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The Modification of an Existing Legal Rule as a Denial of Due Process, Equal Protection, or Fundamental Principles of Right and Justice

J. W. M.
West Virginia University College of Law

of such breaches, they had been obliged to purchase in the market at higher prices, whereby they were damaged in an amount greatly in excess of the plaintiff's claim against them. The counterclaims were disallowed, as they were unliquidated and arose out of different contracts. Conceding that the refusal of offset is sound under the West Virginia law, the injustice of causing the defendant to defend one suit, then of putting him to the trouble of bringing a separate suit to secure from the plaintiff what is justly his, offends against one's inborn sense of justice—especially since in this particular cause the defendant is driven out of the state to bring his suit because the plaintiff is a foreign corporation. Here is the cost and incident trouble of the defense of one suit, the expense and vexation of bringing and prosecuting a second suit,—to settle differences on contracts between identical parties, both of whom are before the court in the first instance. Life is too short, time is too precious, for laymen of this modern age of steam and electricity to submit tamely to injustice worked by the drily logical results of a decadent procedure. It is universally agreed that circuity of action is undesirable, there is no policy against more modern expeditious methods, and until we secure through legislative enactment some of the simple ones, such as counterclaim, we may never hope to drown lay criticism of the technicality of the law, and injustice of our courts.

—C. R. S.

THE MODIFICATION OF AN EXISTING LEGAL RULE AS A DENIAL OF DUE PROCESS, EQUAL PROTECTION, OR FUNDAMENTAL PRINCIPLES OF RIGHT AND JUSTICE.—The majority opinion in the Truax Case[1] decided by the Supreme Court of the United States on December 19, 1921, holds unconstitutional a statute of the state of Arizona prohibiting the issuance of injunctions by courts for peaceful picketing during labor disputes. The decision, it is submitted, will challenge the attention of the legal profession and will give rise to at least the following questions:

1. Does this decision hold that one may, under the Constitution of the United States, have a vested interest in an existing legal rule, which prevents that rule from being modified, even as to subsequent transactions?

2. Does this decision hold that neither the chancellor nor the

[1] Truax *v.* Corrigan, 42 Sup. Ct. 124 (1921) Opinion by Chief Justice Taft. Associate Justices Holmes, Brandeis, Pitney and Clarke dissented.

legislature may, in the exercise of discretion, refuse equitable relief by injunction in cases or classes of cases in which that relief has, in the past, been granted?

3. Does this decision hold that there is a natural law, which because of its fundamental righteousness, overrides legislative enactments?

If the profession shall find in the decision under discussion an affirmative answer to any one of these inquiries, the case will be a landmark in our law.

The Supreme Court of Arizona, in its decision[2] which was reversed in the case under discussion, refused relief by injunction to a restaurant proprietor whose striking employes were picketing his place of business, using no violence. The state court construed the statute[3] to forbid relief by injunction against peaceful picketing. It was admitted by the court that serious damage, on account of loss of patronage had resulted to the plaintiff, the employer, because of the picketing.

1. The first question stated *supra* makes pertinent an inquiry as to what was the law of Arizona with reference to injunctions against peaceful picketing before the enactment of the statute in question. The Supreme Court of Arizona seemed to think that "a serious question" existed concerning that point.[4] However, the Supreme Court of the United States in its opinion adopts the view that the law of Arizona, prior to the statute, regarded all picketing as unlawful, because it was presumed to induce breaches of the peace. The case then seems to present squarely the problem, is it within the power of the legislature of Arizona to modify the law of that state upon that question, if such modification shall create a situation in which losses may be suffered for which statute if valid, would give no relief? Differently expressed, may the consequences of that conduct which is today a tort, a legal wrong, be, by statute rendered *damnum absque injuria* tomorrow? To illustrate, may a state whose law now makes actionable a defamatory statement, even though true, unless the statement is made with good motives and for justifiable ends, so change its law as to make truth a complete defense in all actions for defamation? May one whose business is ruined by a malicious exposure of the truth concerning him, rightly complain that his losses amount to a taking

[2] Truax *v.* Bisbee Local Union, 19 Ariz. 379, 171 Pac. 121 (1918); Truax *v.* Corrigan, 20 Ariz. 7, 176 Pac. 570 (1918).
[3] Arizona Rev. Stat. 1913, par. 1464.
[4] Truax *v.* Bisbee Local Union, *supra*, note 2.

"without due process of law" or may the court answer that, because of the new rule of law, his losses are *damnum absque injuria?* Does the fact that the first rule of law was created by statute, or was embodied only in judicial decisions, and, if the latter, that those decisions were in accord with the law of a majority of other Anglo-American jurisdictions, or, on the other hand, represented a view peculiar to the jurisdiction so holding, affect the competency of the legislature to render non-actionable, conduct which was actionable before? One might further inquire whether the legislature, if it is incompetent to abolish old torts, may create new ones. Have not defendants some rights? If one's conduct is lawful, and profitable today, may it by statute be made tortious, or criminal, tomorrow?

A majority of the Supreme Court held that the Arizona statute, as construed by the Supreme Court of that state was in violation of the Fourteenth Amendment of the United States Constitution because it deprived Truax, the employer, of his property "without due process of law," by rendering him remediless against certain conduct which in fact damaged his business. The Court designated the conduct as "unlawful annoyance" and speaks of "injurious consequences illegally inflicted" and of "losses inflicted by unlawful means." If, however, this conduct was sanctioned by the legislature of Arizona, and by its courts, how could it be held "unlawful" and "illegal"? Presumably because the statute sanctioning it was unconstitutional. But why unconstitutional? Because the conduct which it purported to sanction was illegal? The reasoning of the court would be more easily followed, if it would first establish the unconstitutionality of the statute, and then state the illegality as a consequence.

The court does say that "a purely arbitrary or capricious exercise of that (the legislative) power" is forbidden by the "due process" clause of the Constitution. But the rule laid down by the Arizona statute is substantially the rule established by judicial decision in some other states. Those decisions must then be equally "arbitrary and capricious." Are they therefore unconstitutional? If not, then the unconstitutionality of the Arizona statute must consist in its modification of the former rule and the substitution of a new one. But that amounts to a holding that one has under our Constitution, a vested interest in the continuation of a present rule of law. The majority opinion, however, expressly denies that it intends to so hold.

The above inquiries suggest the further one whether the protection afforded by the due process clause shall be uniform in all parts of the United States, except perhaps as peculiar local conditions may justify peculiar rules. If so, must the courts of all states, hereafter hold peaceful picketing under the circumstances presented in the Truax Case, to be unlawful?

2. The second problem raised at the beginning of this note invites discussion of the fundamental nature of equity jurisdiction. It has been frequently said, and was, at one time, true that equitable relief was granted as a matter of grace, and not as a matter of right. Certain fields of equity jurisdiction have, however, become so well developed that one may now count with some certainty upon the result of a suit in equity, if his case falls within the traditional field. May the legislature narrow the boundaries of the field, without denying to the persons thus excluded from relief, the "equal protection of the laws"? If a state legislature shall conclude that, in a particular kind of legal disputes, there are conflicting questions of policy which render the extraordinary power of the chancellor to specifically restrain or compel certain conduct on the part of the defendant inadvisable, may the legislature declare that policy by leaving the plaintiff to his remedy at law for damages, or his prosecution at the criminal law, if the wrong complained of is also a crime? Does the fact that many courts of equity, in many jurisdictions, in the absence of statute, have denied relief by injunction in the same class of cases, justify a legislature in believing that its attempted classification is not merely arbitrary and capricious? The relation of employer and employee has been thought to afford a reasonable basis for classification, and for the granting of some, and the denial of other, rights than those which obtain among the public generally, as witness the Workmen's Compensation Acts, generally held constitutional. May not courts of equity hereafter deny, as they have done heretofore, equitable relief to complainants in certain classes of cases, or even in certain individual cases because the chancellor is convinced that, when all the conflicting policies and inconveniences and hardships are weighed, the balance of convenience requires that the plaintiff seek his remdy in the law courts? Does the "equal protection of the laws" abolish that most interesting attribute of the chancellor, his right to give relief as a matter of grace, to exercise wide discretion in granting or refusing relief? If the chancellor still has this discretion, in the absence of statute,

may not the legislature exercise a similar discretion, and classify equitable remedies accordingly? The question of whether courts of equity in other states may, by decision, apply substantially the same rule which the legislature of Arizona sought to apply by statute, will doubtless be tested at an early date.

3. The third problem mentioned at the beginning of this note, of whether the decision of the Supreme Court of the United States gives sanction to the view that there is an overriding natural law, is, perhaps, an academic one, since it is not likely that our courts will, admittedly, hold that we have any binding rules of law except those rules of a "positivistic" nature, to be found in our constitutions and statutes, or authoritatively laid down in the decisions of our legally constituted courts. But if a court should take the view that there are certain principles which are so naturally and fundamentally just that they must be the law, the expression of legislatures and other courts to the contrary notwithstanding, the "due process" clauses as found in the Fifth and Fourteenth Amendments of our Federal Constitution, and in our various state constitutions, may be used to clothe such views and give them a sufficiently positivistic appearance. The majority opinion in the Truax Case says "But it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guarantee of due process in the Fourteenth Amendment is intended to preserve . . . ." If the court means to hold that the due process clause requires that all state action insofar as it affects life, liberty, or property, should conform to "fundamental principles of right and justice" we have a doctrine closely resembling the doctrine of "natural law." The doctrine has serious perils for legislatures, at least unless the court is willing to strain its vision in an effort to see some merit in the legislative action. Frequently a legislative act lays down a rule diametrically opposed to the existing rule on the subject. The old rule may be presumed to have violated no "fundamental principles of right and justice" since it may have existed, as a tolerable rule, for a long time. Can it be that the new and opposite rule is also conformable to those principles?

The Court in the case under discussion uses other expressions which, perhaps, lend color to the above views. It speaks of "an exercise of that [the legislative] power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned." Here we have, then, a "wrongful" statute. Why

wrongful? Presumably because it is unconstitutional, since legislatures may, except as bound by constitutional limitations, define both "rights" and "wrongs." But its "wrongfulness" is suggested as a reason for its unconstitutionality. Are the two made synonymous by the Fourteenth Amendment?

To those who have thought that, in recent years, the Supreme Court of the United States has, by a too-liberal definition of the term "police power," allowed to the states such freedom of action that the general constitutional guarantees had become illusory, the decision in the Truax Case will indicate a marked reversal of policy on the part of that court. The further application of that policy to the cases will be watched with interest by the profession.

—J. W. M.

STUDENT NOTES AND RECENT CASES

THE LAW OF SUBJACENT SUPPORT AND THE WEST VIRGINIA RULE. —By a grant of the minerals and reservation of the land or by a sale of the land and a reservation of the minerals, two estates are created, each having certain rights and duties in reference to the other. The most important duty and the one which gives rise to legal complications is that which the subservient estate owes the upper. There is imposed upon the mineral estate the servitude of supporting the surface in its natural form. The general rule established by the common law and by American and English decisions is that it is incumbent upon the grantee of coal to leave a sufficient amount thereof to prevent the subsidence of the surface, unless waived by express words or clear implication.[1] In other words it resolves itself into the maxim of so using your own as not to interfere with others. At common law the right of subjacent support is fundamental, existing as an easement or servitude from which the servient estate could not be relieved except by apt words or necessary implication.[2] As the right was absolute, the courts

[1] Lennox Coal Co. *v.* Duncan Spangler Coal Company, 265 Pa. 572, 109 Atl. 282 (1920); Godfrey *v.* Weyanoke Coal Co., 82 W. Va. 665, 97 S. E. 186 (1918); Stonegap Colliery Co. *v.* Hamilton, 119 Va. 271, 89 S. E. 305 (1916); Rowbotham *v.* Wilson, 30 L. J. Q. B. 54, 17 Eng. Rul. Cas. 647 (1860); Love *v.* Bell, 9 App. Cas. 296, 17 Eng. Rul. Cas. 657 (1884); Western Indiana Coal Co. *v.* Brown, 36 Ind. App. 44, 74 N. E. 1027 (1905); Collins *v.* Gleason Coal Co., 140 Iowa 114, 115 N. W. 497, 118 N. W. 36 (1908); Hooper *v.* Dora Coal Mining Co., 95 Ala. 235, 10 So. 652 (1892); Williams *v.* Hay, 120 Pa. 485, 6 Am. St. Rep. 379 (1888); Silver Springs *etc.* Co. *v.* Van Ness, 45 Fla. 559, 34 So. 884 (1903); Hall *v.* Harvey Coal *etc.* Co., 108 S. E. 491 (W. Va. 1921).

[2] Paull *v.* Island Coal Co., 44 Ind. App. 218, 88 N. E. 959 (1909); Lennox *v.* Duncan Coal Co., *supra;* Burgner *v.* Humphrey, 41 Ohio St. 340 (1884); Berkley *v.* Berwind White Coal Mining Co., 229 Pa. 417, 78 Atl. 1004 (1911).