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State v. Douglas: Judicial "Revival" of an Unconstitutional Statute

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tween the reaction and the physical harm."[35] The "arising out of the employment" analysis fulfills this inquiry, while the use of the meaning of "accident" to grant or deny compensation simply avoids a determination of causation.[36] As a result of *Ferguson*, Louisiana courts can now concentrate on deciding whether the injury "arose out of" and occurred in the "course of the employment," thus permitting the needed flexibility in their decisions.[37]

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STATE v. DOUGLAS: JUDICIAL "REVIVAL" OF AN UNCONSTITUTIONAL STATUTE

Defendant, after a trial by jury, was convicted of inciting to riot.[1] The trial court denied defendant's motion for a directed verdict,[2] citing its lack of authority.[3] On appeal, the Louisiana supreme court

dents." *See, e.g.*, Matter of Kilmas v. Trans Carib. Air., 10 N.Y.2d 209, 219 N.Y.S.2d 14, 176 N.E.2d 714 (1961); Schecter v. State Ins. Fund., 6 N.Y.2d 506, 190 N.Y.S.2d 656, 160 N.E.2d 901 (1959). *See also* J. Norman Geipe, Inc. v. Collett, 172 Md. 165, 190 A. 836 (1937).

Other courts have simply denied compensation on a finding that the employment's connection with the injury was not proven. *See, e.g.*, Jacobs v. Goodyear Tire & Rub. Co., 196 Kan. 613, 412 P.2d 986 (1966); Brundage v. K.L. House Const. Co., 74 N.M. 613, 396 P.2d 731 (1964); Shea v. Youngstown Sheet & Tube Co., 139 Ohio St. 407, 40 N.E.2d 669 (1942).

On the other hand, some decisions have found the necessary employment connection to grant compensation. *See, e.g.*, Travelers Ins. Co. v. Neal, 124 Ga. App. 750, 186 S.E.2d 346 (1971). These courts have in effect held that the injury "arose out of" and in the "course of the employment."

35. Page, *Workmen's Compensation Law—Reviews of Leading Current Cases*, 28 NACCA L.J. 296, 306 (1961-62).

36. Comment, 70 YALE L.J. 1129, 1140 (1961).

37. *The Work of the Louisiana Appellate Courts for the 1962-1963 Term—Workmen's Compensation*, 24 LA. L. REV. 244, 249-50 (1964).

1. LA. R.S. 14:329.2 (Supp. 1969).

2. LA. CODE CRIM. P. art. 778.

3. The trial court was undoubtedly basing its ruling on *State v. Hudson*, 253 La. 992, 221 So. 2d 484 (1969), and cases following that decision in which Code of Criminal Procedure article 778 was declared to be of no effect due to its conflict with article XIX, section 9 of the Louisiana constitution which states in part that "[t]he jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge."

held that the motion for a directed verdict is not violative of the state constitution, thereby refusing to give effect to prior declarations of unconstitutionality. *State v. Douglas*, 278 So. 2d 485 (La. 1973).

Previously, in *State v. Hudson*[4] the supreme court had held that the motion for a directed verdict in jury trials was invalid under the Louisiana constitution. The reversal of *Hudson* in the instant case was based, alternatively, on a finding that prior declarations of unconstitutionality were dicta, or on an overruling of prior holdings of unconstitutionality.[5]

Even though the United States Supreme Court early recognized the function of the judiciary to review the constitutionality of statutes,[6] few cases have come before the courts and none have heretofore been decided by the Louisiana supreme court which answers the question whether a statute, once declared unconstitutional, can validly be applied in a later case by overruling the prior holdings of unconstitutionality.[7] Perhaps the most straightforward approach to the effect given such a statute is the "void ab initio" theory, under which an unconstitutional statute is considered as if it had no existence from the time of its enactment.[8] Apparently based on a belief that the legislature has no power to enact a statute which violates a constitutional provision,[9] this basis of decision seems to preclude later judicial recognition of the statute. While the "void ab initio" doctrine works well when equitable considerations dictate that the statute be treated as if it had never existed,[10] its purely doctrinal approach breaks down when there has been reliance on the statute which has given rise to vested rights,[11] when the reliance is pleaded

4. 253 La. 992, 221 So. 2d 484 (1969).

5. The court interpreted the text of the article, which states that in jury trials the court may direct a verdict of not guilty "if the evidence is insufficient to sustain a conviction," as referring to situations where there is "no evidence" adduced to prove the crime or an essential element thereof. This interpretation was apparently thought necessary in order to make the granting of a directed verdict a "question of law" rather than one of "fact" and therefore properly within the province of the trial judge. State v. Douglas, 278 So. 2d 485, 490-91 (La. 1973).

6. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

7. *See* O. FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE 1-8, 150-79 (1935).

8. *See, e.g.*, Norton v. Shelby County, 118 U.S. 425, 442 (1886) (where the court said "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.")

9. O. FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE 8-12 (1935).

10. It would seem that all effects of a criminal prosecution under a statute later found to be unconstitutional should be removed, insofar as possible, and the statute tested as if it had never existed.

11. A typical situation would be one in which the parties have contracted in reliance on a statute which is later found to be unconstitutional. It would seem unfair

as a defense to otherwise tortious conduct,[12] or in other situations in which the statute should reasonably be taken into account in deciding the controversy before the court.[13] In dealing with these situations courts have sometimes taken the view that a statute will be presumed a valid and enforceable enactment until such time as it is declared unconstitutional.[14] At other times they have declared that the constitutionality of a statute must be considered on a case by case basis, meaning, apparently, that the statute will be valid until declared invalid in a specific case and it will then be invalid only for that case.[15]

In *Chicot County Drainage District v. Baxter State Bank*,[16] the United States Supreme Court reversed a lower court decision that had been based on the "void ab initio" doctrine:

> It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualification. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored . . . and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.[17]

This decision recognizes that a statute, though enacted contrary to a constitutional provision, has existence, and a judicial declaration that it is contrary to a constitutional provision does not retroactively negate this existence.

In *Leisy v. Hardin*[18] the United States Supreme Court struck down a portion of an Iowa statute which prohibited sales of liquor in the "original package" as being an infringement on the commerce power reserved to Congress. Subsequently, in *In re Rahrer*[19] petitioner attacked his conviction under a similar Kansas statute which made

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to penalize either party when they have acted on the good faith belief that the legislation was valid.

12. A common situation arises when a law enforcement officer makes an arrest on the basis of a statute that is later declared unconstitutional. Treating the statute as if it had "no existence" would make it very difficult for the officer to explain his conduct under the circumstances.

13. *See generally* O. FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE (1935).

14. If not given full effect as a valid law, the statute will at least be given effect as an operative fact to be considered in the determination of the case.

15. *See, e.g.*, Shephard v. Wheeling, 30 W. Va. 479, 4 S.E. 635 (1887).

16. 308 U.S. 371 (1940).

17. *Id.* at 374.

18. 135 U.S. 100 (1890).

19. 140 U.S. 545 (1891).

all liquor sales unlawful. But in the interim, Congress had passed the "Wilson Act,"[20] which granted power to the states to regulate such commerce. Thus the court held that the Kansas statute was valid and enforceable as written and it was unnecessary to reenact that portion of the statute which had been previously unenforceable. In reaching this decision, the Court recognized the existence of the statute and took the position that the congressional act removed an "obstacle" which had heretofore prevented its full enforcement.

> This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the state to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress. That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a reenactment of the state law was required before it could have the effect upon imported which it had always had upon domestic property.[21]

Although this language seems to imply that there may be situations in which an act would be void and reenactment required for it to be effective, that situation was not presented. More important, in the present context, is the notion that removal of an "obstacle" allows enforcement of a statute without further legislative action. Though the *Rahrer* case dealt with a statute that was previously unenforceable only by implication, it seems to stand for the proposition that an unconstitutional statute need not always be unenforceable if the cloud of unconstitutionality can somehow be removed.

Prior Louisiana jurisprudence on the subject of judicial revival of a statute seems to be limited to declaration of the "void ab initio" theory. In *Jefferson v. Jefferson*,[22] comparing a rule of court to a statute, the court, in dicta, said:

> when a law is stricken as void, it no longer has existence as law . . . the law cannot be resurrected thereafter by a judicial decree changing the final judgment of unconstitutionality to constitutionality as this would constitute a reenactment of the law by the Court—an assumption of legislative power not delegated to it by the Constitution.[23]

In the instant case the majority, through Justice Barham, fo-

20. 27 U.S.C. § 121 (1970).
21. In re Rahrer, 140 U.S. 545, 565 (1891).
22. 244 La. 493, 153 So. 2d 368 (1963).
23. *Id.* at 501, 153 So. 2d at 370.

cused its discussion on the constitutionality of the directed verdict statute in supporting the holding that the statute was not violative of the Louisiana constitution,[24] and on the proposition that the prior holding of unconstitutionality was "mere dictum."[25] The alternative ground for the decision, that the statute may be reinstated by overruling prior decisions, was relegated to a short paragraph in the opinion.[26] Cited in support of this reinstatement was *West Coast Hotel Co. v. Parrish*,[27] in which the United States Supreme Court overruled *Adkins v. Children's Hospital*[28] without discussing the status of the previously invalidated statute.[29]

In *Douglas* the court seems to have adopted the position that the statute rendered unenforceable by *Hudson* was now valid because the "new" interpretation given it removed any bar to its enforceability. This reasoning appears to be a doctrinally sound approach to judicial review of statutes. If any controversy before the court involves two conflicting principles of law, one embodied in the constitution and one embodied in a statute, then the statutory principle must yield. If the court later reinterprets either provision obviating the conflict, then the statute can be enforced in the future without reenactment; it was not previously "invalidated," but simply not enforced because it was erroneously believed that the constitution prevented enforcement. The later decision regarding the constitutionality can be given retroactive effect under the traditional theory that it is a correct statement of the law as it has always existed.[30] However, the decision can be given only prospective application under the "Sunburst doctrine"[31] which recognizes the competency of state courts to limit the

24. State v. Douglas, 278 So. 2d 485, 490-91 (La. 1973).

25. *Id.* at 490.

26. This reinstatement was supported by a footnote which, after again disclaiming belief that the article had been declared unconstitutional, states that there would be "no problem in reinstating the article since it obviously does not involve any concern with substantive retroactivity. Therefore the case may be overruled, and if the law were invalidated, it can be reinstated." *Id.* at 491 n.6.

27. 300 U.S. 379 (1937).

28. 261 U.S. 525 (1923).

29. The status of the statute was considered shortly thereafter in an opinion by the Attorney General of the United States, who concluded that the statute was valid. 39 OP. ATT'Y GEN. 22 (1937). That view has been acted on by Congress in amending the statute without reenactment. D.C. CODE § 36-401 through 419 (1973). The same result was reached by the Municipal Court of Appeals for the District of Columbia. Jawish v. Morlet, 86 A.2d 96 (D.C. Mun. Ct. App. 1952).

30. *See* J. FRANK, LAW AND THE MODERN MIND 32-33 (1930).

31. Great Northern Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932). For a recent Louisiana supreme court case applying this doctrine see *Barnett v. Develle*, 289 So. 2d 129 (La. 1974).

effect of their decision to only future cases. The change of a statute from "constitutional" to "unconstitutional" or from "unconstitutional" to "constitutional" is not a change in the statute nor a change in the constitution; it is a change in judicial decision interpreting both and should be treated accordingly.

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WORKMEN'S COMPENSATION INSURERS—A DUTY TO INSPECT?

Plaintiff, injured at work when a cable on a crane broke, sued his employer's workmen's compensation insurance carrier as a third-party tortfeasor, alleging that the insurer had gratuitously undertaken to inspect the working premises, and in so doing negligently failed to detect and remove the cause of plaintiff's injuries. The Louisiana First Circuit Court of Appeal *held* since there was no undertaking by the insurance carrier either gratuitous or contractual to inspect for plaintiff's benefit it owed him no legal duty. *Kennard v. Liberty Mutual Insurance Company*, 277 So. 2d 170 (La. App. 1st Cir. 1973).

Whether the employer's workmen's compensation insurer can be liable as a third-party tortfeasor has been the subject of much controversy.[1] More often than not the decisions have turned on the question of the insurer's immunity under the exclusive remedy provisions[2] of the workmen's compensation acts, probably because the courts

1. *See, e.g.*, Beasley v. McDonald Eng. Co., 287 Ala. 189, 249 So. 2d 844 (1971); Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 199 N.E.2d 769 (1964); Fabricius v. Montgomery Elev. Co., 254 Iowa 1311, 121 N.W.2d 361 (1963); Smith v. American Empl. Ins. Co., 102 N.H. 530, 163 A.2d 564 (1960); U.S. Fid. & Guar. Co. v. Theus, 493 P.2d 433 (Okla. 1972); Kerner v. Employer's Mut. Liab. Ins. Co., 35 Wis. 2d 391, 151 N.W.2d 72 (1967). *See generally* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.90 (1970).

2. Some state workmen's compensation statutes explicitly grant to the workmen's compensation insurer the same immunity from third-party tort actions that is enjoyed by the employer by means of the exclusive remedy provision. *See, e.g.*, WIS. STAT. ANN. § 102.03 (2) (Supp. 1961), *amending* WIS. STAT. ANN. § 102.03 (1957), which provides that "the right to the recovery of compensation pursuant to this chapter shall be the exclusive remedy against the employer and the workmen's compensation insurance carrier." This particular provision was interpreted in *Kerner v. Employer's Mutual Liability Insurance Co.*, 35 Wis. 2d 391, 151 N.W.2d 72 (1967) and discussed in a comparison with Michigan law in *Ray v. Transamerica Insurance Co.*, 10 Mich. App. 55, 158 N.W.2d 786 (1968). *Cf.* LA. R.S. 23:1032 (1950), which states in part: "The rights and remedies herein granted to an employee or his dependent on account of a personal injury . . . shall be exclusive of all other rights and remedies of such employee . . . ."