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Florida Constitutional Law: Timely Raising of Issue of Constitutionality and Consideration by Full Court

Graham P. Stansbury

FLORIDA CONSTITUTIONAL LAW: TIMELY RAISING OF ISSUE OF CONSTITUTIONALITY AND CONSIDERATION BY FULL COURT

Singer v. Ben Howe Realty, Inc., 34 So.2d 553 (Fla. 1948)

Plaintiff sought to enjoin defendants from violating a municipal ordinance prohibiting the use of machines emanating annoying noises during certain periods of the day. The bill alleged irreparable financial injury to plaintiff's business of operating a hotel. The chancellor sustained defendants' motion to dismiss the bill on the ground that the ordinance was "unreasonable and void." On appeal to the Supreme Court the decree was unanimously reversed[1] by Division B plus the Chief Justice, the ordinance being held not per se "void and unconstitutional."[2] On petition for rehearing plaintiff asserted that the appeal had not been considered by a full court as required by the Florida Constitution when the constitutionality of a statute, rule or municipal ordinance is brought into controversy. HELD, that, since the constitutionality of the ordinance had not been raised on the previous appeal, and inasmuch as the equity of the bill did not necessarily depend upon the invalidity of the ordinance, consideration by the full court was not required. Petition for rehearing denied.

The basis of the holding was that the issue of constitutionality was not raised by petitioner until petition for rehearing, and that such failure precluded petitioner from raising it as an afterthought. That constitutional issues must be raised promptly and specifically there is no doubt,[3] and, as illustrated by this case, Florida follows the prevailing view.[4]

As an additional practical justification of its decision, however, the opinion observes that, since there was consideration by one division and concurrence by the Chief Justice, the requirements of the constitution are satisfied as fully as if the hearing had been held before the Supreme

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[1]Singer v. Ben Howe Realty, Inc., 33 So.2d 409 (Fla. 1948).

[2]*Id.* at 410.

[3]Baldwin v. American Surety Co., 287 U. S. 156, 53 Sup. Ct. 98, 77 L. Ed. 231 (1932); Carlton v. Fidelity & Deposit Co., 113 Fla. 63, 154 So. 317 (1934); Anthony v. Atlanta, 66 Ga. App. 504, 18 S. E.2d 81 (1941); Womack v. Varnado, 204 La. 1019, 16 So.2d 825 (1943).

[4]Pacific Mut. Life Ins. Co. v. Barton, 50 F.2d 362, *cert. denied*, 284 U. S. 647, 52 Sup. Ct. 29, 76 L. Ed. 550 (1931); Elrod v. Daytona Beach, 132 Fla. 24, 180 So. 378 (1938).

Court *en banc.*

The Florida Constitution permits the Supreme Court to sit in divisions or *en banc*[5] and prescribes certain instances in which it must sit as a single body.[6] Among the prescribed instances is that in which the constitutionality of a municipal ordinance is involved. Argument of cases before four justices of the Supreme Court, constituting a quorum, is proper;[7] but it does not follow that one division of three justices constitutes or equals that quorum, even though its decision be concurred in later by the Chief Justice. There is logic behind the aforementioned provisions of our constitution, and this logic dictates the meaning to be attributed thereto. Certain instances are enumerated which the framers of the constitution deemed more weighty than others; for example, it is provided that two divisions and the Chief Justice shall sit in capital cases. Thus, in these more vital determinations an opportunity is provided for consideration by as many as seven justices; and in no such event may less than four justices, a quorum, sit. If the dictum in this case be followed, a litigant will have his constitutional question determined by a certain three members of the court, that is to say, one division, and, in the event of a unanimous decision and a concurrence by the Chief Justice, the other three justices will never have an opportunity to consider the question. Consideration by a quorum of the whole body and consideration by a division, with the concurrence of the Chief Justice, are separate and distinct things. The obvious reason for the provisions of the constitution is that the minds of men in conference are invariably influenced by hearing the opinions and views of another, and their own opinions and views may well be modified thereby. It is the purpose of Article V, Sections 4 (a) and (b), to give litigants the opportunity of having the full Supreme Court, or at least four members thereof, hear, consider and determine the constitutional question with the advice and counsel of the other members sitting.

To illustrate further the point here made, there are two familiar analogies. Directors of a corporation must actually attend a directors' meeting in order to act validly for the corporation,[8] and members of an administrative body exercising official functions must confer together in

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[5]FLA. CONST. Art. V, §4(a).

[6]FLA. CONST. Art. V, §4(b).

[7]Caples v. Taliaferro, 146 Fla. 122, 200 So. 378 (1941).

[8]United States v. Interstate R. R., 14 F.2d 328 (W. D. Va. 1926); Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 134, 82 Atl. 618 (1912); Nicholson v.