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Public Law: Constitutional Law

Charles A. Reynard

II. Public Law

CONSTITUTIONAL LAW

*Charles A. Reynard**

A half dozen cases of significance involving constitutional issues were disposed of during the term. One of these was a tax case[1] presenting a due process question and is discussed in the section on State and Local Taxation. Of the remaining five, three called for the application of established principles of constitutional law while the other two were concerned with the interpretation and application of special provisions of the Louisiana Constitution.

In *State v. Garrett*[2] the constitutional issue[3] involved was the basic one of the litigant's standing or interest requisite to challenge the validity of a legislative enactment. The defendant in that case had been convicted of violating the provisions of a local option liquor ordinance. By way of defense, *inter alia*, he pointed to the fact that the ordinance, in addition to prohibiting the sale of alcoholic beverages (for which he had been tried and convicted) also prohibited its possession for sale, whereas the proposition originally submitted and approved by the electors had not authorized the enactment of an ordinance prohibiting such possession. The court disposed of the objection summarily with the brief statement "that since the defendant was charged with and convicted for only the sale of intoxicating liquor he is without right presently to question the appearance in the ordinance of the words 'possess for sale', they constituting mere surplusage insofar as this prosecution is concerned."[4] Here, then, we have an application of the salutary principle, adopted by the judiciary in the exercise of appropriate self-restraint as a limitation upon the power of judicial review, that before a person will be permitted to challenge the validity of an enactment, he must show that he has a fundamental right which will be infringed by its enforcement against him.[5]

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* Professor of Law, Louisiana State University.

1. Bahry v. West Ascension Consol. Drainage District, 218 La. 1028, 51 So. 2d 614 (1951), discussed infra p. 172.

2. 218 La. 538, 50 So. 2d 24 (1950).

3. Another, and more controverted issue of the case, involved a point of statutory interpretation.

4. 218 La. 538, 545, 50 So. 2d 24, 26-27 (1950).

5. The principle is as old as the doctrine of judicial review itself. It has been recently discussed and applied in the following cases in the Supreme Court of the United States: United States v. C.I.O., 335 U.S. 106 (1948); Coff-

It was perhaps only coincidental that during the same year when the so-called Kefauver Committee of the United States Senate was encountering similar difficulties, the court should be asked to intervene in contempt of court proceedings on behalf of a witness before a grand jury investigating charges of public bribery who had refused to answer the question, "Did you . . . collect any money from the owners of slot machines . . . ?" *State v. Rodrigues*[6] presented these facts, and the relator, having unsuccessfully argued three points of defense to the trial court, sought an order to stay the sentence imposed by the trial court. The sentence was affirmed on all three grounds. The relator first contended that even if his action constituted contempt, it had been committed outside the presence of the court, entitling him to the benefits of the notice and hearing provisions made applicable in such cases by statute[7] and which, in his case, had not been granted. This contention was found to be without merit by reason of the court's conclusion that a grand jury is a "constituent part" of the court, with the result that contumacious action before it is tantamount to similar conduct before the court itself—a conclusion which seems amply supported by authorities from other jurisdictions as well as the Louisiana jurisprudence.

The relator's two remaining defenses were predicated upon the state constitutional provisions relating to self-incrimination reading as follows:

> "Article I. . . .
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> "Section 11. No person shall be compelled to give evidence against himself in a criminal case or in any proceeding that may subject him to criminal prosecution, except as otherwise provided in this Constitution. . . ."
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> "Article XIX. . . .
>
> "Section 13. Any person may be compelled to testify in

man v. Breeze Corporations, 323 U.S. 316 (1945) and Anderson National Bank v. Luckett, 321 U.S. 233 (1944). There is no doubt that the doctrine has application to municipal or parochial ordinances, as one of the most frequently cited federal cases involved an ordinance of the City of Louisville, Kentucky. (Buchanan v. Warley, 245 U.S. 60 [1917].) While it is universally conceded that the principle, like most others, is subject to numerous exceptions (as, for example, where the public interest in its enforcement demands, or where the entire statute will be invalidated if the challenged, but presently inapplicable provision falls, or where the jurisdiction of the court in the proceedings depends upon the issue of constitutionality involved, etc.), none of them was present in the instant case and there is every reason to regard the decision as a proper one.

6. 219 La. 217, 52 So. 2d 756 (1951).

7. La. R.S. (1950) 15:11.

> any lawful proceeding against any one who may be charged with having committed the offense of bribery and shall not be permitted to withhold his testimony upon the ground that it may incriminate him or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceedings, except for perjury in giving such testimony."

The relator contended that his case should be governed by the ordinary rule provided in Article I, Section 11, rather than the exception contained in Article XIX, Section 13, first, because he had not been informed that any person had been "charged in an affidavit, bill of information, or indictment" with having committed bribery, and second, that the section, if applicable, does not afford complete immunity against prosecutions for other but related crimes and hence amounts to no immunity at all.

The court met the first of these objections by pointing out that acceptance of the relator's construction of the section would unduly restrict the provision to trials of accused persons before judges or petit juries and render meaningless the broader phrase "in any lawful proceeding" (which would include grand jury investigations) found therein, a conclusion which seems wholly realistic and most probably accords with the intent of the framers.

It was the second of these objections, the contention that the exculpatory clause would not relieve the relator from prosecutions for other but related crimes, which seemed to give the court the greatest difficulty. As a matter of fact, the court's opinion furnishes no categorical answer to the question thus posed by the relator's contention. The court might reasonably have interpreted the phrase "such testimony shall not afterwards be used against him in *any* judicial proceedings" (italics supplied), to mean what it literally says, thereby conferring complete immunity contrary to the relator's contention. There is good reason to suspect that the court subscribed to this view because it cited with approval a Pennsylvania case interpreting an identically worded provision in the constitution of that state to confer absolute immunity.[8] However, the opinion of the court, rather than adopting this inter-

8. In re Kelly's Contested Election, 200 Pa. 430, 50 Atl. 248 (1901). There the court said: "Assuming that the witness' answer would disclose the fact that he used money to purchase the votes of certain electors, his answer could not be used against him in any legal proceeding. . . . The most that he could suffer would be that odium which attaches to moral turpitude. . . . His statement subjects him to no higher penalty than moral degradation, which is not a subject of criminal prosecution."

pretation as the authoritative construction of our own constitutional provision, met the issue by a kind of confession and avoidance technique, relying upon the well established principle that the self-incrimination clause of the Fifth Amendment of the Federal Constitution does not apply to state proceedings.[9] On this score the court's language leaves little room for doubt, for it said:

> "We fully agree with the conclusion made by the trial judge in his return to the writ, in which he said: 'The conclusion is inescapable that our State has the right to grant immunity to its citizens from being compelled to give testimony that will incriminate them, or to withhold that right, or to give it under certain conditions or subject to certain exceptions. *The people of this State have chosen to give it subject to the exception with which we are here concerned. . . .*'" (Italics supplied.)[10]

It is clear, therefore, that the trial judge shared the relator's view that the section would not shield him from prosecutions for other but related crimes. There was no claim, nor is there support for the view that exposure to mere moral opprobrium constitutes incrimination.[11] And the supreme court, by placing its imprimatur upon the trial court's conclusion casts doubt upon the alternative construction which would confer complete immunity.

It may be said that the result is inconsequential, as it compels the testimony of recalcitrant witnesses regardless of the interpretative route pursued. It is submitted, however, that if the constitutional framers truly intended the complete immunity suggested here (and established in Pennsylvania) witnesses should be apprized of that fact at the earliest opportunity in order to assist the public and its officials in their attempts to pursue and suppress crime.

The only other case of the term to involve general principles of constitutional law was *Cooper v. Lykes*[12] in which the defendant challenged a legislative[13] act altering the pre-existing law of prescription applicable to mineral interests on the grounds that it (1) was an ex post facto law, and (2) impaired the obligation of contract, contrary to the provisions of both state and federal con-

9. The court cited the early case of Twining v. New Jersey, 211 U.S. 78 (1908). The principle was most recently affirmed in the controversial five to four decision in Adamson v. California, 332 U.S. 46 (1947).

10. 219 La. 217, 52 So. 2d 756, 762 (1951).

11. Brown v. Walker, 161 U.S. 591 (1896).

12. 218 La. 251, 49 So. 2d 3 (1950).

13. La. Act 232 of 1944, La. R.S. (1950) 9:5805.

stitutions.[14] Both contentions are so demonstrably untenable as to evoke sympathy for the court which must devote valuable time to the consideration and decision of the case. For more than a century and a half it has been the settled jurisprudence of the Supreme Court of the United States that the ex post facto clause is a restriction upon the legislative powers of the states in the enactment of criminal laws only.[15] Similarly, for more than a century the same court has uniformly held that statutes of limitation of reasonable duration are valid, affect only the remedy of enforcement, and do not impair the obligation of contracts or rights and interests to which they apply.[16]

The two remaining cases decided during the term called for the construction of particular provisions of the State Constitution. The first of these, *Fouchaux v. Board of Commissioners of Port of New Orleans*,[17] was a suit against an agency of the state, filed after permission to do so had been granted by an act of the legislature.[18] By way of defense, it was asserted that the legislature had failed to conform with the requirements of Article 3, Section 35, of the State Constitution, which, at the time of its adoption as well as at the time of the filing of this case, provided that such acts "shall provide a method of procedure and the effect of the judgments which may be rendered therein."[19] The relevant provisions of the act are set forth in the margin.[20] The court, on the original hearing, by a five to two decision, sustained the validity of the act declaring, first, that there was compliance with the constitutional requirement that a method of procedure be prescribed when the legislature said that it should be "the same as in suits between private litigants," and second, that the effect of any judgment recovered had been adequately dealt with in Section 3. The latter section was construed to mean "that, should plaintiff obtain a judgment . . . a legislative Act, . . . or some

14. U.S. Const. Art I, § 10; La. Const. of 1921, Art. IV, § 15.
15. Calder v. Bull, 3 U.S. 386 (1798).
16. Hawkins v. Barney, 30 U.S. 362 (1831).
17. 219 La. 354, 53 So. 2d 128 (1951).
18. La. Act 365 of 1946.
19. This section, as subsequently noted, has since been amended.
20. Section 1 simply authorizes the filing of suit against the defendant.
Section 2. "That, except as otherwise herein expressly provided, the procedure in said suit or suits shall be the same as in suits between private litigants."
Section 3. "That nothing in this Act shall be construed as conferring on the said Douglas Foucheaux any different or greater claim or cause of action than he had before the passage of this Act, the purpose of this Act being merely to waive the State's and the said Board of Commissioners' immunity from suit insofar as the suit or suits hereby authorized are concerned."

other appropriation by the Board would have to be obtained for its satisfaction." [21] Chief Justice Fournet dissented on separate grounds. Justice Moise disagreed with the majority opinion on both points of procedure and effect, and on rehearing, wrote the majority opinion for a court divided four to two with the Chief Justice absent, reversing the earlier opinion. Justices McCaleb and Hawthorne dissented, adhering to the views expressed in the earlier opinion, written by the former.

Although one encounters some difficulty with the decision on the procedure point (the proviso that procedure applicable to private litigants would seem to suffice, particularly if one subscribes wholeheartedly to the presumption of constitutionality and indulges the maxim that it is a court's duty to adopt from alternative interpretations the one which will sustain constitutionality), there is much to be said for the view that the act was deficient for failure to prescribe the effect of any judgment to be recovered by the plaintiff. As Justice Moise points out on rehearing, the court itself on first hearing had implied that at least *two* effects might be accorded any such judgment—(1) that it be satisfied by legislative appropriation, or (2) that it be paid by board appropriation. The resolution of that alternative is a matter in which the public has an interest, and it is not too much to say that this is the kind of decision which the framers had in mind when they adopted the provision in question, making it the duty of the legislature to say precisely what the effect should be. Much of the doubt and uncertainty which would normally attend the decision, and others which preceded it, have now been resolved by an amendment to the constitutional provision itself[22] which definitely provides that procedure shall be the same as in private litigation, enjoining the legislature to provide the method of citing the state and to designate the court, and clearly defines the effect of judgments in such cases.

The final decision of the term to involve the constitution was *Jones v. State Board of Education*,[23] a taxpayer's suit to restrain the defendants (including the Board of Supervisors of Louisiana State University) from carrying out the provisions of several statutes enacted by the 1950 session of the legislature. The enactments in question expanded the curricula of two of the state's junior colleges, converted them into four year colleges, removed them from the direction and control of the Board of Supervisors

21. 219 La. 354, 53 So. 2d 128, 129 (1951).
22. La. Act 385 of 1946, approved November 5, 1946.
23. 219 La. 630, 53 So. 2d 792 (1951).

of Louisiana State University and placed them within the jurisdiction and control of the State Board of Education. Plaintiff, relying upon Article IV, Section 14, of the Louisiana Constitution which provides in part that "No educational . . . institution . . . shall be established by the State, except upon a vote of two-thirds of the members elected to each house of the Legislature," pointed to the fact that none of the legislation in question had received a two-thirds majority, contended that the legislation provided for the *establishment* of educational institutions, and hence was void.

Although the trial court had agreed with the plaintiff's view of the matter, the supreme court reversed, choosing to regard the legislation as a permissible adjustment or enlargement of already existing state institutions of learning. It reviewed the physical and legislative history of the two institutions affected, which were appropriately brought into the state's educational system (one having been created, the other adopted as a going concern, both by legislation receiving the required two-thirds majority) and concluded that there was no merit to the plaintiff's contention that this previous legislation did nothing more than create two junior colleges. They properly created state "educational institutions" which are the kind of establishments to which the constitutional provision refers. From that point, the court concluded that the plain and unambiguous language "leaves us convinced that the educational institutions therein contemplated are not limited to the higher institutions of learning but to State educational institutions of any character regardless of how they may be designated." [24] By thus viewing the matter as a simple re-allocation of educational functions and an enlargement of activity of existing institutions, the legislature could be forgiven non-compliance with Article IV, Section 14, which, by its terms, applies only to legislation establishing such institutions. The result seems sound and is reached, as the court itself remarked, without resort to the established principle that courts will not declare acts of legislatures unconstitutional unless it is clearly shown that they contravene applicable provisions of the constitution.

LABOR LAW

*Charles A. Reynard**

In one of its infrequent decisions involving organized labor, the court last term affirmed the dismissal of a suit for damages

24. 219 La. 630, 53 So. 2d 792, 797 (1951).

* Professor of Law, Louisiana State University.