SMU | Dedman School of Law

SMU Law Review

Volume 3
Issue 3 *Survey of Texas Law for the Year 1948*

Article 8

January 1949

Constitutional Amendments

Wilson Hanna

CONSTITUTIONAL AMENDMENTS

COMMUNITY PROPERTY

THE voters of the State of Texas in November, 1948, approved an amendment to the Constitution of the State which provided that husband and wife could partition their community property.[1] It is somewhat problematical as to how the amendment will be construed but it has apparently brought about a significant change in the law of community property in this state.

As to what the amendment authorizes between husband and wife and the method required for partition, it would seem that the husband and wife may partition their community property by an instrument in writing into undivided shares or in severalty which shall be the separate property of each spouse. Such partition cannot prejudice the rights of prior creditors. The amendment authorizes the parties to trade their respective community interest in property by an instrument in writing so that each spouse would acquire certain property, theretofore community property, as his separate estate. It further authorizes the Legislature to prescribe additional requirements as to the form of the written instrument required as well as to recordation of such instrument and any other stipulations that the Legislature might desire to make not repugnant to the amendment itself.[2]

There is a long line of authority in this state to the effect that one of several co-tenants can sell his share in the property even though that conveyance is made by metes and bounds rather than by conveyance of an undivided interest. These authorities establish that when such a conveyance is made without the consent of the other co-tenants if it can be given effect without prejudice to the rights of the other co-tenants it will be enforced in what is known as an equitable partition. This is necessarily

[1] TEX. CONST., Art. XVI, § 15, was amended.

[2] TEX. CONST., Art. XVI, § 15, as amended Nov. 2, 1948.

involuntary on the part of the non-participating co-tenants. Under authority of this amendment it could be contended with some force that since partition of the community estate is now permissible that the husband or wife could convey their community half to a third party and thereby effect an equitable partition of the community estate. The terms of the amendment would not seem to support such a contention, however, since a writing is required and the partition provided for is entirely voluntary. In fact an equitable partition would seem to be against the spirit of the amendment.

Prior to the passage of the amendment attempted partitions of the community estate were repeatedly held void. This was on the theory that community property is a unique form of ownership distinguished from co-tenancy by the fact that husband and wife could not force involuntary partition.[3] It was well established before passage of the amendment that the parties could partition the property if they were permanently separated at the time the partition took place or they were in the act of separation, with the intention of remaining permanently separated.[4] Another situation which is analogous in which partition was allowed was when a divorce had been granted the parties and the divorce decree did not contain a property settlement. In this situation the parties became tenants in common as to what had formerly been their community property.[5] Either party then, of course, had the right to force partition.

It was also an established principle in Texas that although the parties could not voluntarily partition their community property, the husband could make a gift to the wife of his share in the community property with the result that what had been community property became the separate property of the wife.[6] Although the

[3] McDonald v. Stevenson, 245 S. W. 777 (Tex. Civ. App. 1922) *writ of error refused.*

[4] King v. Bruce, 145 Tex. 647, 201 S. W. (2d) 803 (1947); McDonald v. Stevenson, 245 S. W. 777 (Tex. Civ. App. 1922) *writ of error refused.*

[5] Taylor v. Catalon, 140 Tex. 38, 166 S. W. (2d) 102 (1942).

[6] Evans v. Opperman, 76 Tex. 293, 13 S. W. 312 (1890).

wife could not make a gift of her share in the community directly to the husband she could make a gift by making a conveyance to a trustee who in turn conveyed to the husband.[7] These transactions were gifts and as such were subject to the Federal Gift Tax. Prior to passage of the amendment the husband and wife could set aside certain portions of their community property into separate property of each spouse through the use of gifts *inter vivos* if they were willing to pay the gift tax and if they went through a trustee in the case of the wife conveying to the husband her share of the community estate.

In *King v. Bruce*[8] the husband and wife had previously attempted to partition a portion of their community property. This partition having been foiled they therefore devised a scheme hoping to effect a partition. They went to New York and had $5800 of their community property transferred to a New York bank. There the husband withdrew $4,000 of the amount which he had paid to him in two containers each consisting of 2,000 silver dollars. The remainder of the money was drawn in four cashier's checks which were indorsed by the parties and placed in the respective containers. The husband and wife then entered into a contract whereby each transferred to the other the contents of their container. They then deposited the $2,900 so acquired by the contract in the New York bank. Upon her return to Texas the wife deposited her $2,900 in a Fort Worth bank. A garnishment was run against this deposit by a judgment creditor of the husband. The contract was held to be a Texas contract on the ground of the domicile of the parties and, as such, was held not to have affected the character of the property, that it was still community property. The defendant in this case contended that the policy of the state should be changed so that a husband could provide a substantial sum of money for his wife as her separate property so that she would have money on which to live in the event the estate of her deceased husband was a substantial length of time

[7] Barnett v. Barnett, 206 S. W. (2d) 273 (Tex. Civ. App. 1947).

[8] 145 Tex. 647, 201 S. W. (2d) 803 (1947).

in the process of administration or was unduly burdened with debts so that very little could be realized in any reasonable time from the community estate.

The defendant contended that a husband should be able to partition the community estate without subjecting the community property to the Federal Gift Tax.

The court admitted the existence of these hardships as well as the frequency with which they occurred, but said:

> "If the electorate of the state desire a change of the state policy, under consideration, it can be made through legislative and constitutional channels provided by law."[9]

It is submitted that the amendment brought about the change contended for in this case.

Ad Valorem Tax Amendment and Tax Exemption of Homestead Amendment

It is believed that the most effective method of presentation of these two amendments is to discuss them together since the Tax Exemption of Homesteads Amendment was not to become operative unless the Ad Valorem Tax Amendment was adopted by the voters. This seems to show a definite legislative intent that the two are to be construed together.

The Ad Valorem Tax Amendment stipulates that after January 1, 1951, there will be no state ad valorem tax levied for general revenue purposes. It authorizes the counties to levy an ad valorem tax "upon all property within their respective boundaries"[10] with a three thousand dollar residential homestead exemption. The tax must not exceed a rate of thirty cents on each one hundred dollar valuation. It is further provided that the revenue which the counties derive from this tax shall be applied to the maintenance and construction of Farm to Market Roads or for Flood Control, "except as herein otherwise provided."[11]

---

[9] *Id.* at 658, 201 S. W. (2d) 803, 809 (1947).

[10] Tex. Const., Art. VIII, § 1-a, as amended Nov. 2, 1948.

[11] *Ibid.*

The amendment also states that in the counties which have been granted tax donations the State Automatic Tax Board shall continue to levy the State ad valorem tax for the period of the donation or until the obligation which was created by the donation is extinguished. In this connection the levy of the state tax shall cease when the amount of the obligation created is repaid, if this occurs before the period of the donation is ended.

Finally the amendment provides that if the donation is for a smaller amount than the full amount of the State ad valorem tax, the county is authorized to retain the differential between the amount of the donation and the amount of the state levy.[12]

Before the adoption of this amendment Article VIII Section 1-a. of the State Constitution read: "Three Thousand Dollars of the assessed taxable value of all residence homsteads as now defined by law shall be exempt from all taxation for all state purposes . . .;"[13]

In *Graham v. City of Fort Worth*[14] the court of civil appeals held that the three thousand dollar exemption as laid down in the Constitution prior to amendment applied only in the case of state taxation and did not exempt the residential homestead from taxation for any other purposes; *i.e.* county or city purposes. *City of Wichita Falls v. Cooper*[15] went further and said that Section 1-a of Article VIII not only did not exempt residential homesteads from taxation for other than state purposes, but that any attempted exemption of property by a city or county would be in conflict with the State Constitution and therefore a nullity. The result was that the county or city was wholly without power to exempt the residential homestead from taxation.

The effect of the amendment in this regard would seem to be that the state is not going to levy the tax and since the county is authorized to levy the tax for certain specified purposes the

---

[12] *Ibid.*

[13] Art. VIII, § 1-a, as it read prior to its amendment.

[14] 75 S. W. (2d) 930 (Tex. Civ. App. 1934) *writ of error refused.*

[15] 170 S. W. (2d) 777 (Tex. Civ. App. 1943) *writ of error refused.*

exemption formerly given in the case of state taxation is made applicable to the counties, *i.e.* as to taxation by counties. Thus from the decisions referred to above the exemption will be held applicable exclusively in cases of taxation by the county, and consequently the cities will remain without power to exempt the residence homstead from taxation to the extent of three thousand dollars or to any amount.

The Residence Homstead Tax Exemption Amendments adds to Article VIII Sections 1-b and 1-c. The former of these additional sections reads as follows:

> "Three Thousand Dollars of the assessed taxable value of all residence homesteads as now defined by law shall be exempt from all taxation for all State purposes."[16]

It is to be noted that this is virtually an excerpt from Article VIII Section 1-a as it read before amendment. Section 1-c provides that this amendment (The Residence Homestead Tax Exemption Amendment) shall not go into effect unless the Ad Valorem Tax Amendment also goes into effect, and then not before January 1, 1951.[17]

The purpose of this amendment is to insure the residence homestead tax exemption of three thousand dollars in the cases where tax donations have been made and as a consequence the State Automatic Tax Board will continue to levy a State ad valorem tax. This contention is strengthened when Section 1-c of Article VIII is considered in that if the Ad Valorem Tax Amendment had not been adopted the exemption which this amendment establishes would have been provided for by Section 1-a of Article VIII.

By way of summary the two amendments together have the effect broadly of (1) discontinuing the levy of the State ad valorem tax for general revenue purposes, (2) authorizing the counties to levy the tax for specified purposes, (3) making a

[16] § 1-b of Art. VIII (added by amendment Nov. 2, 1948).

[17] § 1-c of Art. VIII (added by amendment Nov. 2, 1948).

three thousand dollar tax exemption applicable to this tax, and (4) making a three thousand dollar residence homestead tax exemption applicable to taxation for state purposes which is authorized only in the case of repayment of tax donations previously made by the state to the county or other political subdivision.

WORKMAN'S COMPENSATION

An amendment to the Constitution of the State of Texas was adopted November 2, 1948, which authorizes the Legislature to enact laws so that the counties can provide Workman's Compensation Insurance for their employees. The Amendment specifies that the laws which are passed shall authorize the counties to provide for their own insurance risk. It also empowers the Legislature to pass laws for the administration of the insurance program, the payment of premiums as well as the benefits which are to be paid under the insurance program.[18]

An amendment substantially identical with that under consideration here, except that it dealt with the right of the State to provide Workman's Compensation Insurance for its employees, was adopted November 3, 1936.[19] The only distinguishing factor in the program authorized by the respective amendments is that Section 60 (relating to counties) states that a county shall have "the right to provide its own insurance risk."[20] Judicial interpretation of this clause and of the statutes passed in pursuance of it will be necessary before it has an established meaning in the law of this State, but the phrase would seem to indicate that the counties can select any insurance carrier they desire, whether mutual or an old line insurance company.

Prior to the passage of this amendment there had been some conflict in Texas as to whether cities and counties could participate in Workman's Compensation Insurance.

---

[18] TEX. CONST., Art. III, § 60 (§ 60 added by amendment Nov. 2, 1948).

[19] TEX. CONST., Art. III, § 59.

[20] TEX. CONST., Art. III, § 60.

In *City of Tyler v. Tex. Employers Ins. Ass'n*,[21] a suit by a mutual association against the City of Tyler for premiums due the company, the Commission of Appeals held that by virtue of Article III Section 52 of the State Constitution the municipality could not become a stockholder in a mutual insurance association. Therefore, the insurance contract was *contra* to the Constitution and could not form the basis of a suit against the city.[22] Although this case was severely criticized at the time it was decided, it is still the law of this state.[23]

The Commission of Appeals held in *Southern Casualty Co. v. Morgan*[24] that Article III Section 52 of the Texas Constitution did not prohibit a city from becoming a policy-holder in an old line company, since it would not be a stockholder in an association or corporation. The court went on to say that even had the contract been prohibited by the Constitution, the insurance company could not assert this as a bar to the action for two reasons, (1) the company had received benefits under the contract and was therefore estopped to deny its existence and (2) the clause of the Constitution which was violated was for the protection of the cities, not the insurance companies.

The Supreme Court clarified the situation to a certain extent in *McCaleb v. Continental Casualty Co.*[25] There it was held that although the towns did not come with the Workman's Compensation Act, still it was not objectionable, constitutionally speaking, for them to carry insurance with an old line company which provided for substantially the same benefits as the Workman's Compensation Act.

There is, however, a case which points up the necessity of the

[21] 288 S. W. 409 (Tex. Com. App. 1926).

[22] TEX. CONST., Art. III, § 52. "The legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the state to lend its credit or to grant public money or thing of value in aid of, or to, any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company."

[23] Comment, 5 TEX. L. REV. 300 (1927).

[24] 12 S. W. (2d) 200 (Tex. Comm. App. 1929).

[25] 132 Tex. 65, 116 S. W. (2d) 679 (1938).

present amendment more than do the cases already discussed. In *Brooks v. State*[26] the Court of Civil Appeals held that the state was not within the terms of the act. Although the decision of the case relates to the state, the court said by way of *dicta:*

> "While some cases intimate that municipalities might be authorized to become subscribers to protect their employees engaged in nongovernmental functions, it has been uniformly held that a *county* or city in performing a function of government as an agency or subdivision of the state, and for the purpose of administering a portion of the government, does not come within the purview of the Compensation Act and is not authorized to carry such insurance."[27]

It is to be noted that shortly after this case in 1936 Section 59 was added to Article III changing this result as to the state, but having no effect on either cities or counties.

The county is a subdivision of the state and as such performs many functions of the state itself. It could easily come within the holding of the *Brooks* case, even had the court failed to express its opinion as to counties by way of *dicta.* In the performance of duties in which it is not acting as a subdivision of the state, performing state functions, the analogy between the city and the county as to the governmental functions performed is a close one. It would seem, therefore by analogy to both the state and city, the county was not within the terms of the Workman's Compensation Act before the amendment. This position is made a great deal stronger by the statement of the court of civil appeals in the *Brooks* case. The amendment was therefore necessary to bring it within the purview of the act, just as was an amendment necessary to make the act applicable to the state.

Judge's Retirement and Compensation

This amendment is authorization by the people of the State of Texas for the Legislature to provide for retirement and compensation of both judges and commissioners of appellate courts as well

[26] 68 S. W. (2d) 534 (Tex. Civ. App. 1934) *writ of error refused.*

[27] Brooks v. State, 68 S. W. (2d) 534, 535 (Tex. Civ. App. 1934) *writ of error refused.*

as judges of district and criminal district courts. Such retirement and compensation are to be based on length of service, age, and disability of the individual judge. The Legislature is also to set up in conjunction with the retirement and compensation program, some sort of procedure whereby judges who are in retirement may be recalled "where and when needed."[28]

The program that will come into being under this amendment is left entirely up to the Legislature. It is, however, mandatory that the Legislature pass laws giving effect to the amendment. This is evident from the wording of the amendment. "The Legislature *shall* provide for retirement of and compensation of Judges. . ."[29]

The provisions of the laws passed upon the subject, and therefore the success or failure of the retirement system are solely in the hands of the Legislators of this state.

Compensation of County Law Enforcement Officers

Article XVI Section 61 of the State Constitution was amended November 2, 1948, making it mandatory upon the Commissioner's Courts of the various counties to pay all county law enforcement officers on a salary rather than a fee basis.[30]

This Section of Article XVI is in all respects essentially the same as it was prior to amendment with the exception of the provision noted.

Gubernatorial Succession

This amendment provides that in the event the person receiving the highest number of votes for the office of Governor has died, become disabled, or failed to qualify, that the person receiving the highest number of votes for the office of Lieutenant Governor shall act as Governor until after the next general election. In the event of failure to qualify or disability on the part of the Governor elect, the amendment states that the Lieutenant

[28] Tex. Const., Art. V, § 1-a (§ 1-a added by amendment adopted Nov. 2, 1948).
[29] *Ibid.*
[30] Tex. Const., Art. XVI, § 61, as amended Nov. 2, 1948.

Governor elect shall act as Governor until "a person"[31] has qualified for the office or until the next general election. The intent of the drafters of the amendment seems to have been to leave more specific laws in this connection to the Legislature since it authorizes more elaborate laws relating to gubernatorial succession to be passed, with the sole limitation that any person who succeeds to the office of Governor must be qualified in accordance with other provisions of the Constitution.

It is submitted that the purpose of this amendment is to lay a rather broad foundation on the matter of gubernatorial succession with the more specific provision of any laws relating thereto, being left in the discretion of the Legislature.[32]

Senatorial and Representative Districts

Article III Section 28 of the Texas Constitution stipulated that the Legislature should apportion the state into Senatorial and Representative districts after each United States decennial census. Although this section was by its language mandatory it is difficult to conceive of any device whereby that legislative body could have been forced to apportion the state.[33] This amendment establishes the Legislative Redistricting Board of Texas, composed of five members upon whom the duty of apportioning the state into Senatorial and Representative Districts will fall in the event the Legislature should fail to do so following the next Federal decennial census.

The Legislative Redistricting Board is to be composed of the following state officials: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office.[34] The board is required to meet within ninety days

[31] Tex. Const., Art. IV, § 3a (§ 3a added by amendment Nov. 2, 1948).

[32] *Ibid.*

[33] Tex. Const., Art. III, § 28, as it read prior to amendment.

[34] Tex. Const., Art. III, § 28, as amended Nov. 2, 1948 to become effective January 1, 1951.