WHEN MAILING A COPY OF V-1475 ALWAYS ENCLOSE COPY OF V-1532

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(N)

Overruled in part O-6242

July 11, 1952

Hon. Stewart W. Hellman
Criminal District Attorney
Tarrant County
Fort Worth, Texas

Opinion No. V-1475

Re: Constitutionality of that portion of Art. 209, V.P.C., prohibiting employers from deducting from the wages of employees for the time employees are absent for the purpose of voting.

Dear Sir:

You have requested that this office review the holding in Attorney General's Opinion O-6242 (1944) in the light of court decisions which have been rendered since the opinion was written. That opinion held unconstitutional the portion of Article 209, Vernon's Penal Code, which makes it unlawful for an employer to subject an employee to a deduction of wages because of the exercise of the privilege of attending the polls. The full language of Article 209 is as follows:

> "Whoever refuses to an employee entitled to vote the privilege of attending the polls, or subjects such employee to a penalty or deduction of wages because of the exercise of such privilege, shall be fined not to exceed five hundred dollars."

This statute was originally enacted as a part of the Terrell Election Law of 1905. During the 47 years since its enactment, the statute has never been before an appellate court for construction or application. Opinion O-6242 held that the portion of the statute making it an offense for an employer to refuse an employee the privilege of attending the polls was valid. Similar provisions in statutes of other states have uniformly been upheld against constitutional attacks. See cases cited <u>infra</u>. In holding invalid that portion of Article 209 which prohibits an employer from deducting from an employee's wages for time away from work while attending the polls, the opinion followed two Illinois

cases which held that a comparable provision in an Illinois statute was an unreasonable abridgment of the right to make contracts, in violation of the due process clauses of the federal and state constitutions. People v. Chicago, M. & St. P. Ry., 306 Ill. 486, 138 N.E. 155, 28 A.L.R. 610 (1923); McAlpine v. Dimick, 326 Ill. 240, 157 N.E. 235 (1927). In the first case the Supreme Court of Illinois said that this provision of the statute did not come within the police power of the state, since it did not tend to promote the health, safety, or morals of employees and could not be said to "secure public comfort, welfare, safety, or public morals."

In 1944, when Opinion O-6242 was written, these were the only cases which had ruled on the constitutionality of pay-while-voting provisions in state statutes. Since that date, the question has been considered by the highest state courts of Kentucky and Missouri and by the Supreme Court of the United States.[1]

In Illinois Cent. Ry. v. Commonwealth, 305 Ky. 632, 204 S.W.2d 973 (1947, cert. den. 334 U.S. 843), the court held that a Kentucky statute making it a misdemeanor for an employer to deduct from the usual wages of an employee absenting himself from work for the purpose of voting was unconstitutional as arbitrarily taking property away from one person and giving it to another person without value received or without any contractual basis, in violation of a provision in the Kentucky Constitution that "absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." The court held, further, that the statute was antagonistic to the due process and equal protection clauses of the 14th Amendment to the United States Constitution.

1/ In People v. Ford Motor Co., 63 N.Y.S.2d 697 (App. Div. 1946), the court upheld a conviction under a New York statute, holding that the police power afforded sufficient authority for the statute. Other decisions of state courts which touch indirectly on the constitutionality of pay-while-voting statutes are reviewed in the majority and dissenting opinions in State v. Day-Brite Lighting, Inc., 240 S.W.2d 886 (Mo. Sup. 1951).

In State v. Day-Brite Lighting, Inc., 240 S.W. 2d 886 (Mo. Sup. 1951), the Supreme Court of Missouri upheld the constitutionality of a Missouri statute making it a misdemeanor for any person or corporation to "cause any employee to suffer any penalty or deduction of wages" because of the exercise of the privilege of absenting himself from his employment on election day. The Missouri statute contained further provisions with respect to the time during which the voter was entitled to be absent from work; but so far as the immediate question is concerned, we are unable to perceive any ground of distinction between the Missouri statute and the Texas statute. The majority opinion held that political welfare is within the protection of the police power of a state and that the statute in question did not violate the due process, equal protection, or impairment of obligation of contract clauses of either the state or federal constitution. Upon review of that decision in Day-Brite Lighting, Inc. v. State, 72 S.Ct. 405 (1952), the Supreme Court of the United States held that the Missouri statute did not violate these clauses in the Federal Constitution. The majority opinion stated that the law, which was "designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote," came within the police power for the protection of the public welfare, which included the political well-being of the community. In the course of the opinion the court said: "Extreme cases are conjured up where an employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise."

From this review of decided cases, it is apparent that the complexion of the decisions has changed considerably since Opinion O-6242 was written in 1944. State courts have since reached conflicting results with respect to the effect of provisions in state constitutions on statutes of this nature, and the decision in the Day-Brite case has settled any question of unconstitutionality of the Texas statute under the Federal Constitution.

Inhibitions against state legislative action corresponding to the due process, equal protection, and impairment of obligation of contracts provisions of the Federal Constitution are also contained in the Texas Constitution. Article I, Section 16 of the Texas Constitution, like Article I, Section 10 of the United States Constitution, prohibits the passing of any state law impairing the obligation of contracts. The provision of

Article I, Section 3 of the Texas Constitution, declaring that all free men have equal rights, is comparable to the equal protection clause of the 14th Amendment, and the "due course of law" provision of Section 19 of Article I corresponds to the due process clause of the 14th Amendment.[2] We are not cognizant of any other provision in the Texas Constitution which might be invoked against the validity of the statute.

In undertaking a reconsideration of the holding in Opinion O-6242, we are confronted with the matter of evaluating the persuasiveness of a decision by the United States Supreme Court in regard to a question arising under the Federal Constitution, when a similar question is raised under the corresponding provisions of the Texas Constitution.

Unquestionably it is the right of the state courts to construe the constitutions of their own states, and in the present case we have no doubt that the courts of Texas would not be compelled to place the same construction on the Texas Constitution as the United States Supreme Court has placed on the Federal Constitution. See 21 C.J.S., Courts, § 204; 35 C.J.S., Federal Courts, § 171, and cases there cited. Nevertheless, the persuasiveness of the decisions of other tribunals on questions of first impression in the state court cannot be ignored. The attitude of state courts toward the decisions of federal courts is summarized in the following quotation from 21 C.J.S., Courts, § 205:

> "In cases not arising upon the construction of the constitution and laws of the federal government, but in which the state courts have full jurisdiction and their judgments are final, such courts will adhere to and follow their own decisions and are not bound by those of the federal courts, although

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2/ The courts of this State in innumerable cases have treated the equal rights and due course of law clauses of the Texas Constitution as being identical in scope with the equal protection and due process clauses of the 14th Amendment. See Mahee v. McDonald, 107 Tex. 139, 175 S.W. 676, 680 (1915); Hurt v. Cooper, 130 Tex. 433, 110 S.W. 2d 896 (1937); Ex parte Sizemore, 110 Tex. Crim. 232, 8 S.W.2d 134 (1928); Rumbo v. Winterrowd, 228 S.W. 258, 265 (Tex. Civ. App. 1921); 16 C.J.S., Constitutional Law, § 502, p. 988; id., § 568, p. 1148.

such decisions are persuasive; and the decisions of a state court of last resort upon a question as to which its judgment is final will be adhered to and followed by the lower courts of that state, even though it is in conflict with a decision of the supreme court of the United States. Accordingly the state courts are free to decide for themselves all questions of the construction of state constitutions and statutes. An exception to this rule has been made, however, where the federal supreme court has decided that it is necessary to construe a state statute in a certain way to prevent its being violative of the federal constitution; and where the question presented is as to the construction or violation of a provision of the state constitution which is similar to a provision of the federal constitution, and the same question has been decided by the federal supreme court with respect to the federal constitution, the federal decision is strongly persuasive as authority, and is generally acquiesced in by the state courts, although it is not absolutely binding. . . ."

Under the existing state of authorities, we feel that it is our duty to overrule our former opinion and to follow the decision of the United States Supreme Court in Day-Brite Lighting, Inc. v. State, supra. We therefore hold that the provision of Article 209, V.P.C., prohibiting employers from deducting from the wages of employees for the time the employees are absent for the purpose of voting is constitutional. This provision of the statute should be interpreted in the light of the holding in Opinion O-6242, which we here reaffirm, that the employee is entitled to absent himself from his job for a reasonable time, depending on local conditions.

SUMMARY

Article 209, V.P.C., making it an offense for an employer to refuse to an employee

the privilege of attending the polls or to deduct from the employee's wages because of the exercise of that privilege, is constitutional. Day-Brite Lighting, Inc. v. State, 72 S. Ct. 405 (U. S. Sup. Ct. 1952).

APPROVED:

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Yours very truly,

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