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IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

HEMAN SWEATT

VS.

THEOPHILUS SHICKEL PAINTER, ET AL

TRIAL BRIEF

HERMAN SWEATT VS. THEOPHILUS SHICKEL PAINTER

HEMAN SWEATT	)	IN THE DISTRICT COURT
VS.	)	OF
THEOPHILUS SHICKEL PAINTER, ET AL	)	TRAVIS COUNTY, TEXAS

T R I A L B R I E F

Writ of Mandamus

Although a writ of mandamus will not lie to control or review official action involving the exercise of discretion or judgment, it does not necessarily follow that the writ will be denied merely because the duty involved an element of discretion.

Miller vs. State, 53 SW (2) 838
Parish v.s. Wright, 293 SW 659

The relator must show that there is no impediment to the acts sought to be compelled.

Anderson vs. Polk, 297 SW 219

It is well settled that a writ of mandamus will not issue to enforce a right which is contigent or incomplete by reason of a condition precedent still unperformed by the relator.

English and Scottish American Mortgage and Investment Company vs. Hardy, 53 SW169
Boone vs. McBee, 280 SW 295
Longneck vs. Estes, 300 SW 968 (the Court held that the relator must do only the things that may be rightfully required of him.)

Where the respondent bases his failure to act upon the existence of a statute requiring the performance of certain things by the relator as a prerequisite to doing the acts sought to be compelled, the relator may attack the constitutionality of the statute.

Metropolitan Life Ins. Co. vs. Love
108 SW 821-1157
Jones vs. McMahan, 30 Texas 719
Hallman vs. Pabst, 27 SW (2) 340 (In this case, the court held that a public officer may attack the validity of the statute when he was called upon to perform his duty under such statute.)

A writ of mandamus lies only to compel the performance of an existing legal due that is a due that has already been imposed by the Constitution or statute.

Caven vs. Coleman, 101 SW 199

In order to show default it must appear that performance of the duty has been demanded of the respondent and that he has refused or failed to perform it.

Harney vs. Pickett, 37 SW (2) 717
City of Austin vs. Cahill, 88 SW 542
Burrell, et al vs. Blanchard, 51 SW 46
(In this case the writ was sought to compel the census taker to list Negro children on the roll with white children. The court held that the writ would lie, but the relator failed to make the proper parties respondents and the allegations were insufficient that demand was made on persons who had authority to list the children on the roll.)
Ferguson vs. Wilcox, et al, 28 SW (2) 526 (In this case the Supreme Court held that the relators petition for mandamus could not be dismissed as prematurely filed where answer set up fact showing relators inability to obtain the relief sought.)

In all of these cases the Courts held that a demand must be shown or such conduct on the part of the respondents that a demand for performance would have been futile.

A writ of mandamus lies to enforce the performance of a non-discretionary act or duty.

Miller vs. State, 53 SW (2) 838
King vs. Guerra, 1 SW (2) 373
Murphy vs. Sumners, 112 SW 1070

Whenever the law gives power to perform a particular fact or duty and provides no other special legal remedy for its performance the writ will issue.

City of San Antonio vs. Routledge
102 SW 756 (Writ of Error refused)

Adequate remedy in order to prevent resort to writ of manadamus must be plain, accurate, certain, speedy as well as adequate for the relief sought by the relator and must be such a remedy as will afford relief upon the very subject matter of the controversy and give the relator the particular right which the law affords him.

Houston & TC Railroad Company vs. City of Dallas
84 SW 648
Cleveland vs. Ward, 285 SW 1063
Chrestman vs. Thompkins, 5 SW (2) 257
City of Highland Park vs. Dallas Railway Co.
243 SW 674

Where the purpose of the suit is merely to require the performance of purely ministerial duty and the amount of the claim is not involved, the District Court has jurisdiction irrespective of the amount.

Harrison vs. Whitly, 299 SW 699 (Affirmed, 6 SW (2) 89

Article 7, Section 7, Constitution of Texas provides for separate schools.

Article 29 of the 1925 Revised Civil Statutes makes a like provision.

A university as defined by the Court is an aggregation or union of Colleges; an institution which aims to provide a complete eductaion in various and often quite diverse fields of human knowledge.

27 Ruling Case Law, Page 132
Ingram vs. Texas Christian University
196 SW 608

Article 7, Section 11, of Texas Constitution provides for the support of the University of Texas.

Where the legislature has delegated to the regents of the University of Texas, power to make rules necessary for its government, such board is invested with power to determine the class of persons that may be

admitted provided the rules in that regard are reasonable and not arbitrary, and discriminatory.

Article 2585, 1925 Revised Civil Statutes
Foley vs. Benedict, 55 SW (2) 805

The State may not, by any of its agencies, legislature, judicial or executive, disregard the constitutional prohibition and do indirectlythrough an administrative officer that cannot be done directly by the State.

Brinkerhoff-Farris Trust and Savings Company vs. Hill, 281 U. S. 673
Georgia Power Company vs. Decatur, 281 U. S. 505
Phillip Wagner vs. Leser, 237 U. S. 207
Home Telephone and Telegraph Company vs. Los Angeles 227 U. S. 278

In the case of Panama Refining Company vs. Ryan, 293 U. S. 388, the Supreme Court of the United States held that an executive order to satisfy the constitutional requirement of due process must show on its face the existence or the particular circumstances and conditions under which the making of such order and the power to perform the same has been authorized by Congress.

It is not necessary that the constitution specifically prohibit an act by the legislature or an agency of the State, but where the constitution by a constitutional provision specifically provides for the power and function of the legislature or an agency of the State, such constitutional declaration is an implication of the limitation placed upon the legislature or a State Agency in connection with such subject matter.

Creeknation, et al vs. U. S, 318 US 629

"The General rule is well settled that the provisions of the equal protection clause are not confined to the action of the state through

the executive or judicial authority. They relate to and cover all the instrumentalities by which the state acts, and whoever,by virtue of a public position under a state government, deprives another by any right protected by that amendment against deprivation by the state violates the consitutional inhibition; and since he acts in the name of the state and for the state and is clothed with the state's powers, his acts is that of the state."

Home Telph. & Teleg. Co. vs. Los Angeles
227 U.S.278, 56 L. Ed. 510, 33 S. Ct. 312

" All governmental agencies authorized by the state, particularly municipal corporations, are within the purview of the clause. A case where one in possession of state power uses that power to accomplish the doings of wrongs which are forbidden by the Fourteenth Amendment is within the purview of that amendment, even though the consumation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer." Id.

"Hence the rights protected by the equal protection clause may not be invaded by the acts of a state officer, under color of state authority, even though he not only exceeded his authority, but also disregarded special commands of the state law."

Bank vs. Bennett, 284 U. S. 239, 76 L. ed. 265, 52 S. Ct.133

"The constitutional inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class from being singled out as a special subject of hostile or discriminating legislation. It relates to individuals, but its protective scope goes much further,

for it forbids the legislature to select any person, natural or artificial, and impose discriminations not cast upon others similarly situated."

McCabe vs. Atchison, T & S F R Co.
235 U. S. 151, 59 L. ed. 169, 35 S. Ct. 69
Atchison, T & S F R Co. vs. Mathews, 174
U. S. 96, 43 L. ed. 909, 19 S. Ct. 609
Trus vs. Corrign, 257 U. S. 312
Connolly vs. Sewer Pipe Line Company
184 U. S. 540

"The general rule as to classification in the imposition of burdens is that no one may be subject to any greater burdens and charges than are imposed on others in the same calling or condition or in like circumstances. No burden can be imposed on one class or persons, natural or artificial, and arbitrarily selected, which is not like conditions imposed on all other classes."

Boone vs. State, 170 Ala. 57, 54 So. 109
Ann. Cas. 1912C, 1065

"To hedge a privilege about with conditions and exactions for one class which do not exist for other likewise violates the equality provision of the constitution."

State vs. Cadigan, 73 Vt. 245, 50 A. 1079
57 LRA 666, 87 Am. St. Rep. 714

Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and unequal hand so as practically make unjust and illegal discrimination between persons in similar circumstances, material to their rights, denial of equal protection is still within the prohibition of the Federal Constitution.

Wolu vs. Hopkins, 118 U. S. 356

Article 7, Section 1, of Texas Constitution provides for a

public free school system and under the Constitution, youth of all races are entitled to equal educational opportunities and equal educational facilities. After the adoption of the Constitution, the Legislature enacted Article 2900 providing for separate schools and such article contains the following provisions:

> "All available public schools funds of this State shall be appropriated in each County for the education alike of white and colored children and impartial provisions shall be made for both races."

This Article is a part of Title 49, Chapter 19 of the Revised Civil Statutes of the State of Texas, and is a separate and distinct chapter from Chapter 1, Title 49, of the Revised Civil Statutes of Texas under which the University of Texas was established. Title 49 Chapter 1, of the Revised Civil Statutes of Texas under which the University of Texas was established contains Article 2587 and such Article contains the following language:

> " A fee of admission to the University shall never exceed Thirty ($30.00) Dollars. It shall be open to all persons of both sexes in this State on equal terms."

In my opion, here is a conflict of laws, or Article 2900 does not apply to Negro youth matriculating in the University of Texas. However, this question of conflict of laws does notchange the rule of law on the issue here under discussion, but may become pertinent in the final determination of this issue. I, therefore, conclude that the rules and regulations promulgated by the Board of Regents of the University of Texas barring Negro youth from admission to the University of Texas, is a violation of the constitutional rights afforded a Negro citizen under the Constitution of the United States.

Mitchell vs. U. S. ,313 U. S. 80
Pierre vs. Louisiana, 306 U. S. 355
Alston vs. School Board of City of Norfolk
12 Federal (2) 902
Hill vs. Texas, 316 U. S. 401
20 American Jurisprudence, Section 1027, p. 866

The doctrine is firmly settled in the law, that a State Constitution is in no manner a grant of power, it operates solely as a limitation of power.

Fenske Bros. vs. Upholsters International Union, 193 N. E. 112 (Writ Certioriari denied 295 U. S. 735

Legislative acts of the state which are hostile in their purpose or mode of enforcement to the authorities of the National Government or which impairs the rights of citizens under the Constitution are invalid and void.

Taylor vs. Thomsa, 22 L. Ed. 789

A Constitutional provision operates on new subjects and conditions with the same meaning and intent, which it has when adopted and does not change with the time or commission.

Travelers Insurance Company vs. Marshall
76 SW (2) 1007 (Texas)

The will of the people as recorded in the Constitutiona is the same flexible Law until changed by their own deliberative action, and therefore the court would never allow a change in public sentiment to influence them in giving a construction to a written constitution not warranted by the intention of its founder.

Scott vs. Sanderford, 15 L. Ed. 691
State Exrel Clithero vs. Showather
293 Pacific 1000 (Appeal dismissed 284 U. S. 573)

An expression of one thing in a constitution necessarily involves the exclusion of other things not so expressed.

Ex parte Vallandighal, 17 L. ed. 589

Brown vs. Maryland, 6 L. ed. 678
Thompson vs. Kay, 77 SW (2) 201
Pace vs. Eoff, 48 SW)2) 956 (Texas Com. App.)
Collingsworth County vs. Allred, 40 SW (2) 13
Ferguson vs. Wilcox, 28 SW (2) 526 (Sup. Ct.)
Arnold vs. Leonard, 273 SW 799 (Sup. Ct.)
Keller vs. State, 87 SW 669 (Criminal Ct.)
American Indemnity vs. Austin
246 SW 1019 (Sup. Ct.)
North Texas Traction Co. vs. Hill, 297 SW 778

Where a power is expressly given by the Constitution and the mode of its exercise is prescribed. Such mode is exclusive of all others.

Crab vs. Celeste Independent School Dist.
146 SW 528 (Texas Sup. Ct.)

A statute which either forbids or requires the doing of any act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally vs. General Construction Co.
269 U. S. 385
Lone Star Gas Co. vs. Kelly, et ux
165 SW (2) 446
Yu Cong Eng vs. Trinidad, 271 U. S. 619
Joseph Triner Corporation vs. McNeil
2 N. E. (2) 929
Galveston, H & S. A. Railway Company, etal
vs. Duty, 277 SW 1057

A statute prescribing no standard or rule of conduct Lack that degree of certainty to a law.

International and Great Northern Railway Co.
vs. Mallard, 277 SW 1051
Texas Jurisprudence, Vol. 39, P. 45, 46, 47

The constitutional mandates of equal educational opportunities and equal educational facilities is no met by a declaration of the State of such facilities by legislative enactment when no such facilities exist.

Gaines vs. Canada, 305 U. S. 387

The rights guaranteed by the Federal Constitution for equal educational opportunities and educational facilities is a personal right for the reason that the same is guaranteed by the Federal Constitution.

Mitchell vs. U. S., 313 U. S. 80
McCabe vs. A. T. S. F., 235 U. S. 151

The settled rule is that while a duly qualified expert witness may give his opinion based upon sufficient relevant facts, such facts must be within his personal knowledge, or assumed from common or judicial knowledge, or established by evidence; his opinion is without value and is inadmissible, if based upon facts and circumstances gleamed by him from ex parte statements of third persons, and no established by legal evidence before a jury trying the ultimate issues to which the opinion relates.

Reed vs. Barlow, 157 SW (2) 933

SPECULATIVE OPINIONS

Speculation is defined by respectable authority as the act or process of reasoning a priori - that is, the process of assuming that, because certain facts exist, other more or less connected facts must also exist. It is obvious that to permit a witness to state opinions arrived at by him from such a process would be entirely out of line with the theorty upon which the opinions of nonexperts are received - that they are mere reflections of indesceibable facts. Furthermore, the receipt of opinions based upon such a process would be inadmissible procedure before a tribunal upon whose decision such grave issues as life, liberty and the right of property may hinge.

The rule on speculative expert testimony is announced in the Am.

Jurisprudence volume 20, page 667, Section 795, as follows:

"It is necessary that the facts upon which the expert bases his opinion or conclusion permit reasonable accurate conclusions as distinguished from mere guess or conjecture. Expert opinion testimony should not be allowed to extend to the field of baseless conjecture concerning matters not susceptible of reasonably accurate conclusions. An expert's opinion must be in terms of the certain or probable, and not of the possible.

12 Am. Jur. pages 150, 151, and 152 lays down the following rule: The rule is well settled that arbitrary selection can never be justified by calling it classification. This is forbidden by the equal protection demanded by the Fourteenth Amendment.

The legislature cannot arbitrarily create a class, however, and when thus created make it binding on the courts so that they would be bound to accept such classification as a proper one.

Any discrimination is invalid if it is purely arbitrary, oppressive or capricious, and made to depend on difference of color, race, nativity, religious opinion, political affliations, or other considerations having no proper connection with the object sought by the legislation.

Pamphlet purporting to be used by the Government has no more weight and does not carry upon the face thereof any greater authenticity or verity than any other document issued.

Missouri-Kansas & Texas Railroad Co. vs. Dale
179 SW 935

The rules and regulations of an association may be admitted upon certification or by proof of a member of such association the contents of the rules of said association and issued by said association.

Western Union Telegraph Co. vs. Edkhardt
2 SW (2) 505 (Reformed & affirmed by S. Ct. 11 SW (2) 777

Stipulations entered into at a former trial of the same suit are admissable as evidence as admissions against interests.

National Life and Accident Co. vs. Cassall et al
36 SW (2) 223

An agreed statement of facts by a partner to a suit constitutes an admission of such facts and such admissions preclude the parties from denying such facts in a subsequent action.

Dobbs et al vs. Order of United Commercial Travelers of America; 241 SW 191 (para. 3 Writ or Error denied by Sup. Ct.)

The defendant's admission of a fact may be introduced in evidence or any part thereof and when a part of such admission has been admitted, the party so introducing the same does not admit the truth of the other portion of such stipulation.

Kretzschemar vs. Christensen, 37 SW (2) 844

As a general rule printed books are usually inadmissible as hearsay.

Vinting vs. Carrington, 26 SW (2)711
Woodblock Paving Co. vs. McKay, 211 SW 822

Rules of Private Association are admissable under proper predicate.

Texas Jurisprudence, Vol. 17 page 731

The general rule in Texas is that scientific books are not admissible as evidence of the matters or opinions which they contain.

St. Louis A &T Railroad Company vs. Jones, 14 S W 309

There is an exception to the rule of admitting scientific books where the work book is a treatise of exact science.

St. Louis A & T Railroad Co. vs. Jones,
14 S W 309

Photographs are admitted in evidence when relevant and shown to be correct.

Southwestern Portland Cement Co. vs. Bustillos, 216 SW 268 (211 SW 929, Sup.Ct.)

The fact that the photographs were taken without notice to the adverse parties does not render them inadmissable.

Hawkins vs. Missouri-Kansas & Texas Railroad Co. 83 SW 52

The only identification necessary for the introduction of the photograph is that they represent the scene of the person in question and this may be shown by any witness who knows the facts, even though he did not make the photographs himself, nor did he see it made.

Thompson vs. Galveston H. & S. A. RR Co., 106 SW 910
Missouri vs. Kansas & Texas RR Co., 49 SW 928

Ordinarily qualification of the witness to give expert testimony rests in the discretion of the trial court.

Cobb vs. Texas and N. O. Railway Co. 107 SW (2) 670

The court is to take judicial notice of record and prior proceedings in same suit.

Ferguson vs. Ferguson, 127 SW (2) 1018
Edmondson vs. Edmondson, 134 SW (2) 378

Mere membership in a profession to which the matter relates is not sufficient, must possess special knowledge as to the very matter on which he professes to give an opinion.

Bowan & Blatz vs. Raley, 210 SW 723