F.2d 903, 907 (8th Cir. 1926) (dictum), *cert. denied*, 273 U.S. 744 (1927), or are clearly inadequate, *Bank Line, Ltd. v. United States*, 163 F.2d 133 (2d Cir. 1947). Except under these conditions, a writ of mandamus cannot be

made to perform the functions of an appeal. *Ex parte Fahey*, 332 U.S. 258 (1947).

The problem in the instant case resolves itself into a question of whether or not the traditional formulas should be abandoned in a § 1404(a) transfer case. There is a considerable divergence of opinion concerning the use of extraordinary writs among the circuits with regard to § 1404(a) cases. *Great Northern Ry. v. Hyde*, 238 F.2d 852, 856 (8th Cir. 1956). There is authority that the failure to properly construe and apply the statute, or to consider the relevant factors incident to transfer, renders appropriate the use of extraordinary writs. *Ex parte Chas. Pfizer & Co.*, 225 F.2d 720, 722-23 (5th Cir. 1955) (dictum); see *Wiren v. Laws*, 194 F.2d 873, 874 n.1 (D.C. Cir. 1951). The Supreme Court has taken a definitive position that an erroneous exercise of discretion is insufficient to invoke the use of extraordinary writs. *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379 (1953). The reasoning underlying this review is apparent from the *Fahey* case, *supra*, at 259-60:

Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. . . . [T]hey have the further unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel. . . . These remedies should be resorted to only where appeal is a clearly inadequate remedy. . . . As extraordinary remedies, they are reserved for really extraordinary causes.

The divergence within the circuits concerning § 1404(a) cases appears to result from contrary views as to what constitutes an erroneous exercise of discretion as distinguished from an abuse of judicial discretion. Since an exercise of discretion which is clearly erroneous ought to be considered as an abuse of discretion, *Nicol v. Koscinski*, 188 F.2d 537, 538 (6th Cir. 1951) (dictum), the decision of the district court in the instant case appears to be within the purview of the *La Buy* case, *supra*. Since the majority in the instant case admitted that this case involved a clearly erroneous exercise of discretion, 238 F.2d at 855, it would seem to follow that this case falls within the "abuse of discretion" test for which mandamus will lie. Furthermore, *forum non conveniens* errors can be adequately reviewed only before trial, not afterward by appeal. *Gulf Research & Dev. Co. v. Leahy*, 193 F.2d 302, 305 (3d Cir. 1951) (dictum). The logic underlying this statement seems to be that if the petitioners lost in the court to which the case was transferred, it would be difficult, if not impossible, to show that a substantially different result would have been reached had the transfer not been made.

In terms of the instant case, the major question seems to be this: if petitioner loses in the California court, how can it effectively show on appeal the extent to which its cause was damaged by the hearing of the case in California rather than in Washington? Many courts apparently feel that a defendant cannot effectively show this, so that appeal from the final judgment is inadequate. *Ford Motor Co. v. Ryan*, 182 F.2d 329, 330 (2d Cir. 1950) (dictum). The *Bank Line* case, *supra*, embodies this "inadequacy of appeal" test. Significantly, the court in the instant case, 238 F.2d at 855, also admits that in this case appeal from the final order will be inadequate. It seems a defect in the judicial process to admit the futility of appeal and yet to leave the party in a position where his only recourse is to accept the consequences of a patently

erroneous decision, and in the event of an adverse decision on the merits, take an appeal where its inadequacy is settled in advance. To hold that transfers such as the one here involved are not reviewable until a final order has been entered, at which time it is virtually impossible to prove harm, is to give the district courts an unlimited power to order or deny transfers without any possibility of effective review. This danger should be indicative of the undesirability of the holding.

Finally, § 1404(a) authorizes transfers "in the interest of justice." Not only is the error in the instant case an injustice by itself, but a more serious injustice seems to be created by the holding that nothing can be done to correct the initial injustice until it is too late to secure a really effective correction. In addition to these considerations, § 1404(a) also authorizes transfers "for the convenience of . . . witnesses." It is difficult to see how a transfer to a district where none of the witnesses reside rather than to the district where they do reside can be considered a transfer "for the convenience of . . . witnesses." The decision in the instant case frustrates the intent and purpose of § 1404(a) as regards both justice and convenience, which would justify the issuance of an extraordinary writ "reserved for really extraordinary cases." *Ex parte Fahey, supra* at 260.

In short, the court in the instant case has apparently failed to apply the exceptions to the general rule which the facts of the case demand. The court's own admissions as to the existence of the error coupled with the inadequacy of appeal from the final order, policy considerations, and the purposes of the transfer statute as to justice and convenience, indicate that this case should be brought within the exceptions to the traditional rules concerning the use of extraordinary writs.

*Richard D. Schiller.*

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CONSTITUTIONAL LAW — DUE PROCESS — EXTRATERRITORIAL PERSONAL SERVICE OF A NON-RESIDENT IS NOT VIOLATIVE OF DUE PROCESS WHERE THE NON-RESIDENT COMMITS TORT WITHIN THE STATE.— Plaintiff's complaint alleged that defendant's agent, while delivering a stove in Illinois, negligently injured plaintiff. Defendant, a non-resident, was personally served with process in Wisconsin, pursuant to the 1955 amendments to sections 16 and 17 of the Illinois Civil Practice Act. The amended sections provide for personal service of process outside the state on non-resident defendants who transact business, own property, insure persons, property or risks, or who have committed tortious conduct within the state. ILL. ANN. STAT. c.100, § 16, 17 (Smith-Hurd 1955). Defendant appeared specially and questioned the constitutionality of the amended statute. Service was quashed by the trial court. Upon appeal to the Illinois Supreme Court, *held*, reversed. Assertion of jurisdiction over a non-resident who has committed a tortious act within the state and who has been personally served outside the state is not violative of due process of law. *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 675 (1957).

Historically the jurisdictional power of a state over non-resident defendants has been limited by the due process clause of the fourteenth amendment of the United States Constitution. U.S. CONST. amend. XIV, § 1. A state's jurisdiction was limited to those parties over whom the sovereign had physical control, *Pennoyer v. Neff*, 95 U.S. 714 (1877). The *Pennoyer* doctrine was based on common law principles of physical power. However, it is quite possible that the Supreme Court, realizing the difficulties of travel and communication existing in 1877 and desiring to protect non-residents from harassing actions within the state of the forum, saw the practical necessity of limiting personal jurisdiction to state territorial limits.

The necessity of physical control as defined in the *Pennoyer* case was applicable only to individuals; corporations were treated differently where service of process was concerned. A state could compel a foreign corporation operating within the territorial limits to appoint an agent for service of process. Initially appointment of an agent was based upon a theory of implied or forced consent which distinguished between corporations and individuals. *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1855). This distinction was necessitated by the multistate operation of corporations and the need to protect citizens of the state. The implied or forced consent doctrine soon gave way to the presence theory. The basis was no longer a fictitious consent but the legitimate interest of the state in providing redress in its courts against corporations having substantial contacts with the state and in favor of those persons entitled to the state's protection. *Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898).

As the jurisdictional concept regarding corporations developed, the theory concerning individuals underwent important changes. The effects of the *Pennoyer* case could still be seen in *Flexner v. Farson*, 248 U.S. 289 (1919), where it was held that a state could not assume jurisdiction over members of a partnership transacting business in the state by serving their purported agent within the confines of the state. However, the principles of the *Flexner* case were repudiated in *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935), where it was held that a state could assume jurisdiction over a non-resident partnership transacting business within the state. Prior to the *Doherty* decision, *Kane v. New Jersey*, 242 U.S. 160 (1916), held that a non-resident motorist could be required to actually appoint the Secretary of State his agent for service of process in actions or legal proceedings caused by the operation of his registered motor vehicle as a condition precedent to the operation of an automobile within the state. Later in *Hess v. Pawloski*, 274 U.S. 352 (1927), the Supreme Court upheld a statute appointing a state official as the agent for service of process and providing for notice by registered mail to non-residents who utilized the state highways. The police power of the state was said to validate the extraterritorial assertion of jurisdiction. Due process of law was satisfied since ample provision was made for notice and opportunity to be heard. Effective personal service outside the state was allowed in *Milliken v. Meyers*, 311 U.S. 457 (1940), when the Supreme Court held that the requirements of natural justice were met when the state, by personal notification, served process on a domiciliary who had left the state. Extended jurisdiction had thus developed to the point where service could be effective beyond the borders of the state.

Conceptually, jurisdiction has been broadened over the years to fulfill the needs of a technologically progressive society with the resultant evolution from the physical presence, required by *Pennoyer v. Neff*, *supra*, to that of substantial justice. "The liability rests on the inroads which the automobile has made on the decision of *Pennoyer v. Neff* . . ." *Olberding v. Illinois Cent. R.R.*, 346 U. 338, 341 (1953). The Court provided grounds for the *Nelson* decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), by indicating that personal jurisdiction established through extraterritorial service would not be violative of due process where the activities of the non-resident within the state "establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which [have been] incurred there." 326 U.S. at 320. Thus, the Supreme Court of Vermont in *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951), upheld a Vermont statute similar to the amended sections of the Illinois Civil Practice Act. The court followed the minimum contact theory of the *International Shoe* case adding that there was no violation of due process when sufficient contact made bringing of suit in Vermont reasonable. The decision in *Nelson v. Miller* is far removed from *Pennoyer v. Neff*, and is the most advanced stage of an evolution necessitated by the technological changes that have made travel and communication between the states commonplace rather than unusual.

The reasonableness of the Illinois statute is apparent when one realizes that the resident and non-resident are treated in the same manner and that in any case where jurisdiction is asserted under the statute the witnesses would most likely be in Illinois. While *International Shoe Co. v. Washington*, *supra*, was concerned with a corporation, not an individual, and it did not grant jurisdiction upon the basis of a single act within the state, the holding in *Nelson v. Miller* is within the spirit of the enunciated doctrine, namely, certain activities within the state give rise to personal jurisdiction.

J. M. Lynes

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COURTS — JURISDICTION — OUTSTANDING COMMITMENT OF DEFENDANT TO A MENTAL INSTITUTION NOT A BAR TO CRIMINAL PROSECUTION. — Defendant was committed to a mental institution under court order following an insanity inquest. After showing improvement, he was released from the hospital in the custody of his mother. It was during his release that the defendant was alleged to have committed the crime of second degree burglary. Before trial, the possibility of defendant's insanity was suggested to the trial court; subsequently he was examined by court-appointed physicians. At the preliminary hearing, the trial court determined from the medical evidence that defendant had sufficient comprehension to understand the nature and procedure of the criminal action, and to make a defense, although no record of a formal restoration of sanity was introduced. He was tried and found guilty. On appeal the

jurisdiction of the trial court to hear the case was attacked on the ground that the trial court, by entertaining the criminal charge, was permitting a "collateral attack" upon the court order which committed defendant. *Held*, affirmed; where a trial court has made an independent finding of defendant's sanity, the fact that there is at the time of the alleged crime and at the time of the trial an outstanding commitment of the accused to a mental institution does not bar the court from taking jurisdiction. *Marx v. State*, 141 N.E.2d 126 (Ind. 1957).

It is a time-honored principle of the common law that an insane person cannot be tried on a criminal charge if at the time of trial he is insane because he is not capable of pleading ". . .with that advice and caution that he ought." 4 BLACKSTONE, COMMENTARIES \*24; see *In re Buchanan*, 129 Cal. 330, 61 Pac. 1120 (1900). Consequently, where the issue of insanity at the time of trial is raised, the court must determine whether the defendant has sufficient capacity to understand the nature and object of the proceedings, and the ability to assist in his own defense. See *Ashley v. Pescor*, 147 F.2d 318 (8th Cir. 1945); *United States v. Boylen*, 41 F. Supp. 724 (D. Ore. 1941). If a trial court tries and convicts an accused who is physically and mentally incapable of making an adequate defense, the court violates those certain immutable principles of justice that inhere in the very idea of free government. *Sanders v. Allen*, 100 F.2d 717 (D.C. Cir. 1938); see also BLACKSTONE, COMMENTARIES, *supra*. Thus, to try an accused mentally incapable of standing trial would be to deny due process. Even the prosecution may validly raise the question as to the defendant's ability to stand trial, regardless of the objection of the defendant. *Cogburn v. State*, 198 Tenn. 431, 281 S.W.2d 38 (1955) (statute).

Where there is an outstanding commitment of the accused to a mental institution at the time of trial a problem arises due to the differing meanings attributed to insanity in various phases of the law. The test to be utilized in determining sanity is dependent upon the nature of the proceeding *eg. United States v. Boylen, supra*. In a civil case one may be declared judicially insane (incompetent) where it is determined that he has a mental disorder which renders him incapable of properly conducting his affairs, *Browne v. Smith*, 119 Colo. 469, 205 P.2d 239 (1949), while in cases involving testamentary capacity it must be ascertained whether the testator was of sound and disposing mind at the time of the execution of the will, *In re Shields' Estate*, 49 Cal. App.2d 293, 121 P.2d 795 (1942). However, a finding that one is competent to manage his estate does not necessarily imply testamentary capacity, *Emry v. Beaver*, 192 Ind. 471, 137 N.E. 55 (1922).

An outstanding commitment to a mental institution raises a presumption of continuing insanity, which must be overcome before the prosecution may proceed to trial. *Perkins v. Mayo*, 92 So. 2d 641 (Fla. 1957). But the presumption is not unimpeachable. The release of an accused by the superintendent of the mental institution in itself, has been held sufficient to rebut the presumption of continuing insanity. *Brewer v. Hunter*, 163 F.2d 341 (10th Cir. 1947); *but cf. Matter of Judge*, 148 F. Supp. 80 (S.D. Cal. 1956).

The strength of the presumption of continuing insanity may vary with the factual setting. If a person has been judicially declared incompetent as a result of a hearing arising from a criminal prosecution, it is errone-

eous to try the accused in a subsequent criminal action until it has been judicially determined that the accused is capable of standing trial, even though there has been a medical certification of restored sanity. *Gunther v. United States*, 215 F.2d 493 (D.C. Cir. 1954). Likewise a release by a hospital superintendent is insufficient to rebut the presumption of continuing insanity. See *Taylor v. United States*, 222 F.2d 398 (D.C. Cir. 1955). The requirement of judicial determination of sanity at the subsequent trial is a reasonable application of the presumption in that the person was committed to a mental institution because it was specifically determined he was incapable of standing trial. The same test is used in both judicial determinations, whereas in other situations, dissimilar tests of insanity give rise to a presumption which is not conclusive, since the extent of mental aberration necessary to establish incapacity may differ.

Since the use of any one of several tests to determine mental incompetence depends upon the nature of the proceeding, an adjudication as to competency, or the lack of it, in one type of proceeding should not be conclusive in another type of proceeding. However, if the present judicial proceeding in which mental incompetence is claimed is identical in nature with the prior proceeding, — the identical test of insanity being involved in both proceedings — then the prior determination of insanity should stand until overcome by an independent determination at the subsequent proceeding that the disability no longer exists. This results from the proper use of the presumption of continuing insanity. An independent determination was made by the trial court in the instant case, even though the prior commitment did not arise from the defendant's inability to stand trial. This procedure, although not required by precedent, is preferred when the trial court is confronted with the presumption of continuing insanity. It effectively rebuts any presumption that insanity exists which would bar trial. The presumption, having been overcome in the instant case, the trial court properly asserted jurisdiction.

*Harry Contos, Jr.*

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LABOR LAW—INJUNCTION—FEDERAL DISTRICT COURTS MAY ENJOIN NLRB FROM EXCEEDING STATUTORY AUTHORITY IN CERTIFICATION PROCEEDINGS, — Plaintiff, president of an unincorporated labor organization open to professional workers, petitioned the NLRB, requesting that the union be certified as bargaining representative for designated professional employees pursuant to section 9(c) of the Labor Management Relations Act (Taft-Hartley Act), 61 STAT. 143 (1947), as amended, 29 U.S.C. § 159(c) (1952). Although petitioner desired a unit of only professional employees, the Board found that a larger unit was more appropriate, since there were 233 professionals and only nine non-professionals and the inclusion of the few non-professionals would not destroy the "professional character" of the unit. *Westinghouse Elec. Corp.*, 115 N.L.R.B. 1420 (1956). The Board was asked, but refused, to direct that an election be conducted in order that the professionals could determine whether they desired to be separated; the Board then ordered a



representation election. Section 9(b)(1), 61 STAT. 143 (1947), 29 U.S.C. § 159(b)(1) (1952), specifically provides that the Board shall not decide that any group is appropriate for collective bargaining purposes where such unit includes both professional and non-professional employees unless a majority of the professionals vote to include the non-professionals. The plaintiff filed a motion to stay the election. This motion was denied; an election was held, under the direction of the Regional Director of the NLRB, among the employees in the unit found appropriate by the Board, including the non-professional employees, without the professional employees having been given first an opportunity to decide whether they desired to be included in such unit. A majority of the votes cast were for the union and the union was certified as bargaining representative of the mixed unit. Subsequently, a complaint was filed in federal district court to set aside the election, enjoin the NLRB from further proceedings contrary to section 9(b)(1), and to compel the Board to hold a professional election as required by the act. Petitioner's requests were granted. *Kyne v. Leedom*, 148 F. Supp. 597 (D.D.C. 1956). Upon appeal, *held*, affirmed. Where the NLRB has violated a specific statutory requirement resulting in injury to the plaintiff, the district court may assert equity jurisdiction and compel compliance with statutory mandates. *Leedom v. Kyne*, 249 F.2d 490 (D.C. Cir. 1957), *cert. granted*, 26 U.S.L. WEEK 3204 (U.S. Jan. 13, 1958) (No. 633).

Generally there is no judicial review of any proceedings prior to a final order by the Board as the courts are without jurisdiction. *Fitzgerald v. Douds*, 167 F.2d 714 (2d Cir. 1948); *American Twine & Fabric Corp. v. Textile Workers Union, CIO*, 96 F. Supp. 475 (D.N.H. 1951) (injunction denied). See *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943). The act provides judicial review through section 10, 61 STAT. 146 (1947), 29 U.S.C. § 160 (1952), generally limiting review to situations in which there have been final Board orders. In *AFL v. NLRB*, 308 U.S. 401 (1940), it was held there could be no judicial review of certification proceedings, as such, since they are not final orders within the meaning of the review provisions of the act. This decision was closely followed by *A.G.M. Workers' Ass'n v. NLRB*, 117 F.2d 209 (7th Cir. 1940) in which a union asked that the Board be ordered to set aside its order dismissing a petition for certification. The motion was dismissed upon the ground that the court lacked jurisdiction. Here an aggrieved party was denied judicial review both prior to and after a final Board determination. "It seems to be thought that this failure to provide for a court review is productive of peculiar hardships, which were perhaps not foreseen. . . . But these are arguments to be addressed to Congress and not the courts." *AFL v. NLRB*, *supra* at 411-12. In *Madden v. Brotherhood and Union of Transit Employees*, 147 F.2d 439 (4th Cir. 1945), the court refused to affirm a judgment granting injunctive relief where plaintiff was denied a place upon the ballot. Although it was contended that the Board had transgressed its lawful authority, the court held that a certification proceeding is not the equivalent of a Board order for review purposes as it in itself brings about no injury. The court then concluded that the subsequent election produced no substantial effect either upon the employer or the employees, even though the petitioning union was denied a place on the ballot.

Several cases have indicated that where there is a substantial constitutional question, the district courts may assume jurisdiction although no final order has been issued. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947) (dictum); *White v. Douds*, 80 F. Supp. 402 (S.D.N.Y. 1948) (complaint dismissed on grounds that no substantial constitutional question was presented and plaintiff had not exhausted administrative remedies); *Mechanics Educ. Soc. v. Schauffler*, 103 F. Supp. 130 (E.D. Pa. 1952) (complaint dismissed on grounds that no substantial constitutional question presented, only an alleged error of law); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947) (dictum); *Westinghouse Elec. Corp. v. NLRB*, 236 F.2d 939 (3d Cir. 1956) (dictum). In *Worthington Pump and Mach. Corp. v. Douds*, 97 F. Supp. 656 (S.D.N.Y. 1951), the district court asserted jurisdiction where due process was in issue although the complaint was dismissed for failure to establish irreparable injury. But it has been held that the district courts cannot acquire equitable jurisdiction prior to a final Board order as other remedies are yet available. *Volney Felt Mills, Inc. v. LeBus*, 196 F.2d 497 (5th Cir. 1952).

Other attempts to circumvent the review provisions of the act have been unsuccessful. In *International Union of Operating Engineers, AFL Local 148 v. International Union of Operating Engineers, AFL Local 2*, 173 F.2d 557 (8th Cir. 1949), the union sought injunctive relief invoking section 10 of the Administrative Procedure Act, 60 STAT. 243 (1946), 5 U.S.C. § 1009(a)(c) (1952). Section 10(a) provides "Any person suffering legal wrong because of any agency action . . . shall be entitled to judicial review thereof," but section 10(c) affords review only of final agency decisions. Certification proceedings are not tantamount to a final Board determination. *Ohio Power Co. v. NLRB*, 164 F.2d 275 (6th Cir. 1947). Thus these sections of the Administrative Procedure Act are not applicable.

The Supreme Court has indicated through dicta that equitable relief is not foreclosed in all instances despite the failure of a substantial constitutional issue; the power of the judiciary to compel an administrative body to exercise its "duty" imposed by statute has been specifically left unanswered. See *General Comm. v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323 (1943), n. 12. This is the exact problem presented in the instant case as the Board refused to comply with the specific mandate to hold a professional election. Similarly, equitable jurisdiction independent from the review provisions of the act was left unanswered in *AFL v. NLRB*, *supra* at 412. It was said that the question "can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury . . . for which the law, apart from the review provisions . . . affords a remedy." See also *Inland Empire Dist. Council, Lumber Workers v. Millis*, 325 U.S. 697 (1945).

It has been held that the district court possesses equitable powers, independent from the statutory review provisions, where the Board has acted arbitrarily, capriciously and without authority in law, and the court is satisfied that the failure to assert its injunctive power would result in irreparable injury. Thus in *R. J. Reynolds Employees Ass'n. v. NLRB*, 61 F. Supp. 280 (W.D.N.C. 1943) where the petitioning union was denied the effective enjoyment of their right to be placed upon the

ballot in a representative election, the court held that the Board could be enjoined from proceeding with a scheduled election. The failure to assert equitable jurisdiction would have been to deny a remedy where a wrong had been perpetrated by the Board since the plaintiff had "no adequate remedy at law."

In situations involving the Board's statutory power concerning the filing of non-communist affidavits, the district court's authority to assert equity jurisdiction has been upheld where it has been determined that the Board exceeded statutory authority. *Farmer v. United Elec. Workers*, 221 F.2d 36 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 943 (1954). See also *Leedom v. International Union of Mine Workers*, 352 U.S. 145 (1956). While the Board's action in preliminary proceedings is usually not reviewable, equity may intervene where injury from an unlawful act of the Board would continue unabated unless judicial relief was granted. The prerequisites to judicial intervention appear to be an unlawful act of the Board resulting from a transgression of statutory authority coupled with irreparable injury to plaintiff. As to the former, the important distinction is departure from statutory requirements by way of transgression, in contradistinction to erroneous exercise of administrative discretion or an error of law. Compare *Farmer v. International Fur Workers*, 221 F.2d 862 (D.C. Cir. 1955) with *DePratter v. Farmer*, 232 F.2d 74 (D.C. Cir. 1956) and *Madden v. Brotherhood and Union of Transit Workers, supra*.

*Leedom v. International Union of Mine Workers, supra*, indicates that the instant case was correctly decided. However, its effect is limited to situations where the Board has acted in blatant disregard of statutory mandates. In most "hardship cases," as in *A.G.M. Workers' Ass'n v. NLRB, supra*, there will be no judicial intervention since it is clear that Congress did not intend that there should be any judicial review of preliminary Board determinations. See 93 CONG. REC. 6444 (1947). To allow such would be to frustrate the purposes of the act and subject the administrative machinery to delay. However, "considerations of delay in the bargaining resulting from direct review have no consequence where, as here, the Board has acted outside the statute in frustration of the very restraint placed upon it by Congress." Brief for the Appellees p. 18, n. 6, *Leedom v. Kyne, supra*. The act should be amended to define a limited area for judicial review of certain preliminary Board decisions where administrative abuse has been flagrant—a study of the cases clearly reveals that present statutory remedies are inadequate. At least, a partial solution is forthcoming, certiorari having been granted in the instant case.

R. L. Cousineau

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MUNICIPAL CORPORATIONS — IMMUNITY — MUNICIPALITY LIABLE FOR TORTS OF POLICE OFFICERS UNDER RESPONDEAT SUPERIOR. — Plaintiff's husband, while in a state of excessive intoxication, was incarcerated in the town jail and left unattended by the jailor. During the night the jail became filled with smoke, resulting in the fatal suffocation of the prisoner. Plaintiff's complaint against the municipality alleged

negligence on the part of the jailor producing wrongful death. The complaint was dismissed on the theory that the municipality was immune from liability for the torts of its police officers. On appeal, *held*, a municipal corporation is liable for the torts of its police officers under the established principles of respondeat superior. In so ruling the court expressly overruled established precedent to the contrary. *Hargrove v. Cocoa Beach*, 96 So. 2d 130 (Fla. 1957).

While corporate liability for the torts of employees is an accepted principle of agency law, the municipal corporation has been accorded a measure of immunity; it is a subdivision of the state which as a sovereign is immune from all suit without its consent. *Kennedy v. Daytona Beach*, 132 Fla. 675, 182 So. 228 (1938). There is no logical reason why municipalities should not enjoy *complete* immunity if they are subdivisions of the state, see *Irvine v. Town of Greenwood*, 89 S.C. 511, 72 S.E. 228 (1911). But municipal immunity extends only to governmental or public functions as distinguished from proprietary or corporate functions, since in the latter situation the municipality is operating in a manner analogous to a corporation deriving private gains. *Bailey v. Mayor of New York*, 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842).

Municipal immunity has been justified on three grounds. First, it is based on a corollary of the ancient concept that the king can do no wrong, *Kennedy v. Daytona Beach*, *supra*, but this is a fallacious argument in a democracy, see *Madison v. San Francisco*, 106 Cal. 2d 232, 234 P.2d 995 (1951), separate dissenting opinion, 236 P.2d 141 (1951); furthermore, municipal immunity does not exist in England where the idea that the king could do no wrong originated, see *Hillyer v. St. Bartholomew's Hospital*, [1909] 2 K.B. 820. Secondly, it is said that the individual should bear the loss in silence rather than the entire citizenry which ultimately would bear the loss through taxation. *Taylor v. Westfield*, 233 Ky. 619, 26 S.W.2d 557 (1930). But, extended to its logical conclusion, this argument would call for immunity from proprietary tort liability as well as contract liability. Thirdly, the possible liability to the city may retard city employees in the performance of their duties. *Barker v. Santa Fe*, 47 N.M. 35, 136 P.2d 480 (1943). Rather than retard, it should increase the efficiency of city employees for a city, fearing liability, would become more selective in hiring and more conscientious in its direction of employees. *Miami v. Bethel*, 65 So. 2d 34, 35 (Fla. 1953) (special concurring opinion). Furthermore, it has never been advanced that the liability that now exists as to proprietary functions has retarded city employees in their performance thereof.

Practical application of the immunity, turning on the distinction between governmental and proprietary functions, has resulted in conflicting decisions in similar factual situations. *Hoggard v. City of Richmond*, 172 Va. 145, 200 S.E. 610 (1939). A charitable hospital operated by a city may be "governmental," *Kress v. Newark*, 8 N.J. 562, 86 A.2d 185 (1952) or "proprietary," *Kardulas v. City of Dover*, 99 N.H. 359, 111 A.2d 327 (1955); a park operated by a city may be "governmental," *Clark v. Louisville*, 273 Ky. 645, 117 S.W.2d 614 (1938) or "proprietary," *Terre Haute v. Webster*, 112 Ind. App. 101, 40 N.E.2d 972 (1942); and a sewer system operated by a city may be "governmental," *Gotcher v. Farmersville*, 137 Tex. 1, 151 S.W.2d 565 (1941) or "pro-

proprietary" *Barker v. Santa Fe*, 47 N.M. 85, 136 P.2d 480 (1943). The ascertainment of the point of demarcation from governmental functions is of increasing importance as city administration becomes larger and more complex.

In the instant case, 96 So. 2d at 132, the court partially justifies over-throwing municipal immunity with regard to the torts of policemen, upon a guaranty of the state constitution, FLA. CONST., Declaration of Rights §4, which provides that the courts of the state should be open to furnish a remedy for every injury or wrong. In so reasoning the court assumes a delicate position for two reasons. First, such a constitutional provision is inapposite as an argument for creation of a new right or remedy as the present existence of the right or remedy is a condition precedent to the operation of the constitutional provision. *Muller v. Nebraska Methodist Hospital*, 160 Neb. 279, 70 N.W.2d 86 (1955); *Apitz v. Dames*, 205 Ore. 242, 287 P.2d 585 (1955). *But see Noel v. Menninger Foundation*, 175 Kan. 751, 267 P.2d 934 (1954). Thus it may be posited that the constitutional provision granting a remedy for every wrong or injury does not create municipal liability since there was no legal right prior to the instant case either at common law or by statute to recover from the municipality when the tort was perpetrated by a police officer. See *McCoy v. Kenosha County*, 195 Wis. 273, 218 N.W. 348 (1928). Secondly, the court reasoned that the plaintiff's legal rights were invaded; therefore, she suffered a wrong for which the Florida Constitution guaranteed a remedy. However, her cause of action against the jailor for negligence resulting in wrongful death was not impaired by the policy of municipal immunity.

It appears that the necessary implication of the decision is that for every wrong the constitution guarantees an effective remedy. *Cf. Noel v. Menninger Foundation, supra*. To deny plaintiff a possibility of recovery against the municipality in this instance is to deny an effective legal remedy and leave the plaintiff with a relatively worthless cause of action from the standpoint of monetary compensation. But the court, anticipating the logical extension of the implication that effective remedies are guaranteed, confined the decision in the instant case to the torts of police officers, and reaffirmed existing immunity in the area of legislative, judicial, quasi-legislative and quasi-judicial functions. Also the rule of the instant case will leave unaffected the area of non-liability for torts committed by state employees. The doctrine of the state's sovereign immunity is much more firmly rooted than municipal immunity and will not be as easily overthrown by judicial fiat. See *Shaffer v. Monongalia General Hospital*, 135 W. Va. 163, 62 S.E.2d 795 (1950).

That municipal immunity is a creature of the judiciary and not the legislature supports the position of the court in the instant case insofar as the court found it necessary to revoke established precedent in favor of immunity. See *Mississippi Baptist Hospital v. Holmes*, 214 Miss. 906, 55 So. 2d. 142 (1951); *Haynes v. Presbyterian Hospital Ass'n*, 241 Iowa 1280, 45 N.W.2d 151 (1950).

The instant case is in accord with the modern trend to revoke the immunity of religious and charitable institutions by judicial decision — the immunity being contrary to modern ideas of social justice and economic realities. *Durney v. St. Francis Hospital*, 46 Del. 350, 83 A.2d

753 (1951) (respondeat superior applicable to hospital operated by religious group); *Foster v. Roman Catholic Diocese of Vermont*, 116 Vt. 124, 70 A.2d 230 (1950) (privately conducted religious and charitable institution not immune from liability for negligence or the maintenance of a public nuisance); *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P.2d 220 (1951) (respondeat superior applicable to privately operated charitable hospital); *Roman Catholic Church, Diocese of Tucson v. Keenan*, 74 Ariz. 20, 243 P.2d 455 (1952) (parochial school held liable for injury to child as a result of employee's negligence).

The modern city is "big business." The majority of its operating funds comes from excise taxes and revenue derived from "business" activities such as the furnishing of utilities rather than taxation of the citizens as individuals. In fairness such revenues should be subject to invasion for the purpose of recompensing the individual injured as a result of a city employee's tort no matter what type of function he was performing. *Miami v. Bethel*, *supra* at 35 (special concurring opinion). As activities become more diversified the greater becomes the possibility that an individual citizen will have to bear the risks of municipal negligence. To remedy this unjust situation, immunity should be denied, by the judiciary if necessary, in the most flagrant instances, namely injuries resulting from the torts of municipal employees. Separate dissenting opinion, *Madison v. San Francisco*, 106 Cal. 2d 232, 234 P.2d 995 (1951) at 236 P.2d 141 (1951). However, municipal immunity is so entrenched in precedent that any comprehensive treatment must come from the legislatures.

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