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CONSTITUTIONAL LAW

THE decisions handed down in the past year by the supreme courts of the states in the Southwest which dealt with some phase of Constitutional Law were notable only for the number thereof. Only three or four cases, out of a number somewhat over forty, have any real significance, or make any real contribution to this field. Perhaps ten of this forty have some passing interest.

The more important cases interpreted the United States Constitution. Only a few cases had to deal solely with the constitutions of the various states.

LABOR RELATIONS

The Texas Supreme Court upheld the validity of the Texas statute requiring union organizers to register with the Secretary of State, and to carry a card showing such registration, TEX. REV. CIV. STAT. Article 5154 (a) (Vernon, 1950), against objections that it interfered with freedom of speech.[1] The appellant had been soliciting persons to join the labor union he represented, without having complied with the registration requirements. The Texas court based its decision upon *Thomas v. Collins*,[2] wherein the United States Supreme Court, in considering the same statute here in question, held that the statute could not be used in a manner which would cause a previous restraint to be placed upon the freedom of speech. In that case, the conviction of a union official for violation of an injunction ordering him not to make a public speech without first registering was reversed. The United States court said, "the state may regulate labor unions with a view to protecting the public interest, but such regulation must not trespass upon the domains set apart for freedom of speech."[3] The court, while recognizing that there are certain activities closely related to free speech which may be regulated in order to protect the public from fraud, refused to draw a line between those activities, and those which may not be regulated because they are pro-

[1] Coutlakis v. State, ...Tex. Cr. R....., 268 S.W. 2d 192 (1954).
[2] 323 U.S. 516 (1945).
[3] *Ibid.*, p. 532.

tected by the First Amendment. The court simply said that an attempt to prevent the making of a public speech went too far and transgressed upon the protected liberties. It expressly declined to decide whether the mere solicitation of members, apart from the making of a public speech, was within this protected domain, and since that time has never yet seen fit to draw this line.

The Texas court in the present case, has seemingly construed the silence of the court upon this point, and some dicta in the *Thomas* case, *supra*, sustaining regulation of solicitation for funds, to mean that solicitation for members alone may be regulated by the state. This is the second Texas decision so holding. The Texas Court of Civil Appeals reached the same conclusion in an earlier case.[4]

Prohibition of solicitation for money, unless the solicitor first registers, has been upheld as a valid exercise of the states' police power to prevent the perpetration of fraud upon the public.[5] It may be that a solicitation for members of a labor union could be regulated on a similar basis. There is, however, a very fine line between activities which may be regulated in the public interest, and those which may not be interfered with because of the necessity of preserving certain fundamental freedoms. There is a conflict between cases on this subject — some holding that the activity of solicitation for members may be regulated, and others holding that it may not. For example, a California court construed the *Thomas* decision to mean that the state could not prevent solicitation of even one person. They seemed to think that the principle of the *Thomas* case, which would not allow interference when an organizer was soliciting membership from 300 persons, would apply equally as well when there was only one person involved.[6]

If this case should come before the United States Supreme Court, the conflict may finally be resolved, and an answer given to this difficult problem.

[4] American Federation of Labor v. Mann, 188 S.W. 2d 276 (Tex. Civ. App. 1945).

[5] "Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free speech comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed." Thomas v. Collins, 323 U.S. 516, 540 (1945).

[6] *In re* Porterfield, 28 Cal. 2d 102, 168 P. 2d 706 (1946).

In another decision concerning labor relations, the Arkansas Supreme Court joined the growing number of courts which have held that the right to picket is not identical with the right of free speech, and held that an injunction could be issued to restrain unlawful picketing,[7] even though the picketing was peaceful.[8] This is in accord with a number of recent United States Supreme Court decisions.[9]

RACE DISCRIMINATION

In the only racial discrimination question to come before the highest state courts in the past year, the Texas Court of Criminal Appeals held that the fact that no Negro had ever been appointed county jury commissioner was not enough to show any injury to the accused.[10] It said that any discrimination in the selection of jury commissioners must have found its way into the work of the jury commissioner in selecting the lists of grand and petit jurors before the accused could show any injury or complain.

As the law now stands, it is not even necessary for a Negro to be on the jury when another Negro is on trial.[11] The requirement is that there must be no discrimination in the selection of jurors. If the method used for selection is fair and impartial, and there is no systematic exclusion, the requirements of due process of law are met.[12]

TRIAL PROCEDURE

The Louisiana Supreme Court construed the doctrine of *Powell v. Alabama*[13] to necessitate appointment of separate counsel for each defendant, in a capital case, when there were two or more defendants whose interests did not coincide.[14]

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[7] The only real problem in regard to this type of case seems to be in determining what is, and what is not unlawful. Generally, if there is a state statute declaring an activity unlawful, then there is no question. Of course, if there is no statute, then the determination of the unlawfulness is left to the courts.

[8] Sheet Metal Workers v. Daniels, ...Ark....., 264 S.W. 2d 597 (1954).

[9] Hughes v. Superior Ct. of State of Calif. in and for Contra Costa County, 339 U.S. 460 (1949); Intern. Broth. of Teamsters Union, Local No. 309 v. Hawke, 339 U.S. 470 (1949); Senn v. Tilelayers Protective Union, 301 U.S. 468 (1936).

[10] McNair v. State, ...Tex....., 265 S.W. 2d 105 (1954).

[11] Baker v. State, 150 Ga. 446, 7 So. 2d 792 (1942).

[12] Akins v. State of Texas, 325 U.S. 398 (1945).

[13] 287 U.S. 45 (1932).

[14] State v. Brazile, ...La....., 75 So. 2d 856 (1954).

The Criminal Court of Oklahoma decided that the constitutional right to be confronted by witnesses is waived by a defendant's conduct inconsistent with the maintenance of this right. The use of a deposition by a defendant, when he had objected to the use of the same deposition by the prosecution (because he had not had a chance to cross-examine when the deposition was taken) was said to be conduct inconsistent with this right, and hence was a waiver thereof.[15]

The New Mexico Supreme Court had occasion to consider whether the results of a blood test were admissible in evidence, when the blood had been taken from the defendant while he was unconscious. The defendant objected to the use of such evidence on the ground that it was the equivalent of forcing him to testify against himself.[16]

The court distinguished between *real* and *personal* evidence, and said that the freedom from self-incrimination applied only when there was a use of *personal* evidence. The court thought that the evidence in the present case was *real* evidence.

It has been held that the evidence obtained by a blood test is not communication (i.e. *personal* evidence), but is real evidence of the ultimate fact — the defendant's physical condition.[17] Likewise, the use of *real* evidence has been held not to violate the constitutional provision against self-incrimination, since this prohibition extends only to cases of testimonial compulsion.[18]

There is another rule which applies in cases of this sort, regardless of the nature of the evidence. It was first laid down in the case of *Rochin v. California.*[18a] Under this rule, evidence obtained in a manner that is shocking and contrary to the settled principles of the Anglo-American legal system is not admissible in a trial. In such cases, use of the evidence thus obtained is said to violate the due process clause. The court in the present case discussed that rule, and decided that the situation in the present case (where

[15] Miles v. State, ... Okl. Cr....., 268 P. 2d 290 (1954).
[16] Breithaupt v. Abram, 58 N. Mex. 385, 271 P. 2d 827 (1954).
[17] People v. Haeussler, ...Cal. 2d....., 260 P. 2d 8 (1953).
[18] People v. Trujillo, 32 Cal. 2d 112, 194 P. 2d 281 (1948).
[18a] 342 U.S. 165 (1952).

the blood used in the test was taken with a hypodermic) did not fall within that rule.

There have been many cases which have discussed the admissibility of the results of blood tests, and though some have inferred that the admission of the evidence might be unconstitutional if the blood used in the test was procured without the consent of the defendant, no case has ever unequivocally laid down that rule. On the other hand, a prosecuting attorney has been allowed to testify concerning the refusal of the defendant to submit to the test,[19] and, in a slightly different case, the forcible taking of a breath sample was held not to deprive a person of due process.[20]

Although the defendant in the case at hand may have been deprived of some right, it would seem that it was not so fundamental as to come within the protection of the due process clause.

STATUTORY CONSTRUCTION

Two cases arose last year in which the courts were called upon to determine whether certain language in a statute was sufficiently clear to inform the defendant of the charges against him. The Louisiana court was presented with the problem of whether the term "sexually indecent" was clear enough to form the basis of a charge,[21] and the Oklahoma Criminal Court had to decide the sufficiency of the term "confidence game."[22] Both courts held the terms valid, saying that the term "confidence game" had a popular meaning throughout the nation, and was well understood (although the court conceded that if the defendant had asked for a clear definition, it should have been given). It was held that the term "sexually indecent" was well defined and that it had an accepted meaning that was not susceptible to misunderstanding.

The Supreme Court of Oklahoma was called upon to construe its Mental Health Act[22a] for the first time, and upheld it against objections that it deprived a person of liberty without due process of law. The main objection was that the act did not provide for a

[19] Gardner v. Commission, 195 Va. 945, 81 S.E. 2d 614 (1954).
[20] State v. Berg, ... Ariz. ....., 259 P. 2d 261 (1952).
[21] State v. Roth, 226 La. 1, 74 So. 2d 392 (1954).
[22] Lazar v. State, ... Okl. Cr. ....., 275 P. 2d 1003 (1954).
[22a] 43A, O.S. Supp. § 60.

hearing or notice to a party before such party was put under observation to determine whether he was insane.[23] The court released the petitioner, who had been committed for observation, deciding that he had been deprived of liberty without due process, but upheld the validity of the statute. The court said that the act inferentially provided for a hearing and notice to defendants, and that it was intended that such hearing be given. (Note — the statute nowhere expressly provides for any such hearing.) It went on to say that if a statute provided for a hearing either expressly *or by implication*, the requirements of due process were met. There is a long line of decisions which have held that "the essential elements of due process of law are notice and opportunity to be heard, and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause."[24] The novelty of the case lies in the means used by the court to sustain the law, and not in the rule of law it followed.

INTERSTATE COMMERCE

The Oklahoma Supreme Court upheld an order of the Corporation Commission of that state which set a minimum price to be obtained from the sale of gas taken from wells in that state, even though portions of the gas found its way into interstate commerce. It said that such a regulation did not unlawfully place an embargo upon interstate commerce,[25] or violate due process. The court said that the Commission, under its power to preserve natural resources, might fix a uniform price for the gas. The contention that such a regulation in respect to sale of raw gas at the well-head does not constitute a deprivation of property without due process was upheld by the United States Supreme Court in *Phillips Petroleum Co. v. Oklahoma.*[26] The price-fixing provision, insofar as it applied to the sale of gas at the well-head was likewise upheld by the United States court against objections that it placed a burden upon interstate commerce in *Cities Service Gas Co. v. Peerless Oil and*

[23] In the matter of Lutker, ...Okl. Cr...., 274 P. 2d 786 (1954).

[24] Martin v. Sturbel, 367 Ill. 21, 10 N.E. 2d 325 (1937); McGowan v. McGowan, 324 Ill. App. 520, 58 N.E. 2d 338 (1944); Muskogee Iron Works v. Bason, ...Okl....., 55 P. 2d 68 (1936).

[25] Natural Gas Pipeline Co. of America v. Corporation Commission, ...Okl....., 272 P. 2d 425 (1954).

[26] 340 U.S. 190 (1950).

Gas Co.[26a] Therein, the court stated that the congressional power over interstate commerce was not exclusive, but that a state might regulate matters of local concern over which federal authority had not been exercised. The requirement is that the regulation must not discriminate against or burden interstate commerce, that the regulation safeguard some obvious state interest, and that the local interest outweigh the national interest in preventing state regulation. The court held that the interest of the state in protecting its natural resources was a legitimate interest. The problem posed by the present case, which takes the case out of the sphere of the above-stated rules, is that the price fixed by the order herein would apply to sales of all processed gas, and the residue after processing, wherever they might occur, and not only to sales made at the well-head. In so far as it does this, the state seems to have exceeded its power, and is putting a burden on interstate commerce proper, and is taking property in violation of the due process clause.

TAXATION

As long as a state uses a method that reasonably allocates to that state the portion of business done there, a tax upon foreign corporations or those engaged in interstate commerce is valid and does not violate the due process clause. This test has been applied by the United States Supreme Court as far back as 1924.[27] The Supreme Court of Louisiana upheld a statute of the above-mentioned type,[28] which provided that "for purposes of allocation, all investments in, advances to, and revenues taken from a parent corporation or subsidiary shall be allocated to Louisiana on the basis of capital employed in Louisiana for corporation franchise tax purposes by parent or the subsidiary corporation."[29] The court said that this was a method fairly calculated to assign to Louisiana that portion of business reasonably attributable to that state, and as such, it met the requirements of the Fourteenth Amendment.

[26a] 340 U.S. 179 (1950).
[27] Butler Bros. v. McColgan, 315 U.S. 501 (1942); Bass, Ratcliff & Gretton, Ltd., v. State Tax Comm., 266 U.S. 271 (1924).
[28] Arkansas Fuel Oil Corp. v. Fontenot, 225 La. 166, 72 So. 2d 465 (1954).
[29] Wests LSA R.S. Sec. 47.606(B).

FLUORIDATION

The question of the legality of the fluoridation of city water supplies by the city health authority came up before the courts of Oklahoma and Louisiana, and both courts reached the conclusion that such an action was within the police power of the states (which had been delegated to the cities.)[30] The main objection in each case was that the city had made an unwarranted exercise of the police power in violation of the Fourteenth Amendment, and that the action was unreasonable and arbitrary. The courts overruled these contentions, and said that the state, under its police power, might take reasonable measures for the protection of the public health. Fluoridation of the water supply was held to have a real and substantive relation to the public health. It was said that such an action was a matter of private health and hygiene, but the court overruled this contention also. It is interesting to note that one of the other lesser objections was that the action abridged the freedom of religion. The court thought that this objection meant that the cities' action was compulsory medication, and overruled this contention. A California case a few years earlier which dealt with the same problem posed in these two cases was decided in the same way.[31]

Fred R. Disheroon.

[30] Dowell et al. v. City of Tulsa, ...Okl....., 273 P. 2d 859 (1954); Chapman et al. v. City of Shreveport, 225 La. 859, 74 So. 2d 142 (1954).

[31] De Aryan v. Butler, ...Cal. 2d....., 260 P. 2d 98 (1953).