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Constitutional Law--Interstate Commerce--Injunctions Restraining Interference Therewith

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EDITORIAL NOTES

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—INJUNCTIONS RESTRAINING INTERFERENCE THEREWITH.—The right to strike, in the mining industry, has received a serious set back if the United States Supreme Court sustains the decision of the district judge in the Pittsburgh Terminal Coal Corporation Case. With what alarm that decision has been received by labor unions and the press is manifest from the following quotation:

> "Through the decision, *Pittsburgh Terminal Coal Corporation* v. *United Mine Workers of America,* however, the production of coal in this case is established as interstate commerce within the terms of the Clayton Act, and the acts of a labor union can be held to constitute a monopoly in contravention of the Sherman anti-trust act. More and more the courts are building up precedents for such decisions and this reaching out by injunction is responsible for this growing attitude of distrust upon the part of labor toward the courts, and actuated the recent warning by the American Federation of Labor that there should be hesitancy about placing in the hands of the courts any greater powers."[1]

The charge is made that in the above case the production of coal is established as interstate commerce. It is a criminal offense to enter into a contract, combination, or conspiracy in restraint of trade or commerce among the states or with foreign nations, or to monopolize or attempt to monopolize or conspire to monopolize any part of such trade.[2] It has been laid down by the Supreme Court that the mining of coal is not interstate commerce and the conspiracy to obstruct the mining at particular mines, though it may prevent coal from getting into interstate commerce, is not a conspiracy to restrain that commerce unless an intention to restrain it be proved.[3] Can such intent be proved? Is not the primary purpose—the direct object, benefit of the labor members, rather than a malicious or even wilful desire or intent to interfere with interstate trade? Can the

[1] PITTSBURGH PRESS, Thursday, October 13, 1927.
[2] The Sherman Anti-Trust Act (Act July 2, 1890, 26 Stat. 209).
[3] 259 U. S. 344, 407 (1921).

assumed jurisdiction be justified by decision? Or rather is it not refuted by many pronouncements by the United States Supreme Court on the subject? Negotiable instruments are not instruments of commerce and buying and selling futures in another state or sending apparel out of state to be laundered and returned are not interstate commerce.[4] In the case of *Kidd* v. *Pearson*,[5] the court said:

> "No distinction is more popular to the common mind or more clearly expressed in economic and political literature than that between manufacture and commerce. Manufacture is transformation—the fixing of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces a regulation at least of such transportation. The legal definition of the term, as given by this court in the case of *County of Mobile* v. *Kimball*, is as follows: 'Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the state, with the power to regulate, not only manufactures but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry, for is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? * * * * * The power being vested in Congress and denied to the states, it would follow as an inevitable result that the duty would devolve upon Congress to regulate all these delicate, multiform, and vital interests—interests which in their nature are and must be local in all the detail of all their successful management."

It was held that the Child Labor Law cannot be sustained on the theory that Congress has power to control interstate commerce in the shipment of child-made goods because of the effect of such goods in states where the evil of child

[4] Williams v. Fears, 179 U. S. 270 (1900).
[5] 128 U. S. 1 at 20 (1888).

labor has been more vigorously restrained than in the state of production.[6] Neither was Congress able to control child labor by the imposition of a tax.[7]

The American Sugar Refining Company by acquisition of certain refineries was controlling the output of ninety-eight percent of the sugar in the United States. A suit was instituted under the Sherman Act after the acquisition of certain refineries in Pennsylvania. The court held that the transaction had only to do with the acquisition of property within a state and was not prohibited by the Sherman Act. The argument was that the power to control the manufacture of refined sugar is a monopoly over a necessary of life to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable and therefore the Government, in the exercise of its power to regulate commerce, may repress such monopoly directly or set aside the instruments which have created it. But the court distinguishes the power to control the manufacture of a given thing and the power to control its distribution. The court says:

> "Commerce succeeds to manufacture and is not a part of it. The power to regulate commerce is a power to prescribe the rule by which commerce shall be governed and is a power independent of the power to suppress monopoly, but it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction itself is a monopoly of commerce."[8]

The manufacture of paper is not commerce though paper may become the subject of commerce.[9] The mining of ore even though when mined the ore is immediately and continuously loaded on cars and shipped into states to satisfy existing contracts is not interstate commerce and is subject to local taxation.[10]

There seems to be no question and the courts will yield no dissent to the proposition that a combination, conspiracy, or agreement between independent manufacturers and producers of a necessary of life, to fix and maintain uniform

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[6] Hammer *v.* Dagenhart, 247 U. S. 251 (1817).
[7] Bealy *v.* Drexel Drug Co., 259 U. S. 20 (1921).
[8] U. S. *v.* E. C. Knight Co., 156 U. S. 1 (1895).
[9] Mass. Paper Co. *v.* U. S., 246 U. S. 135 (1917).
[10] Oliver Iron Co. *v.* Lord, 262 U. S. 172 (1922).

prices for their productions or otherwise to suppress competition with each other is an unlawful restraint upon such trade.[11] However, it will be found that combinations in restraint and monopoly of trade within a single state to affect commerce within the meaning of the Sherman Act must have for their purpose an effect that is not accidental, secondary, remote, or merely probable.[12] Thus where the subject matter of the combination was manufacture, even though the direct object was monopoly of manufacture, the end was not a necessary or primary consequence.[13] Yet the court speaking of the contracts and agreements for the purpose of controlling prices to be paid for cattle at stock yards says that their effect upon commerce among the states is not accidental, secondary, remote, or probable. There the subject matter was sales and the very point of the combination was to restrain and monopolize commerce among the states in respect of such sales. It will be noted that the emphasis is placed upon the words *direct object* of the contracts and agreements entered into.

In other cases the direct object of attack was interstate commerce. Where, for example, members of a trade union attempted to enforce a boycott against a manufacturer of hats,[14] and a combination of retail dealers attempted by an agreement among them to blacklist or boycott wholesalers engaged in interstate retail trade in lumber.[15] In another case the question was whether a state could tax a business of a broker dealing in contracts for the future delivery of cotton where there was no obligation to ship from one state to another.[16] The tax was sustained and dealing in cotton futures was held to be not interstate commerce. But where the defendants conspired to gain control of the available supply of cotton and enhance the prices in all markets of the country, it was held to be a conspiracy to restrain interstate trade as such control would directly and materially impede and burden the due course of trade among the states which the anti-trust act was designed to prevent.[17] It will

[11] U. S. *v.* E. C. Knight Co., 156 U. S. 1 (1895); Addyston Pipe and Steel Co. *v.* U. S., 175 U. S. 211 (1899); Northern Securities Co. *v.* U. S., 193 U. S. 197 (1904).
[12] U. S. *v.* E. C. Knight Co., *supra.*
[13] Swift & Co. *v.* U. S., 196 U. S. 375 (1905).
[14] Loewe *v.* Lawlor, 208 U. S. 274 (1907).
[15] Eastern States Retail Lumber Assn. *v.* U. S., 234 U. S. 600 (1914).
[16] Ware & Leland *v.* Mobile County, 209 U. S. 405 (1907).
[17] U. S. *v.* Patten, 226 U. S. 525 (1913).

be noted in this case that the direct object of the conspiracy is within the category intended to be restrained by the act. Mr. Chief Justice Taft has said:

> "Coal mining is not interstate commerce, and obstruction of coal mining though it may prevent coal from going into interstate commerce is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it or has necessarily such a direct, material and substantial effect to restrain it that the intent reasonably must be inferred."[18]

The circumstances that a car loaded with coal and billed to another state was held to have no significance upon the head that there was a conspiracy in restraint of commerce. If five thousand tons of coal a week is not such a tonnage that its withdrawal from interstate trade would furnish a basis of itself for inferring an intent to restrain interstate trade, but five thousand tons a day is such a tonnage that its withdrawal from interstate trade is evidence from which an intent can be inferred on the part of the union to restrain interstate commerce, can it not be argued that a producer who habitually ships five thousand tons of coal per day in interstate commerce would be just as guilty of violating the Sherman Anti-Trust Act by stopping the mines and withdrawing such a tonnage from trade as the United Mine Workers by means of a strike? In other words, if the intent to restrain interstate commerce is to be inferred from the quantity of coal withdrawn by a strike, is it not just as reasonable to infer that a large corporation has a like intent when it shuts down its mines for what to it is good and sufficient cause? If it were assumed that several persons combined to impair or destroy a factory or mine at which commodities were produced that go into interstate commerce that fact alone would not support a finding of a combination or conspiracy. The fundamental question in defining the scope of the commerce clause is whether the conduct sought to be regulated has direct or indirect relation to interstate commerce. To hold that an injury to a mine merely producing coal which, if produced and sold would enter into interstate commerce, or a closing of the mine, is interference with interstate commerce, is to ignore the dis-

[18] United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 410 (1921).

tinction which underlies the interpretation of the commerce clause.[19]

It is elementary that before the United States courts have jurisdiction, where there is no diversity of citizenship, a federal question must be presented for determination. Not merely alleging the existence of such a question will suffice to give the court jurisdiction. There must be a real substantive question. Nor can jurisdiction be inferred argumentatively from the pleadings.[20] Assuming that the plaintiff is owner of and engaged in operating coal mines located within one state whose available output of coal under normal conditions is approximately seventeen thousand tons daily, eighty-three percent of which is habitually and regularly shipped in interstate commerce; and assuming that the United Mine Workers of America being entirely cognizant of these facts, determined on and caused a strike in concert of all the plaintiff's mines; and assuming that the Executive Committee of the United Mine Workers and all its members generally have been and are now engaged in an effort to unionize the mines of this particular district for the effect such unionization will have upon the competitive field composed of states surrounding said district; and assuming further that said United Mine Workers know that such strike will prevent and they intend such strike to prevent the shipment of coal from the plaintiff's mines in interstate commerce, and that they know and intend that such withdrawal of coal from interstate commerce will enhance the price of coal produced by the competitive field around said district, can it be said that the direct and primary purpose of such strike is to interfere with interstate commerce to the extent of conferring jurisdiction on the federal court, no diversity of citizenship appearing on the record? Must not the United Mine Workers interfere with the shipment of coal in transit or with it after arrival at its destination rather than interfere with the local operation of coal mines before such interference with interstate commerce can be said to be within the meaning of the Sherman Anti-Trust Act? Is not this distinction made by the court in holding that the interference with the manu-

[19] U. S. *v.* Patten, 226 U. S. 525 (1913); Hopkins *v.* U. S. 171 U. S. 578 (1898); Delaware, etc. Ry. Co. *v.* Ukronis, 238 U. S. 439 (1915).

[20] Hanford *v.* Davies, 163 U. S. 273 (1896); Hall *v.* Burr, 234 U. S. 712 (1914).

facture of trunks and leather goods was not of itself an interference with interstate commerce, even though its effect might be to curtail the shipment of the manufactured product in interstate commerce?[21]

In the second Coronado Coal Company Case, the court, through Mr. Chief Justice Taft, says:

> "The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or its production is ordinarily an indirect and remote obstruction to that commerce, but when the intention of those unlawfully engaged in the manufacture or production is shown to be to restrain or to control the supply entering and moving in interstate commerce or the price of it in interstate markets, their action is a direct violation of the anti-trust act." * * * * "We think there was substantial evidence tending to show that the purpose of the destruction of the mines was to stop non-union coal and to prevent its shipment to other states than Arkansas where it would be competition tending to reduce the price of the commodity and check injurious maintenance of wages for union labor in competing mines."[22]

The above language is seized upon as the basis of the decision by the district judge. It is submitted that it is both too general and predicated upon a premise, the assumption of which is necessary to give the court jurisdiction. Therefore it is not a proper compass to steer us safely across an uncharted and suspectedly treacherous sea.

The difference between the weight of ordinary evidence produced at trial in a suit for damages, and ex parte affidavits in support of a petition for a restraining order should not be lost sight of. The court may be justified in inferring a wrongful intent when it hears and weighs all the evidence in a case, or may even by intuition decide that such wrongful intent was the motivating cause. Yet the court should not lay itself open to criticism of unfairness by drawing from ex parte affidavits inferences of wrongful intent. Where intent is a necessary element of crime it must be exactly alleged and conclusively proved. No less strict rule should be countenanced in equity cases where issues of fact as of law are tried by a single judge without a jury.

[21] United Leather Workers *v.* Herkert, 265 U. S. 457 (1924).
[22] Coronado Coal Co. *v.* United Mine Workers, 268 U. S. 295 (1925).

There is too much danger from injunctions like that in the Pittsburgh Terminal Coal Company Case that in this vast struggle of forces lying beneath social unrest the power of the state can justly be said to have been thrown on the side of capital.

—CLIFFORD R. SNIDER.

THE CHANGING LAW OF COMPETITION IN PUBLIC SERVICE—A DISSENT.—The principles outlined by Mr. Hardman in his very able article in this issue of the West Virginia Law Quarterly, and in his former article under the same title in the last volume of this Quarterly have attracted interest which is not confined to this state. Mr. Hardman is among the first to analyze the decisions illustrating what he terms a new judicial legal principle, *i.e.*, a principle of regulated monopoly in public service with a view to the protection of existing public utilities against ruinous competition. By this he means that courts should recognize that the paramount intent of the public in having good service at adequate rates is better served by protecting existing utilities against free competition.

The question of whether there is or whether there should be such a new legal principle in public utilities law is one which has attracted wide interest and even anxiety. The editors of the Quarterly have received letters and inquiries from various parts of the United States. Companies operating bus lines and companies manufacturing busses are anxious to know what this new legal principle is and what its results will be. Such companies have vital economic interests in the question. They are able to keep in touch with legislatures and usually have, or at any rate think they have, an idea of what legislative acts mean. They also have, or think they have, means of persuading legislatures to repeal acts if they are economically unsound. The announcement of a new judicial principle dealing with public utilities however leaves them in a state of perplexed