EDUCATIONAL SERIES

NON-PARTISAN JUDICIARY

Nebraska's democratic legislature at its last session enacted a law providing for a non-partisan judiciary. This law prohibited political parties from nominating candidates for judges and candidates for school offices. At the instigation of the republican state committee proceedings were commenced for the purpose of destroying this law. The supreme court of the state declared the law to be unconstitutional. Of the five members sitting on the case three were to be, and now are, candidates for re-election. Two of those are republicans and one is a democrat. The two republicans declared against the law while the democrat, Judge J. R. Dean, held that the law was constitutional. The court stood three to two. Three republicans wrote the court's opinion declaring the law to be un-constitutional. Judge Letton, republican, followed with a dissenting opinion upholding the law. Judge Dean's opinion in support of the law will be of general interest. It follows:

I am unable to concur in the opinion of the majority of the court. From the arguments of counsel and the law applying to the facts it does not clearly appear that the act in question comes within the inhibitory provisions of the fundamental law that have been invoked to destroy it. The act is attacked solely on constitutional grounds, and thus the recognized rules of this and other jurisdictions, in cases involving constitutional construction, should be applied to determine the right of the act to take a place among the laws of the state.

Viewed from any point there is a delicacy surrounding the discussion of some features of the case that would be gladly avoided, but due regard for the performance of a public duty otherwise directs. The legislature has for many years been modifying the general election laws in response to public demand. It gave us the Australian ballot system and events have proven its wisdom. It gave us the state wide primary law and, while it may be defective in some respects, it is within the province of the legislature to amend it. In any event it is not likely a return will be had to the convention system of nominating candidates for public office. The non-partisan judiciary act, with but seven negative votes in the senate and but twenty-seven negative votes in the house recorded against it, is but an expansion of the general primary system. Its principle is not new to the statute books of five states or more. It is not an untried experiment.

In the preservation of the constitutional checks and balances of our system of government is involved the preservation of government itself. It is fundamental that the legislative, executive and judicial departments should each be free to perform their separate functions without interference from either of the others. Applying this principle to a legislative act, the validity whereof is attacked on the sole ground of being repugnant to the constitution, a decent respect for the legislative and executive departments which have respectively passed and approved it, inculcates an abiding desire on the part of the judiciary to refrain from disturbing it except for the most weighty reasons.

An act of the legislature is presumed to be constitutional. This presumption continues until the contrary is affirmatively shown by the challenging party. The legislature is presumed to know, to interpret and to make effective by competent legislative enactment the will of the people, and every act passed that is conformable to the constitution has all the power of that instrument behind it. All intendments of the law favor these presumptions. The judiciary is not the master of the constitution but merely its interpreter, and in the exercise of this prerogative it is not the court's duty to declare an act unconstitutional unless it clearly and beyond question contravenes some provision of the fundamental law, and every reasonable doubt will be resolved in favor of sustaining the act. By close adherence to this long familiar rule may the judiciary preserve itself from the imputation of even seeming to invade the legislative realm. It may thus avoid "bench legislation," an insidious judicial offense, and one which may in time, if indulged, imperil the perpetuity of our institutions. Cooley's Const. Lim. 7th Ed., 227; Prof. Wigmore, 23 Am. Law Review, 719; City of Topeka v. Gillett, 32 Kan. 431; Ogden v. Saunders, 12 Wheaton (U. S.) 270; Hoover v. Wood, 9 Ind. 286; Wellington Petitioner, 16 Pick. 96.

The majority opinion holds: "Political parties are the great moving forces in the administration of public affairs. * * *" That evil influences and impure motives should creep into the management of political parties are circumstances that have been long recognized and are everywhere deplored. But the act is not aimed at the destruction or even the impairment of an exercise of the legitimate functions of political parties. The relator's argument on this point indicates he is seized with this fear, and in a manner his protest against the act is suggestive of John's protest at Runnymede. The non-partisan act leaves the solution of political questions to political parties. It appears to be only a well directed protest against the domination of non-political departments of government by partisan political influence. Justice, in the proper application of its principles, is no respecter of party lines. No logical reason for the domination of our school system by the spirit of partisanship can be advanced. There is sufficient latitude in public questions and public problems, that are in their nature purely political, to absorb the legitimate attention of those whose guiding hands would direct the destinies of the political parties and thus indirectly, but none the less potently, the destiny of state and nation. In the departments sought to be affected the legislature has the right within the bounds of the fundamental law to exert its power to the end they may be effectively removed by legislative enactment from the domain of partisan politics.

Who will question the propriety of legislation to the end the judiciary may avoid even the appearance of securing place and power at the hands of the cunning captains of political patronage? He was a wise writer who said: "A gift doth blind the eyes." Is the gift less seductive, and will it less effectually dull the eye of the magistrate to the iniquities of the giver because it takes the form of preferment in office? No one will question the propriety of giving added meaning to the vital truth expressed in the motto of our state, "Equality Before the Law." By what means may this result be the better maintained. Will it be by an immersion of the judiciary in the seething pool of partisan politics, or will it be by its separation from that stirring feature of political life in the manner pointed out by the act in question? The legislature, coming from the body of the people, and charged with legislative responsibility, solved the problem in a manner satisfying to itself by the passage of the non-partisan judiciary act. Who then is to pass upon the wisdom or the unwisdom, the expediency or the inexpediency that may be involved in its declared purpose? Not the judiciary for it is not within its constitutional province, but the legislature alone in the exercise of its power to amend and its power to repeal.

Will it be seriously urged that loyalty to party or to party leadership, because of past achievement or promise of future performance, or for any sane reason, is always and everywhere and regardless of all else the paramount duty of the citizen, whether in or out of office? It is to be deplored that in some instances in public history, in the exuberance of an intense partisan spirit, loyalty to party leadership seems at times almost to have overcome loyalty to all else. Political parties will be always with us. They are inseparable from our form of government, but danger lies in the direction of the exercise of a spirit of excessive and unreasoning loyalty to party or to party leaders. See "Message of the Presidents," (Washington), p. 54; Bryce's, "The American Commonwealth," vol. 1, p. 104.

The opinion holds in effect that because, under the provisions of the act in question, only five hundred petitioners in Adams county, the home of relator, can take part in nominating him that he might thereby be prevented from receiving a nomination and the electorate of his county, which contains about 5,000 electors, would thus be deprived the opportunity of voting for him. The point does not seem to be well taken. It does not appear reasonable to believe the enforcement of this feature of the act would be fraught with results so serious. There are eight counties contiguous to that of relator, having a population in each that is not much, if any, less than that of Adams county. Thus, in his own and in the eight neighboring counties, with one additional, the names of the requisite five thousand signatures might be obtained by the relator, or by any qualified candidate. In the state at large the entire vote amounts to approximately 250,000. Two per cent of that number is the number of signatures required to place the name of relator in nomination. The most populous county in the state has approximately 25,000 voters. Two per cent of that number is the maximum number of signatures permitted by the act in any one county, so that upon a percentage basis, while it is true no percentage is named in the act, it is seen there is no distinction between the different portions of the state and no distinction as to the number of signatures required of candidates for position in the same class. The act seems to impose no unusual or unreasonable burden or restriction in the requirement that the signatures of five thousand electors shall be obtained, with the limit of five hundred in any one county. These are mere details of the law, regulations that are within the power of the legislature to prescribe. By the arrangement of the ballot provision is made that the voter may write in the names of such additional persons as may commend themselves to his choice. Healey v. Wipf, 117 N. W. (S. Dak.) 521; 23 Am. Law Review, 719; Paine on Elections, (1888), sec. 5.

The act is not obnoxious to the constitutional prohibition against class legislation because it includes all candidates for judicial position in courts of record, and all candidates for executive school positions. It adds no new qualifications to the constitutional requirements respecting the position sought by relator. State v. Hunter, 28 Kan. 578; State v. Township Committee, 14 Atl. Rep. 587; City of Topeka v. Gillett, 32 Kan. 431; State v. Berka, 20 Neb. 375; State v. Irrigation Co., 59 Neb. 1.

The majority opinion cites State v. Drexel, 74 Neb. 776. There a candidate for nomination was required, by the act there in question, to pay a sum equal to one per cent of the salary of the desired office, for the term, to entitle his name to appear on the primary ballot. In brief, the act required him to purchase the right to submit his name to the electorate as a party candidate for nomination. The act was held to be clearly repugnant to the constitution, but it does not clearly appear that the rule there invoked applies to the facts in the case at bar. People v. Election Commissioners, 221 Ill. 9; and Rouse v. Thompson, 228 Ill., 522, are cited in the majority opinion. The soundness of all that is said in the cited portions of the cases may be conceded. For the most part they appear to show a connection between the primary election and the general election.

The opinion discusses two features that were not argued in the brief of relator. Reference is had to the feature limiting the number of signatures that may be obtained in any one county to five hundred, and to that other feature which discusses freedom of speech and the right to peaceably assemble. It is an established rule of this court that assignments which are not argued in the briefs of the party complaining are deemed to be waived and will receive no attention here. The reason for the rule and its application is sound. It is fair to all litigants, avoids surprise to counsel and gives to each party an equal opportunity to be heard on contested matter. In Brown v. Dunn, 38 Neb. 52, the rule was applied by Ragan, C. "We will not examine errors alleged in a petition in error unless such errors are specifically pointed out and relied upon in the briefs filed in the case, under the rules of this court." In support of his ruling he cites Phenix Ins. Co. v. Lord, 37 Neb. 423. To the same effect are the following: Peaks v. Lord, 42 Neb. 15; Madsen v. State, 44 Neb. 631; Blodgett v. McMurtry, 54 Neb. 71; Scott v. Chope, 33 Neb. 41; Glaze v. Parcel, 40 Neb. 732; Gulick v. Webb, 41 Neb. 706; Erch v. Bank, 43 Neb. 613; Johnson v. Gulick, 46 Neb. 817; Wood Co. v. Gerhold, 47 Neb. 397; Mandell v. Weldin, 59 Neb. 699.

The majority opinion holds: "Where it appears on the face of the legislative act that an inducement for its passage was a void provision, the entire act falls," and that, "Where valid and invalid parts of a legislative act are so intermingled that they can not be separated in such a manner as to leave an enforceable statute expressing the legislative will, no part of the enactment can be enforced." Even assuming that the portions of the act in question

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