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Federal Jurisdiction - Doctrine of Equitable Abstention Applied to Civil Rights Case

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that the proponents of the will had assumed and carried the burden of proving the ability of the testatrix to read. Under the evidence adduced upon the trial of the case it appears that the court might well have affirmed the lower court's decision that the testatrix did not have the ability to read at the time the will was confected.[28] In view of the fact that the Supreme Court will usually accept a lower court's findings on questions of fact where the credibility of witnesses is involved,[29] the instant decision may be indicative of a liberal attitude toward the statutory requirement that a testator have the ability to read in order to make use of the new wills act.

Since the comparatively few formal requirements imposed by the new wills act are devised to prevent fraudulent practices, it appears that they should be rigidly enforced. However, when there is no indication of fraud, such as in the instant case, it is felt that the court may properly take a more liberal attitude as to the weight of conflicting evidence in construing the formal requirements of a testament.

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FEDERAL JURISDICTION — DOCTRINE OF EQUITABLE ABSTENTION APPLIED TO CIVIL RIGHTS CASE

Declaratory and injunctive relief were sought in a three-judge federal district court[1] convened to hear constitutional challenges to five Virginia segregation laws.[2] Federal jurisdiction was

28. See notes 2 and 3 *supra.*

29. See, e.g., Orlando v. Polito, 228 La. 846, 84 So.2d 433 (1955).

1. 28 U.S.C. § 2281 (1952) provides that the following factors will necessitate the convening of a three-judge court: (1) injunctive relief must be requested; (2) plaintiff must ask that state officers be restrained from enforcing a state statute or an order of a state administrative agency; (3) the contention must be made that the statute or order violates the Federal Constitution. The fact that a three-judge court always sits as a court of equity has enabled the doctrines of equitable discretions to enter the picture. See MOORE, COMMENTARY ON THE JUDICIAL CODE 51-54 (1949); Comment, 19 LOUISIANA LAW REVIEW 813 (1959).

2. 4 VA. CODE §§ 18-349.9—18-349.37 (Supp. 1958); 7 VA. CODE §§ 54-74, 54-78, 54-79 (1958).

3. 28 U.S.C. § 1343 (1952): "*Civil Rights and Elective Franchise*

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person;

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United Staes, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

"(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

based upon the civil rights statutes,[3] diversity of citizenship,[4] and ordinary federal question jurisdiction.[5] Three of the Virginia laws were found to be unconstitutional, the court retaining jurisdiction as to the other two acts but refusing to pass on their validity until they could be construed by the courts of the state. On appeal by the State of Virginia to the United States Supreme Court, *held*, reversed, three Justices dissenting. The three statutes found to be unconstitutional are not so clearly violative of the Constitution that a state court interpretation might not avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the federal question. The district court should have postponed decision as to the constitutionality of these laws pending a state court interpretation thereof. *Harrison v. NAACP*, 360 U.S. 167 (1959).

The doctrine of equitable abstention, expressed by the Court in the instant case, is one of the principal court-created means for limiting the exercise of federal jurisdiction to enjoin state action.[6] The leading case establishing this doctrine is *Railroad Commission of Texas v. Pullman Co.*,[7] wherein the Court advanced as a basis for postponing the exercise of jurisdiction pending action in the state courts the policy of avoiding constitutional adjudication whenever possible, as well as the potentiality for

"(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

The substantive law provisions applicable are 42 U.S.C. §§ 1981, 1983 (1952).

4. 28 U.S.C. § 1332 (1952).

5. *Id.* § 1331.

6. In *Ex parte* Young, 209 U.S. 123 (1908), the Court held that a suit to enjoin a state official from acting in a manner alleged to violate the Federal Constitution is not subject to an eleventh amendment objection, and therefore is not excluded from the federal judicial power. Since that decision a series of federal statutes have imposed restraints on the power of the district courts to issue injunctions against state action. Two of the most important of these were the Johnson Act of 1934, which applies to injunctions against state regulatory agencies, 28 U.S.C. § 1342 (1952), and the Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1952).

Some judicially-created devices which have limited the power of the federal courts to enjoin state action include the rule that equity will not act if there is an adequate remedy at law, Boyce's Ex'rs v. Grundy, 28 U.S. 210 (1830); the rule that equity will not ordinarily enjoin criminal proceedings, *In re* Sawyer, 124 U.S. 200 (1888); and the equitable abstention doctrine.

7. 312 U.S. 496 (1941). The *Pullman* decision was not the first in which the abstention device had been used (see Pennsylvania v. Williams, 294 U.S. 176 (1935); Hawks v. Hamill, 288 U.S. 52 (1933); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929)), but it was the first in which an unequivocal statement of the doctrine appeared, and is generally cited as the leading case for the doctrine.

friction between the federal and the state judiciary inherent in striking down state action. The Court's statement of the abstention doctrine in the *Pullman* case sets out the major factors generally considered by the courts in determining the appropriateness of abstention in cases involving a federal constitutional question.[8] On the other hand, in cases where an injunction against state action is sought and no federal constitutional question is present, the applicability of the abstention doctrine will depend upon such factors as the lack of federal court equipment to deal with complex state regulatory schemes, and generally upon the desirability of avoiding potential federal-state friction.[9] In the non-constitutional cases where equitable abstention is deemed appropriate, the practice of the federal courts generally is to dismiss the action.[10] In the constitutional abstention cases, the general rule is that federal action will be stayed, but the federal court will retain jurisdiction over the federal question pending a state court's settlement of the interwoven questions of state law.[11]

Something of an exception to the general rule of applicability of the equitable abstention doctrine in cases where a federal constitutional question is interwoven with an unsettled question of state law may be seen in recent decisions in the lower federal courts involving deprivations of personal liberties. Examination of some of these decisions indicates that where the federal cause of action is based upon deprivation of a party's civil rights, the federal courts have been somewhat reluctant to apply the abstention doctrine.[12] In some of these cases the refusal to abstain was based upon concern for the peculiar urgency in securing a fed-

8. See City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959); Government & Civic Employees Organizing Committee, CIO v. Windsor, 353 U.S. 364 (1957); Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957); Government & Civic Employees Organizing Committee, CIO v. Windsor, 347 U.S. 901 (1954); Albertson v. Millard, 345 U.S. 242 (1953); Shipman v. Du Pre, 339 U.S. 321 (1950); Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949); AFL v. Watson, 327 U.S. 582 (1946); Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450 (1945); Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101 (1944); Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942).

9. County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Stefanelli v. Minard, 342 U.S. 117 (1951); Alabama Pub. Serv. Comm. v. Southern R.R., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943).

10. See note 9 *supra*.

11. See note 8 *supra*. One exception to this rule is the case of Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949), where dismissal of the complaint, rather than retention, was ordered.

12. Romero v. Weakley, 226 F.2d 399 (9th Cir. 1955), reversing 131 F. Supp. 818 (S.D. Cal. 1955); Westminster School District v. Mendez, 161 F.2d 774 (9th Cir. 1947); Mitchell v. Wright, 154 F.2d 924 (5th Cir. 1946); Morris v. Williams,

eral determination of a party's civil rights.[13] In others, it appears that the courts have been willing to exercise their jurisdiction without regard to the abstention doctrine once it has been determined that the doctrine of exhaustion of administrative remedies does not apply.[14] In still others, the courts have exercised their jurisdiction without any discussion of their reasons for not abstaining.[15]

The instant case appears to clear up much of the confusion exhibited by the lower courts on the question of the applicability of the abstention doctrine in a civil liberties case.[16] Under this holding, it seems that hereafter the same determination of the abstention issue will be appropriate in cases involving civil rights as is exercised in other constitutional abstention cases. There has been criticism of this holding as running counter to the clearly expressed intention of Congress in enacting the civil rights legislation, on which jurisdiction herein was predicated, to have a speedy effective determination of a party's civil rights in the federal courts.[17] The dissent in the instant case makes a

149 F.2d 703 (8th Cir. 1945); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956), aff'd mem., 352 U.S. 903 (1956); Dyer v. Kazuhisa Abe, 138 F. Supp. 220 (D. Hawaii 1956); Heard v. Ouachita Parish School Board, 94 F. Supp. 897 (W.D. La. 1951); Alesna v. Rice, 74 F. Supp. 865 (D. Hawaii 1947), reversed, 172 F.2d 176 (9th Cir. 1949); Stapleton v. Mitchell, 60 F. Supp. 51 (D. Kan. 1945), appeal dismissed sub. nom., McElroy v. Mitchell, 326 U.S. 690 (1945); Mills v. Board of Education, 30 F. Supp. 245 (D. Md. 1939). *Contra*: Williams v. Dalton, 231 F.2d 646 (6th Cir. 1956); Carson v. Board of Education, 227 F.2d 789 (4th Cir. 1955); Dawley v. Norfolk, 159 F. Supp. 642 (E.D. Va. 1958), affirmed, 260 F.2d 647 (4th Cir. 1958), cert. denied, 359 U.S. 935 (1958); Lassiter v. Taylor, 152 F. Supp. 295 (E.D.N.C. 1957); Catoggio v. Grogan, 149 F. Supp. 94 (D. N.J. 1957); Bryan v. Austin, 148 F. Supp. 563 (E.D. S.C. 1957), vacated as moot, 354 U.S. 933 (1957); Robinson v. Board of Education, 143 F. Supp. 481 (D. Md. 1956).

13. Romero v. Weakley, 226 F.2d 399 (9th Cir. 1955); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956), aff'd mem., 352 U.S. 903 (1956); Alesna v. Rice, 74 F. Supp. 865 (D. Hawaii 1947); Stapleton v. Mitchell, 60 F. Supp. 51 (D. Kan. 1945).

14. Mitchell v. Wright, 154 F.2d 924 (5th Cir. 1946).

15. Westminster School District v. Mendez, 161 F.2d 774 (9th Cir. 1947); Morris v. Williams, 149 F.2d 703 (8th Cir. 1945); Heard v. Ouachita Parish School Board, 94 F. Supp. 897 (W.D. La. 1951); Mills v. Board of Education, 50 F. Supp. 245 (D. Md. 1939).

16. The instant case is the first expression by the Supreme Court on this question since the *Pullman* case (312 U.S. 496 (1941)), wherein Justice Frankfurter, speaking for the Court, stated that the case "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative . . . is open." This language was directed at the complaint of the Pullman porters, intervenors in the case, who were alleging that an order of the Texas Railroad Commission violated the equal protection clause of the Fourteenth Amendment. The *Pullman* case, however, has not been considered a civil rights case, and has not been cited as authority in civil rights cases, presumably because the chief complaint in the case was by the Pullman Company, who were alleging that the Railroad Commission's order amounted to a deprivation of *property* without due process of law in contravention of the Fourteenth Amendment.

17. See Comment, 14 RUTGERS L. REV. 185 (1959).

strong argument against the exercise of abstention in a civil rights case, especially where the statutes being questioned are expressions of "a state policy that seeks to undermine paramount federal law."[18] The majority opinion does not comment on this point, other than to state that "we are unable to agree that the terms of these three statutes leave no reasonable room for a construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem."[19]

There is language in the opinion of the instant case which gives rise to speculation as to some further significance of the case. The Court indicates that it will not come to grips with the question of the constitutionality of a state statute until it has become "a complete product of the state."[20] Presumably a statute is never a "complete product of the state" until it has been construed by the courts of the state.[21] If this is what is meant by this language, it is possible that the instant case represents an extension of the abstention doctrine, since the mere fact that the state courts have not construed a statute apparently has not been a sufficient basis for applying the abstention policy in prior cases.[22] Assuming that this fact is henceforth to be accorded more weight than formerly in the determination of whether abstention is appropriate, it might well dictate the exercise of abstention where the doctrine has hitherto not been applied. For example, it is generally understood that abstention is not appropriate in a case where the federal constitutional challenge is levelled at the vagueness and breadth of a state statute proscribing speech, whether or not the statute has ever been given a state court construction, since the issue raised is whether the statute is invalid on its face. But under the "complete product of the state" language, it is arguable that such a statute might be sent back in order to give the state court an opportunity to pass on the question of constitutionality.

Clearly the instant case stands for the proposition that the doctrine of equitable abstention applies in civil rights cases, the same considerations to be applicable in determining the appropriateness of abstention in these cases as in other cases involving

18. 360 U.S. 167, 184 (1959).
19. *Id.* at 177.
20. *Id.* at 178.
21. *Ibid.* The Court stated that a complete product of the state is "the enactment as phrased by its legislature and as construed by its highest court."
22. See, e.g., Morey v. Doud, 354 U.S. 457 (1957).

federal constitutional questions. While such a decision may be desirable from the standpoint of uniformity of the law, and while it may follow logically from statements of the abstention doctrine found in many of the cases, it is the view of this writer that the dissent's argument that the civil rights legislation takes this case out of the general rule has not been met. The dissenting opinion points out that since the equitable abstention doctrine arose in the *Pullman* case, it has been extended so far as to have become a delaying tactic, both expensive and frustrating. Apart from regional connotations, there is some merit to the views of one writer that applying the abstention doctrine in cases like the instant case "gives utterance to the very legal discord which the [civil rights] statutes were enacted to silence."[23]

David W. Robertson

LABOR LAW — POWER OF THE ARBITRATOR TO AWARD DAMAGES

Plaintiff union brought an action for specific enforcement of an agreement to arbitrate, which was treated as an action for a declaratory judgment interpreting a provision in the collective bargaining agreement with defendant employer calling for arbitration of differences in the interpretation or performance of the agreement. Defendant had assigned an employee overtime work which plaintiff contended should have been assigned to another employee. Plaintiff demanded that the aggrieved employee receive premium pay for the work unjustly denied him. Defendant refused to pay him on the ground of a company policy of "no work—no pay," but did offer to let him work four hours at his convenience, for which he would receive premium pay. Plaintiff refused this offer and requested arbitration. Defendant agreed on condition the arbitration be limited to a determination of whether there had been a violation of the agreement, without formulating a remedy. The agreement was silent as to the arbitrator's power to award damages or penalties for misassignment of overtime, although other sections provided for remedies.[1]

23. See Comment, 14 RUTGERS L. REV. 185, 191 (1959).

1. E.g., Section 14 dealing with vacations; Section 15 dealing with pay for those on jury duty; Section 16 dealing with severance pay; Section 17 dealing with annuities; Section 18 dealing with funeral leaves. The district court said: "In these clauses [enumerated above] there is language to be applied for determining an appropriate remedy, e.g., if there is a dispute as to whether or not a certain employee qualifies for a vacation without pay, the arbitrator certainly has the right to order the company to give the employee a two weeks' vacation with pay." Refinery Employees v. Continental Oil Co., 160 F. Supp. 723, n. 4 (W.D. La. 1958).