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Statutory Injunction Against the Gambling Nuisance in Louisiana

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STATUTORY INJUNCTION AGAINST THE GAMBLING NUISANCE IN LOUISIANA

Louisiana Act 120 of 1940 was a radical innovation in the use of the ex parte restraining order. It amended a previous statute[1] which authorized the abatement of a gambling establishment as a public nuisance by providing that

> "where a petition is filed under this act and such petition is supported by the ex parte affidavits of two reputable citizens sworn to before any officer authorized by law to administer oaths to affidavits, detailing matters within such affiants' knowledge and clearly establishing the existence of a nuisance as defined in Section 1 of this act, the court to whom such petition and affidavits is presented shall *forthwith* issue a temporary restraining order, to be in force until the hearing on the rule to show cause under Section 5 of this act; and said temporary restraining order shall prohibit the use of the place where said nuisance is averred to exist for any purpose, or purposes, whatsoever, pending the trial and determination of the said rule to show cause." (Italics supplied.)

Several nice questions have arisen in connection with the ex parte procedures authorized by this statute. In *Dupuy v. Tedora*[2] the district judge refused to accept ex parte affidavits submitted according to the terms of the act on the ground that the court personally knew it was being done for purely selfish and political reasons. The supreme court, on application for writs of certiorari, prohibition and mandamus, without passing on the constitutionality of the act, said, " 'all courts shall be open, and every person for injury done him . . . shall have adequate remedy by due process of law and justice administered without denial, partiality or unreasonable delay.' . . . The refusal of a judge to permit a citizen to come into his court for the purpose of having his cause heard and decided because in his opinion the citizen has no case . . . is a clear violation of the Constitutional mandate that 'All courts shall be open' . . . The 'due process of law' provision in the Constitution is designed to include oppression and arbitrary

1. La. Act 49 of 1938, as amended by La. Act 120 of 1940 [Dart's Crim. Stats. (1943) § 1026]. The original statute, La. Act 192 of 1920, enacted for the purpose of carrying out the provisions of Art. 188, La. Const. of 1913, contained language identical with that of the 1940 anti-gambling statute.

2. 204 La. 560, 15 So.(2d) 886 (1943).

power from every branch of the government."[3] This decision made it clear that the court *must* issue the temporary restraining order where the required affidavits are filed and cannot, of its own volition and accord, refuse the relief sought until after a hearing on the merits.

In *Womack v. Varnado*[4] the district judge granted the injunction as prayed for according to the ex parte procedure set out in the anti-gambling statute. The supreme court sustained the action without ruling on the constitutionality of the procedure since the question had not been raised in district court.[5]

The real test of the validity of the new procedure came in the case of *Mongogna v. O'Dwyer*.[6] The plaintiffs filed a petition, supported by ex parte affidavits, declaring O'Dwyer's establishment to be a gambling house and asking that it be closed. As pointed out in a prior case,[7] the 1940 amendment, in express terms, made mandatory the issuance of a restraining order pending a hearing on the rule to show cause why the alleged nuisance, created by defendant, should not be abated and an injunction issued to prohibit its continuance. Is this procedure a violation of the due process clause of the Constitution? Does it deprive the trial judge of his discretionary powers by compelling him to close a business without a hearing? Does it delegate an exclusive judicial function to private citizens? These questions were answered in the affirmative by the supreme court when it declared the new ex parte injunctive proceedings unconstitutional.

Both the federal and state constitutions guarantee that property shall not be taken without due process of law.[8] Under the

3. 204 La. 560, 573, 15 So.(2d) 886, 890, citing La. Const. of 1921, Art I, § 6, and Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 4 Wheat. 518, 4 L.Ed. 629 (1819).

4. 204 La. 1019, 16 So.(2d) 825 (1943).

5. However, the court stated by way of dictum that "if it be assumed arguendo, however, that said Section 10 of Act 120 of 1940 is unconstitutional, the remainder of the statute would not necessarily fall because of that. Where an unconstitutional portion of a statute is inseparable from the remaining provisions, the entire law is invalid. . . . But if the constitutional parts of a statute are independent of the invalid portion, the former will be permitted to stand. . . . Should section 10 be stricken from the statute, the remaining portion would be complete in itself and capable of being enforced in accordance with the intention of the Legislature to suppress gambling." 204 La. 1019, 1029, 16 So.(2d) 825, 828. See also City of Alexandria v. Hall, 171 La. 595, 131 So. 722 (1930); State v. Bonner, 193 La. 402, 190 So. 626 (1939); Stewart v. Stanley, 199 La. 416, 5 So.(2d) 531 (1941); Ricks v. State Department of Civil Service, 200 La. 341, 8 So.(2d) 49 (1942); Ricks v. Close, 201 La. 242, 9 So.(2d) 534 (1942).

6. 204 La. 1030, 15 So.(2d) 829 (1943).

7. Dupuy v. Tedora, 204 La. 560, 15 So.(2d) 886 (1943).

8. La. Const. of 1921, Art I, § 2; U.S. Const. Amend. IV, § 1.

procedure authorized by the 1940 statute the operator of a supposedly legitimate business would have no defense until trial, and it is highly probable that he would suffer irreparable damage as a result of the temporary restraining order. If a mistake had been made by the affiants in declaring the establishment to be a gambling house, when in reality it was a legitimate business, the operator would have no recourse until the trial were held and the matter determined by the court. He might then be placed at a substantial disadvantage in his attempt to regain his former customers, many of whom would not return because of the circumstances surrounding the closing of the business. A procedure which makes such injury possible is inconsistent with the duty of the state to protect its citizens who are engaged in legitimate businesses. The supreme court correctly decided that the power granted to private citizens under the act was clearly a usurpation of the powers and duties of the judiciary.

An examination of the statutes of several states failed to disclose any similar enactments.[9] However, it is significant to note, by way of analogy, that a corresponding New York law[10] expressly requires that the restraining order may be granted only after due notice. This provision was inserted in order to eliminate the inherent hardships of the ex parte procedure, particularly with reference to labor disputes. Wisconsin[11] prohibits all ex parte injunctive orders in industrial disputes. Minnesota[12] provides for ex parte injunctive procedure only if violence to property is threatened. Not one of the statutes[13] examined require the courts, on being petitioned, to issue *forthwith* a temporary restraining order, as required by the act under discussion. It is also significant that even during the existence of the National Prohibition Act,[14] when legislatures throughout the country were authorizing the famous Padlock Injunctions, no ex parte procedure so far-reaching was authorized.

The ex parte procedures declared unconstitutional by the court in *Mongogna v. O'Dwyer*[15] applied only to gambling nuisances and are to be distinguished from the general temporary restraining order which is issued in cases where an injunction is

9. New York, California, Mississippi, Tennessee, Texas, Florida, Nevada and Wisconsin.
10. New York, Civil Practices Act, § 882, as amended by c. 378 of 1930.
11. Wis. Stat. (1929) § 113.07.
12. Minn. Stat. (Mason, Supp. 1936) § 4256.
13. Note (1930) 30 Col. L. Rev. 1184.
14. 41 Stat. 405 (1919), 27 U.S.C.A. § 1 (1940).
15. 204 La. 1030, 16 So.(2d) 829 (1943).

sought and the court is satisfied that irreparable injury, loss, or damage will result to the applicant before a hearing on the merits of the case.[16] The issuance of such a temporary restraining order has been held to rest in the discretion of the trial court.[17] The temporary restraining order is issued for the primary purpose of maintaining the status quo pending a hearing on the application for a temporary injunction.

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16. Art. 297, La. Code of Practice of 1870, as amended by La. Act 29 of 1924, § 2 [Dart's Stats. (1941) § 2079].

17. Snowden v. Red River and Bayou Des Galises Levee and Drainage District, 172 La. 447, 134 So. 389 (1931).