BROWN CRACKER & CANDY CO. v. CITY OF DALLAS.

(Supreme Court of Texas. May 17, 1911.)

MUNICIPAL CORPORATIONS (§ 592*)—REGULATION—ORDINANCES—STATE LAW.

Dallas city ordinance regulating, colonizing, and segregating keepers and inmates of bawdyhouses is in violation of Pen. Code 1895, art. 361, as amended by Laws 1907, c. 132, providing that any person who shall keep a disorderly house, shall be punished by fine, imprisonment, etc., and invalid, Const. art. 1, § 28, providing that no power to suspend laws shall be exercised except by the Legislature, so that the city had no authority to suspend article 361 within the specified district.

[Ed. Note.—For other cases, see Municipal Corporations, Cent Dig. § 1314; Dec. Dig. § 592.*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Henry Hatcher and others against the City of Dallas. From a judgment in favor of defendant, affirmed by the Court of Civil Appeals, plaintiff Brown Cracker & Candy Company brings error. Reversed and remanded.

Wm. Clark, Edward P. Dougherty, and Jno. F. Murphy, for plaintiff in error. James J. Collins and Jno. C. Robertson, for defendant in error.

BROWN, C. J. Henry Hatcher, for himself and other citizens of the city of Dallas, instituted this suit in the Fourteenth district court in and for Dallas county against the city of Dallas and its mayor, S. J. Hay, and its commissioners, Harry L. Seay, D. F. Sullivan, William Doran, and C. B. Gillespie. It is alleged that all of the said plaintiffs own property contiguous to the district which is embraced in the description contained in the ordinance hereafter mentioned.

It is alleged in the said petition that the charter of the city of Dallas contains the following provision: "To prohibit and punish keepers and inmates of bawdyhouses and variety shows, to prevent and suppress assignation houses and houses of ill fame; and to regulate, colonize and segregate the same; to determine such inmates and keepers as vagrants and provide for the punishment of such persons." It is further alleged that under and by authority of the said charter provision said commissioners enacted this ordinance: "Section 1. That all bawdyhouses and the inmates thereof, as defined by law, are hereby prohibited in any part of the city of Dallas except the district and territory hereinafter designated, within which district in accordance with article 362a of the Penal Code of the state of Texas, they shall hereafter be confined, which said district and territory is bounded as follows, to wit: * * *" It is also alleged that the officers above named were proceeding to make publication of the said ordinance as required by the said charter in order that the same may be put into effect, and, if not prevented from so doing, the said ordinance would become effective in the said city of Dallas, and that thereby there would be a district created in which bawdyhouses, houses of prostitution, and the like would be permitted to be established and maintained. The application for writ of error goes elaborately into a discussion of the case, quoting portions of the charter that are pertinent to the issue. It is alleged in the petition that the real estate near to the district described in the ordinance would be greatly depreciated in value by reason of the presence of said houses as resorts for immoral persons and criminal characters of different kinds, and that the petitioners would be greatly damaged, because they would not be able to rent or sell their property at reasonable prices. The Brown Cracker & Candy Company specially alleges damages in the fact that it has a large business in the vicinity of the said district in which it employs a large number of respectable females, whom the company would not be able to employ, and it could not secure suitable and proper help to carry on its business in the neighborhood of such reservation as that to be created by the ordinance. The court sustained a general demurrer and dismissed the petition, from which the Brown Cracker & Candy Company alone appealed to the Court of Civil Appeals, and that company alone made application for writ of error to this court, which was granted.

The charter of the city of Dallas contains this language: "That no ordinance shall be enacted inconsistent either with the laws of the state of Texas, or inconsistent with the provisions of this act." This section of the charter expresses no more than was before the general rule of law. 1 Dill. Corp. § 319. If, therefore the ordinance sought to be enjoined is in conflict with article 361, Pen. Code, as amended in 1907 (Laws 1907, c. 132), the ordinance cannot be sustained. Article 361 reads: "Any person who shall, directly or as an agent for another, or through any agent, keep or be concerned in keeping or aid or assist or abet in keeping a bawdyhouse or a disorderly house, in any house, building, edifice or tenement, or shall knowingly permit the keeping of a bawdyhouse or a disorderly house in any house, building, edifice or tenement owned, leased, occupied or controlled by him, directly as agent for another, or through any agent, shall be deemed guilty of keeping or being concerned in keeping or knowingly permitted to be kept, as the case may be, a bawdyhouse or a disorderly house, as the case may be, and on conviction shall be punished by a fine of two hundred dollars and by confinement in the county jail for twenty days for each day he shall keep, be concerned in keeping or knowingly permit to be kept, such bawdy or dis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

orderly house." The ordinance provides: "That all bawdyhouses and the inmates thereof, as defined by law, are hereby prohibited in any part of the city of Dallas except the district and territory hereinafter designated, within which district in accordance with article 362a of the Penal Code of the state of Texas, they shall hereafter be confined. * * *" By this language bawdyhouses are prohibited in every part of the city of Dallas except the territory designated "within which district in accordance with article 362a of the Penal Code of the state of Texas, they shall hereafter be confined." This language compels such houses and their inmates to be and remain in that district, if they be in Dallas. The fourth section provides for regulating their conduct, and guarding the inmates from disease, presumably to protect male visitors. An argument to demonstrate that the ordinance permits such houses to exist in that district would be inexcusable. The language is too plain to require explanation or application. The ordinance is plainly in conflict with article 361, copied above, which denounces the penalty of extermination against all such places and houses and practices, and, upon conviction, inflicts a penalty of $200 and 20 days' imprisonment upon all persons for each day they may be concerned in operating them. The antagonism between the ordinance and the law is as emphatic as that between life and death.

It follows logically that both laws cannot be in force in that territory at the same time, and it devolves upon this court to determine which is to be maintained. As before stated, the law of the state, if in force, must prevail, and the inquiry now reaches that point upon which the decision of this case must depend. In Davis v. State, 2 Tex. App. 425, it was held, in effect, that a provision in the charter of the city of Waco similar to that under consideration had the effect to suspend the state law on the same subject. In that case the court cites State v. Clark, 54 Mo. 17, 14 Am. Rep. 471, which sustains that view of the question, but no reference is made to anything in their Constitution that would affect the question. Our Constitution at the time the Davis Case was decided was materially different from article 1, § 28, of the present Constitution, which reads: "No power of suspending laws in this state shall be exercised except by the Legislature." The present Constitution omits at the end of this section the words, "or by its authority," which words were in that section of all former Constitutions. Under the former Constitutions, it might have been, and probably should have been, held that the provision in the charter authorizing the city "to regulate and segregate," etc., such houses, gave authority to such city to suspend the state law on the same subject, and that the enactment of such an ordinance would have that effect. In Burton v. Dupree, 19 Tex. Civ. App. 275, 46 S. W. 272, Judge Key, in his usual succinct and forcible style, points out the difference between the former and present provisions of our Constitution, and states clearly the effect such change must have upon this question. Quoting the present section 28 of article 1 of the Constitution, that learned judge says: "This section restricts the power to suspend laws to the Legislature, and expressly prohibits the exercise of such power by any other body. In view of this provision of the Constitution, it must be held (whatever may have been the power of the Legislature under former Constitutions) that that body cannot now delegate to a municipal corporation or to any one else authority to suspend a statute law of the state. We therefore hold that the provisions of the Penal Code referred to were and are in force within the entire limits of the city of Waco, as well as elsewhere in the state, and that the lease contract in question, being knowingly made for the purpose of assisting in the violation of a penal law, is contrary to public policy, and not enforceable in the courts." Since the amendment of the Constitution, the Court of Criminal Appeals has held in accordance with Judge Key's opinion. If it be admitted that the Legislature intended to confer upon the city of Dallas authority to suspend article 361 within the district laid out, that provision of the charter would be void, because in conflict with section 28 of article 1 of our present Constitution. The Legislature had no authority to delegate that power to the city.

We are of the opinion that the ordinance sought to be enjoined is void, and that the district court erred in sustaining the demurrer to plaintiff's petition, and the honorable Court of Civil Appeals erred in affirming that judgment. It is therefore ordered that the judgments of the district court and Court of Civil Appeals be reversed, and the cause be remanded to be disposed of in accordance with this opinion.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. HIXON.

(Supreme Court of Texas. May 10, 1911.)

MASTER AND SERVANT (§ 32*)—BLACKLISTING STATUTE—LETTERS—RIGHT OF ACTION.

A railroad discharged a brakeman, because he refused to proceed upon a train which he thought was not properly equipped. Under the blacklisting statute (Acts 30th Leg. c. 67, § 1, par. 3), providing that any person discharged by any corporation may demand in writing a true, written statement of the cause of his discharge, the brakeman received one basing it on grounds of insubordination. He sued for damages, claiming that the statement should have included the circumstances surrounding his refusal to proceed upon the train, but failed to allege that the statement was published, other than by addressing it to himself, or that the matters stated were known to be untrue, or

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