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Constitutional Law

CONSTITUTIONAL LAW

CONSTRUCTIVE CONTEMPT OF COURT

IN *Craig v. Harney*[1] the United States Supreme Court, overruling the Texas Court of Criminal Appeals,[2] held that the conviction for contempt of newspapermen who published articles vehemently attacking a county judge and his ruling in a suit still pending on motion for new trial, violated the freedom of press guaranty of the First and Fourteenth Amendments.[3] Applying the "clear and present danger" test the Court held that the mere vehemence of the language used is not the measure of the power to punish for contempt, but rather that there must be an imminent threat to the administration of justice.

Undoubtedly the Texas court found the publications in question to be of such a vehement and acrid nature as seriously to raise the question of a clear and present danger to the due and orderly administration of justice. Nevertheless, the Supreme Court of the United States concluded otherwise believing that these publications in their setting and given all the vehemence which the Texas court gave to them, failed to meet the clear and present danger test. The Court, speaking through Mr. Justice Douglas, stated that it took more imagination than the court possessed "to find in this rather sketchy and one-sided report of a case any imminent or serious threat to a judge of reasonable fortitude."[4]

In a battering dissent that comports with common sense and reality Justice Jackson stated:

> "From our sheltered position, fortified by life tenure and other defenses to judicial independence, it is easy to say that this local judge

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[1] 331 U. S. 367 (1947).

[2] *Ex Parte* Craig 193 S. W. (2d) 178 (Tex. Ct. Cr. App. 1940).

[3] A resume of the publications in question is set forth in Appendix to Opinion of Craig v. Harney, 331 U. S. 367, 378-383 (1947).

[4] *Id.* at 375.

ought to have shown more fortitude . . . but I am not so confident that we would be indifferent if a news monopoly in our entire jurisdiction should perpetrate this kind of an attack on us."[5]

Since both the Texas court and the United States Supreme Court applied the "clear and present danger" test, it cannot be said that the *Craig* case changed in any manner the law of contempt. It is submitted, however, that the Supreme Court in the exercise of its recognized prerogative to make an independent examination of the facts when it is asserted that a person has been deprived by a state court of a fundamental constitutional right[6] has, in this case, merely substituted its own opinion for that of the Texas court and thereby denied the right of a state to determine for itself what acts and course of conduct constitute a clear and present danger to the orderly administration of justice in its own courts.

Privileges of Legislators

In a petition for mandamus and prohibition against a district judge, the Supreme Court of Texas, in *Mora v. Ferguson*,[7] sustained the validity of Article 2168a[8] which makes it mandatory to grant a continuance to a party if he or his attorney is a member of the legislature.

The defense attorney in a rape case was a member of the Texas Legislature and filed a motion, eight days before the legislature was to convene, for a continuance based on this statute which was overruled. In support of this ruling the district judge attacked the constitutionality of the statute, contending it undertook to add to the privileges and immunities given members of the legislature by express constitutional provision; and that the statute was an unwarranted invasion by the legislature of the functions of the judiciary in that the circumstances under which the attorney had been granted a previous continuance estopped him to claim a fur-

[5] *Id.* at 397.

[6] See Mr. Justice Douglas' statement and authorities cited at 373.

[7] 145 Tex. 498, 199 S. W. (2d) 759 (1947).

[8] Tex. Rev. Civ. Stat. Ann. (Vernon's, 1925) art. 2168a.

ther continuance based on this statute. To reverse the district court's ruling would amount to an imposition upon the court of a rule of procedure different from the ordinary rule of waiver and estoppel.

The statute was sustained on the broad ground that it promotes the public interest and welfare, and the court gave no indication as to what conduct, if any, would operate as a waiver or estoppel to assert the provisions of this statute. Inasmuch as its provisions are made expressly mandatory by the legislature, it is believed the courts will regard no conduct as working an estoppel, for the public interest involved would seem to preclude any such possibility.

THE HOME RULE AMENDMENT

Passage by the 50th Legislature of the Firemen's and Policemen's Civil Service Act[9] and the Firemen's and Policemen's Compensation Act[10] represents a further encroachment upon the power of Home Rule cities to regulate their local affairs.

It will be remembered that in 1912 the so-called Home Rule Amendment[11] to the Texas Constitution was adopted in order to permit cities of more than five thousand inhabitants to provide their own charters and to pass ordinances regulating local matters, without the necessity of first obtaining an express grant of authority from the legislature. The only limitation which this Amendment places upon the power of the cities to legislate with respect to local matters is:

> "... no charter or ordinance shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of the State."

The cities have taken the position that the provision refers to legislation which existed at the time the amendment was adopted

[9] TEX. VERNON'S ANN. CIV. STAT. (Supp. 1947) art. 1269m.
[10] TEX. PEN. CODE (Supp. 1947) art. 1583-2.
[11] TEX. CONST. Art. II, § 2.

and not to subsequent legislation. This construction, however, has not been accepted by the courts, and it would seem that the meaning of the provision is no longer open to question: the legislature may pass laws regulating local affairs of Home Rule cities so long as it does so by enactment of general, as distinguished from special, laws.[12]

The new Firemen's and Policemen's Compensation Act contains a provision making responsible city officials liable to heavy fines for failure to pay the prescribed salaries.[13] It would seem that by attaching this penal provision the legislature is, in effect, compelling the cities to levy and collect taxes for local purposes, a power which it cannot exercise directly.

The constitutionality of the new Firemen's and Policemen's Civil Service Act has already been assailed by the City of Fort Worth in a suit now pending, the city taking the position that the effect of the act is to nullify all provisions contained in its charter respecting its fire and police departments and to substitute therefor the provisions enacted by the legislature.

It seems reasonable to believe that if the people, in adopting the Home Rule Amendment, did not intend to exclude the legislature altogether from the field of city government, at least they intended that it produce more significant consequences than merely permitting the cities to exercise home rule only in fields in which the legislature does not choose to act.

VOTING MACHINES

In *Reynolds v. Dallas County*[14] the Amarillo Court of Civil Appeals sustained the validity of Article 2997a known as the

[12] City of Beaumont v. Fall, 116 Tex. 314, 291 S. W. 202 (Tex. Comm. App. 1927). The Court there stated: "In a word, as long as the State does not, in its Constitution or by general statute, cover any field of the activity of the cities of this State, any given city is at liberty to act for itself. But when the State itself steps in and makes a general law and applies such law to all cities of a certain class, then we submit, that no city of the same class is authorized, under our Constitution, to enact contrary legislation. If this principle has not already been adopted as the settled law of this State, then it should be so understood from this time forward." 116 Tex. 324, 291 S. W. 205.

[13] TEX. PEN. CODE (Supp. 1947) art. 1583-2, § 2.

[14] 203 S. W. (2d) 320 (Tex. Civ. App. 1947).

Voting Machine Law, which permits the commissioners court of any county in Texas to adopt for use in elections any kind of voting machine approved by the Secretary of State. An injunction was sought against Dallas County prohibiting the use of voting machines to register and record the ballots cast in local and state elections. Several objections to the statute were urged,[15] the chief one being that the machines used provide no means for numbering the ballots cast as required by Article 6, Section 4 of the Constitution.[16] The Court conceded that the constitutional requirement for the numbering of ballots was mandatory,[17] but decided the statute was not unconstitutional merely because the machine itself does not number the ballots, for other methods of numbering could be utilized. Even though the provisions do not fully meet the constitutional requirement, the remedy was for the legislature and not for the courts.

Peaceful Picketing

Two 1947 decisions by different Courts of Civil Appeal deal with peaceful picketing. In one the facts of the case were found to justify a prohibition of all picketing, and the other seems to permit the union to picket, so long as the picketing does not become effective. While the results of these decisions are similar, the reasoning and the interpretation of recent United States Supreme Court decisions dealing with peaceful picketing as an aspect of free speech are diverse.

In *International Assn. of Machinists Lodge 1488 v. Downtown Employees Assn.*[18] the Galveston Court of Civil Appeals held that the evidence, viewed in a light most favorable to the plaintiffs (an auto company and an association of its employees), showed: (1)

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[15] Allegations were made that the statute was an unwarranted delegation of legislative power to commissioners courts to suspend the primary and general election laws, and it was an attempt to convert general laws of the state into special laws.

[16] This section requires the legislature to provide for the numbering of ballots.

[17] *See* Woods v. State, 133 Tex. 110, 126 S. W. (2d) 4 (1939).

[18] 204 S. W. (2d) 685 (Tex. Civ. App. 1947).

peaceful picketing, (2) a loss of thirty-five to forty percent of its gross business sustained by the company, (3) a loss of over one-third of their pay sustained by the employees, (4) a union contract sought which required all workers to join the union, (5) a subsisting contract between the auto company and the plaintiff association, completed a day or two before the picketing began, and (6) a finding made that most of the employees were members of the plaintiff association. The court held that there was no abuse of discretion in issuing a temporary injunction based on these findings. The court relied upon its own opinion in the case of *Carpenters and Joiners Union v. Ritter's Cafe*,[19] which condemned picketing to cause breach of contract, or to cause the public to cease trading with a business.

The Dallas Court of Civil Appeals, in *Turner v. Zanes*,[20] upheld a permanent injunction against activities in pursuit of a secondary boycott. Such activities included threatened secondary strike and threatened secondary picketing, and were directed primarily against certain common carriers, named co-defendants in the action, and only secondarily against the plaintiff, a trucking firm engaged in a dispute with the defendant union. But the court also approved the portion of the lower court's decree which allowed primary picketing of the plaintiff's own place of business. The court approved restrictions upon the primary picketing designed to insure its peaceful nature, but modified the decree insofar as it limited the picketing to persuasion and dissuasion of employees, declaring the defendant's right to publish the facts of the labor dispute to the general public, in spite of a Texas statute limiting the purpose of picketing to persuasion of employees and prospective employees.[21]

The injunction was approved upon the following grounds: (1) that secondary boycotts are a violation of Texas anti-trust statutes

[19] 138 S. W. (2d) 223, 227 (Tex. Civ. App. 1940), *second appeal*, 149 S. W. (2d) 694, 697 (Tex. Civ. App. 1941), *affirmed* 315 U. S. 722 (1942).

[20] 206 S. W. (2d) 144 (Tex. Civ. App. 1947).

[21] TEX. REV. CIV. STAT. ANN (Vernon, 1925) Art. 5153.

(the court considered this application of the statutes to have been approved by the *Ritter's Cafe* case), and (2) that reasonable restrictions upon peaceful picketing are within the police power of the state and not violative of the right of free speech. For the latter conclusion the court relied upon Mr. Justice Reed's dissent in the *Ritter's Cafe* case,[22] and Mr. Justice Douglas' concurring opinion in *Bakery and Pastry Drivers v. Wohl.*[23]

One of the restrictions upon the primary picketing, which was apparently approved, provided that the defendants must remove their picket line, if it resulted in the refusal of common carriers to deliver goods to the plaintiff, until such deliveries were completed. This restriction seems to accomplish the same effect as if no modification had been made. It may be explained by the court's emphasis on a common carriers statutory duty to carry goods for all and sundry.[24]

The purpose of the picketing was to obtain a "union shop" contract, but the court did not refer to recent Texas legislation outlawing such a contract apparently because no appeal was taken by the plaintiff, and the only effect of such legislation would be to entitle plaintiff to an injunction against all picketing for a union shop.

The two cases approach the problem of picketing from entirely different points of views. That of the Galveston court is simply the old view of the common law that where there is an injury, there must be a remedy, unless injury is justified. The Dallas court viewed the common law as definitely changed by recent decisions of the United States Supreme Court enlarging freedom of speech, but found that the injunction issued by the lower court did not infringe freedom of speech, when modified so as to permit the union to publicize the dispute to all, as well as to employees and prospective employees.

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[22] 315 U. S. 722, 738 (1942).

[23] 315 U. S. 769, 776 (1942).

[24] Burlington Transportation Co. v. Hathaway, 234 Iowa 135, 12 N. W. (2d) 167 (1943).

The attitude of the Dallas court is more nearly in line with United States Supreme Court decisions, although it may be doubted that the result reached was much more favorable from the union's point of view than was the Galveston court's decision, because of the peculiar restriction upon the primary picketing which provided that the picket line must be removed as soon as it resulted in any action by the common carriers detrimental to the plaintiffs.[25]

J. T.

[25] For a report of 1947 Texas labor legislation see 2 SOUTHWESTERN L. J. 79 (1948).