December 1930

Constitutional Law--Right to Discharge Employees--Liberty of Contract

Henry K. Higginbotham  
*West Virginia University College of Law*

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Constitutional Law — Right to Discharge Employees — Liberty of Contract.—The plaintiff, a labor union, was the body chosen by the employees to represent them in the settlement of disputes with their employer. The defendant, the railroad-employer, had discharged individual members of the union for the purpose of supplanting it with a company union. The plaintiff, already having an injunction restraining the railroad from interfering with the employees’ choice of representative, instituted an action to punish for contempt. The railroad was ordered to reinstate the men discharged, to recognize the union chosen by the men, and to disestablish the union which it had set up. This was based on a statute that the representatives for the purpose of settling industrial disputes should “be designated by the respective parties . . . . without interference, influence, or coercion exercised by either party over the self-organization or designation of representative by the other.” The decision was affirmed by the United States Supreme Court in Texas and N. O. R. Co. v. Brotherhood of Ry. and S. S. Clerks. 3

Hitherto, the courts have held that constitutional guaranties of personal liberty, and the natural right to liberty of contract, precluded legislative prohibitions of this sort. 4 In Adair v. United States 5 a statute which undertook to prevent the discharge of an employee simply because of his membership in a union was held unconstitutional. In Coppage v. Kansas 6 a statute was avoided which prohibited the employer from insisting that as a condition of continued employment the employee should agree not to join a union. These two cases, evidently, were based on the fallacious theories that laborers and capitalists, in respect to employment bargaining, were already equally free, and that the right of the capitalist to discharge or employ was so sacred and so protected by the Constitution that it should not be encroached. One fallacy is apparent when we consider that “necessitious men are not, truly speaking, free men, but to answer a present exigency, will submit to any terms that the crafty may impose on them.” The other fallacy is disclosed if it is recognized that labor has a right

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5 236 U. S. 1, 35 Sup. Ct. 240 (1914).
to organize, and that perhaps the advantageous position which capital enjoys should not be upheld to the extent of enabling capital to do away with that right. Yet, the decisions on these and closely related topics have been rather uniform in supporting the capitalists by upholding these thought-to-be unimpeachable liberties."

Factually, the present case only holds that under the statute a railroad may not discharge employees if the purpose of such discharge is to influence the employees' choice of representatives for the voluntary settlement of disputes. The decision does not specifically overrule the holdings of the Adair and Coppage cases, but it is a step in that direction, and goes further than any case yet decided in protecting the right of the workmen to have a union. It is submitted that the result is good, the reason being best shown by the analogy to the usury laws which are upheld on the

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7 Powell, Collective Bargaining before the Supreme Court (1918) 33 Pol. S. Q. 396, 409, sums up the effect of the two cases as follows: "To him that hath shall be given protection, not only of that which he hath, but of every leverage which his possessions give him in acquiring more. To him that hath not shall be given the solace that he is free and unrestrained by the law as to the bargains he shall make. He may be influenced as much as he likes by the fact he has little property or none. He lives in a land of freedom and equality."


9 Pound, op. cit. supra n. 3.
theory that the borrower’s necessities deprive him of freedom in contracting and place him at the mercy of the lender. The situation of the laborer is much like that of the borrower. The case, it is believed, tends “to establish the equality of position between the parties in which liberty of contract begins.” However, it may be doubted whether this decision goes very far to effectuate the purpose of the statute. —Henry K. Higginbotham.

Criminal Law—Obscene Books—Evidence.—On charge for selling obscene matter under Massachusetts General Laws (1921) c. 272 § 28, trial judge admitted in evidence the chapters of the book containing the excerpts charged obscene, and refused to admit the entire work or a synopsis. The jury found the defendant guilty. Held, affirmed. Commonwealth v. Freide. The question of obscenity is generally held one of fact for the

10 The dissenting opinion of Mr. Justice Holmes in Coppage v. Kansas, supra n. 5, at 236 U. S. 27.

11 The avowed purpose of the statute is to facilitate the settlement of disputes, and though it contains no provision for forcible arbitration, it does state that “All disputes between carrier and its employees . . . . . . . shall be considered and if possible decided . . . . . in conference between representatives designated and authorized so to confer, respectively, by the carrier and by the employees thereof interested in the dispute.” However, Chief Justice Hughes, in delivering the opinion of the court, said: “While an affirmative declaration of a duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of the legislation can not be disregarded.” So, although as indicated in the text, the Court enforced the prohibition, even though the statute did not provide the means for such enforcement, the inference would be that the positive obligation to confer and attempt to settle disputes would be unenforceable, and thus each party being free to refuse to confer, either could easily thwart the purpose of the statute.

1 Theodore Dreiser’s, “An American Tragedy”.

2 “Whoever imports, prints, publishes, sells or distributes a book, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language . . . . shall be punished by imprisonment for not more than two years and by a fine of not less than one hundred nor more than one thousand dollars.”

3 171 N. E. 472 (Mass. 1930).