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Law Law - Validity of State Laws Banning the Union Security Contract - In Favor of a Third Person

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the parish of defendant's domicile has jurisdiction over divorce and separation suits.⁴ Therefore, in cases involving exclusively intrastate or inter-parish elements, the only necessity for determining the domicile of either party is to determine the parish in which the suit must be filed.

In determining the domicile of the wife, the supreme court consistently has applied Article 39 of the Civil Code,⁵ which states that the wife has no domicile other than that of her husband. Though by way of dictum often mentioning the possibility of a contrary conclusion,⁶ the supreme court invariably has refused to allow a wife to establish a separate domicile in cases involving intrastate or inter-parish jurisdictional questions⁷ Indeed, if the wife were allowed to establish a separate domicile because of the husband's cruel treatment, it would be necessary to decide the merits of the case in order to determine in which parish the suit should be brought. Because of the necessity of insuring full faith and credit in interstate cases, however, the court has allowed a wife to establish a domicile in this state when her husband was domiciled in another.⁸ But these decisions and the reasons underlying them should never be confused with those cases involving only intrastate or inter-parish jurisdictional issues.

THOMAS A. HARRELL

LABOR LAW—VALIDITY OF STATE LAWS BANNING THE UNION SECURITY CONTRACT—A North Carolina statute¹ and a Nebraska constitutional amendment² providing that no person be denied an opportunity to obtain employment because he is or is not a member of a labor organization and forbidding employers from entering into contracts or agreements obligating themselves to exclude

4. Art. 162, La. Civil Code of 1870.

5. Art. 39, La. Civil Code of 1870: "A married woman has no other domicile than that of her husband."

6. *Laiche v. His Wife*, 156 La. 165, 100 So. 292 (1924); *McGee v. Gasery*, 185 La. 839, 171 So. 49 (1936); *Bruno v. Mauro*, 205 La. 209, 17 So.(2d) 253 (1944).

7. *Evans v. Saul & His Wife*, 8 Mart. (N.S.) 247 (La. 1829); *Glaude v. Peat*, 43 La. Ann. 161, 8 So. 884 (1891); *Laiche v. His Wife*, 156 La. 165, 100 So. 292 (1924); *Switzer v. Elmer*, 172 La. 850, 135 So. 608 (1931); *McGee v. Gasery*, 185 La. 839, 171 So. 49 (1936).

8. *Champon v. Champon*, 40 La. Ann. 28, 3 So. 397 (1888); *Smith v. Smith*, 43 La. Ann. 1140, 10 So. 248 (1891); *George v. George*, 143 La. 1032, 79 So. 832 (1918); *Zinko v. Zinko*, 204 La. 478, 15 So.(2d) 859 (1943); *Burgan v. Burgan*, 207 La. 1057, 22 So.(2d) 649 (1945).

1. N.C. Laws (1947) c. 328, § 2.

2. Neb. Const. Art. XV, § 13, as adopted in 1946.

persons from employment because they are or are not labor union members are valid under the United States Constitution. *Lincoln Federal Labor Union No. 19129, American Federation of Labor v. Northwestern Iron & Metal Company*; *Whitaker v. State of North Carolina*, 69 S.Ct. 251 (U.S. 1949).

In rejecting the allegations of unconstitutionality, the Court held that these laws do not abridge freedom of speech and opportunity of union members peaceably to assemble and petition the government for a redress of grievances,³ for nothing in the language of the laws indicates a purpose to prohibit speech, assembly, or petition; the constitutional right of workers to assemble cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who join in the assembly; the laws do not deny equal protection of the law to unions against employers and non-union workers,⁴ for they also prohibit employer-company union contracts which obligate the employer to refuse jobs to union members⁵ and forbid employers to discriminate against union as well as non-union members; nor do they deprive anyone of liberty of contract without due process of law by making it unlawful to refuse employment to a person because he is or is not a union member;⁶ since the states have constitutional power to ban such discriminations by law, they also have the power to ban contracts which if performed would bring about the prohibited discrimination.

Notwithstanding the limited recognition given to union security contracts by the Taft-Hartley Law,⁷ it reserves to the states power to prohibit any such contract. The reservation reads: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."⁸ The state action considered in the instant case was, of course, protected by this provi-

3. U.S. Const. Amends. I, XIV.

4. U.S. Const. Amend. XIV.

5. The so-called "yellow-dog" contract is non-enforceable in any court of the United States. See 47 Stat. 70 (1932), 29 U.S.C.A. § 103 (1932).

6. U.S. Const. Amend. XIV.

7. The Taft-Hartley Law authorizes the union-shop contract, which allows the hiring of non-union workers but requires they join the union within thirty days after entering employment. See 61 Stat. 136 (1947), 29 U.S.C.A. § 158(a)(3) (Supp. 1948).

8. 61 Stat. 151 (1947), 29 U.S.C.A. § 164(b) (Supp. 1948).

sion against any charge that it was in conflict with the Taft-Hartley Law.⁹

In view of the proposals now before Congress, to repeal or amend the Taft-Hartley Law,¹⁰ the validity of state action of this character will doubtless come again before the court for determination, unprotected by the saving language of the present law. Since a total of twenty-two states have enacted laws against the making of union-security agreements,¹¹ the question of the validity of this legislation continues to be of major importance. Its status under the Wagner Act¹² may be the issue, if the view of those who are advocating return to this earlier law should prevail.

The Wagner Act does not contain any language giving states power to ban union security agreements. On the other hand, Section 8(3) makes it an unfair labor practice for an employer, "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act . . . or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein. . . ."¹³ In addition, Section 7 declares that "Employees shall have the right . . . to engage in . . . concerted activities, for the purpose of collective bargaining or other mutual aid or protection,"¹⁴ and Section 13 adds, "Nothing in . . .

9. Labor Management Relations Act of 1947, 61 Stat. 136 (1947), 29 U.S.C.A. § 141 (Supp. 1948).

10. Bills to amend: H.R. 209, 439. Bills to repeal: S. 69, 249; H.R. 211, 231, 237, 259, 482, 891, 985, 1143, 1184, 1219, 1318.

11. Laws banning any and all forms of union security agreements have been enacted in twelve states: Arizona constitutional amendment, *Ariz. Laws* (1947) 399; Arkansas constitutional amendment No. 34, Nov. 7, 1944 and *Ark. Act* 101 of 1947; *Ga. Laws* 1947, No. 140, p. 616; *Iowa Laws* (1947) c. 296; *Neb. Const. Art. XV*, § 13, as adopted in 1946; *Nev. Comp. Laws* (1929) § 10473; *N.C. Laws* (1947) c. 328, § 2; *N.D. Laws* (1947) c. 92; *S.D. Const. Art. 6*, § 2, as amended Nov. 1, 1946, and *S.D. Laws* (1947) c. 92; *Tenn. Pub. Acts* (1947) c. 36; *Texas Laws* (1947) c. 74; *Va. Acts of Assembly* (1947) c. 2.

Various other states have declared the union-security contract to be against public policy but have provided no penalties for operation under such contracts. Louisiana is among these: *La. Act* 202 of 1934, § 2 [*Dart's Stats.* (1939) §4381.2]. Cf. *Uniform Control Act*, *La. Act* 180 of 1946, §§ 1-8 [*Dart's Stats.* (Supp. 1947) §§ 4379.18-4379.25]. Others permit union-security contracts only under specified conditions.

For a survey of state laws on the subject, see 21 *Labor Relations Reference Manual* 66 (1947-1948).

12. *National Labor Relations Act* of 1935, 49 Stat. 449, 29 U.S.C.A. § 151 (1935).

13. 49 Stat. 452, 29 U.S.C.A. § 158(3) (1935).

14. 49 Stat. 452, 29 U.S.C.A. § 157 (1935).

this title shall be construed so as to interfere with or impede or diminish in any way the right to strike."¹⁵

In the opinion under consideration the Court said that "states have the power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition or some valid federal law."¹⁶ The broad question would therefore be whether a state law banning union security contracts would run afoul of the foregoing provisions of the Wagner Act.

Although Section 8(3) provides that nothing in any other statute of the United States shall preclude an employer from entering into a closed shop contract, it says nothing about state statutes.¹⁷ The obvious purpose of this section is to protect an employer from committing an unfair labor practice in violation of the act by entering into a closed shop contract with the union which holds bargaining rights for his employees. This purpose and the language of Section 8(3) afford no basis for finding an implied ban against state enactments outlawing the union security contract. The Supreme Court has observed that, in the Wagner Act, "Congress has not seen fit to lay down even the most general guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action."¹⁸

The Court has likewise expressed its opinion concerning the meaning of Section 13. In *International Union, U.A.W., A.F. of*

15. 49 Stat. 457, 29 U.S.C.A. § 163 (1935).

16. 60 S.Ct. 251, 257 (U.S. 1949).

17. See *International Union, U.A.W., A.F. of L. 232 v. Wisconsin Employment Relations Board*, 69 S.Ct. 516, 521 (U.S. 1949): "Congress designedly left open an area for state control . . . the intention of Congress to exclude states from exerting their police power must be clearly manifested." *Allen-Bradley Local No. 1111, United Electrical Radio and Machine Workers of America v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749, 62 S.Ct. 820, 825, 86 L.Ed. 1154, 1164 (1942): ". . . this Court has long insisted that an intention of Congress to exclude states from exerting their police power must be clearly manifested." But see *Bethlehem Steel Co. v. New York State Labor Relations Board*; *Allegheny Ludlum Steel Corporation v. Kelly*, 330 U.S. 767, 772, 67 S.Ct. 1026, 1029, 91 L.Ed. 1234, 1245 (1947): "It has long been a rule that exclusion of state action may be implied from the nature of the legislation and the nature of the subject matter although express declaration of such result is wanting."

18. *Bethlehem Steel Co. v. New York State Labor Relations Board*; *Allegheny Ludlum Steel Corporation v. Kelly*, 330 U.S. 767, 771, 67 S.Ct. 1026, 1029, 91 L.Ed. 1234, 1244, 1245 (1947). See *International Union, U.A.W. A.F. of L. 232 v. Wisconsin Employment Relations Board*, 69 S.Ct. 516, 521 (U.S. 1949): "Congress has not seen fit in any of these Acts to declare a general policy or to state specific rules as to their effects on state regulations over which the several states traditionally have exercised control."

L. 232 v. Wisconsin Employment Relations Board,¹⁹ decided in February, 1949, it said, "What other acts or state laws might do is not attempted to be regulated by this section."

The most serious question concerns Section 7. In the *International Union* case, the Supreme Court dealt with the effect of Section 7 on a state labor board injunction enjoining a series of unannounced union meetings, held during working hours and designed to spur the employer into a contract favorable to the union. The state board order was issued while the Wagner Act was still in effect. The Court decided that nothing in the act specifically excluded the power of the state to enjoin such action and that Congress had expressed no policy on the activity. To the argument that Section 7 grants employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, the Court replied that the bare language of the section "cannot be construed to immunize the conduct forbidden by the judgment below." And it added, "No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert. But because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert."²⁰ In other words, the purpose of Section 7 was to preclude any state finding, in concerted activities in aid of collective bargaining or unionization, an illegal conspiracy in consequence of the fact that the action was in concert; it did not undertake to provide that a state might not continue to deal with otherwise illegal action. The Court was influenced by prior jurisprudence recognizing that the Wagner Act did not give protection to all kinds and types of work stoppages, and that, in general, the kind of concerted activity protected thereby was that which, not considering the element of concert, would be recognized as not unlawful. In short, harrassment of an employer by repeatedly calling unannounced work stoppages was not concerted activity of the kind protected by the act.

Prior to modern legislation, strikes to secure a closed shop were considered lawful in some jurisdictions and unlawful in others, with perhaps the latter being in the majority. Even though a strike for a closed shop might be given the protection of Section 7 as a concerted activity not otherwise illegal, the ques-

19. 69 S.Ct. 516, 526 (U.S. 1949).

20. 69 S.Ct. 516, 523.

tion remains as to what effect such a view would have with respect to the validity of state enactments making it unlawful for an employer to enter into a closed shop contract with a union and thereby discriminating against non-member workers. Mr. Justice Rutledge, in his concurring opinion in the *American Sash and Door* case²¹ pointed up the problem. On the one hand we would have the state saying it is illegal for an employer to make a closed shop contract with a union and, on the other, the federal government saying that it is legal for a union to strike to secure a closed shop. There seems to be an extensive, although questionable, belief at large in the states to the effect that strikes for objects found illegal under state law, and picketing in support thereof, may be enjoined. States having legislation of the type being considered might therefore believe that they would have the power to enjoin a strike aimed at inducing an employer to enter into a closed shop contract on the ground that the object sought could not be legally granted by the employer.²² Under the stated assumption concerning the coverage of Section 7, such a view would not be justified. But on the other hand, a contrary view would result in putting the employer in a most unenviable position: if he did not grant the union demand, the strike and its concomitants might destroy his business, and if he did, he would be in violation of state law and subject to the penalties provided, probably including injunctive restraint.

If this issue is ever presented, the choice is going to lie between recognizing that where a state is not denied power to forbid an employer to take any given action, it has authority to declare illegal, and subject to appropriate sanction, any concerted activity seeking to compel such action, or declaring that where concerted activity on the part of a union is protected by federal law, the state may not forbid an employer to yield to the demands being supported by the protected activity. The latter view would constitute a determination that a state law forbidding an employer to grant any demand of a union, where the

21. American Federation of Labor, Arizona State Federation of Labor v. American Sash & Door Company; Lincoln Federal Labor Union No. 19129, American Federation of Labor v. Northwestern Iron & Metal Co.; Whitaker v. State of North Carolina, 69 S.Ct. 260, 267 (U.S. 1949).

22. Mr. Justice Rutledge said, "The syllogism might well be: The decisions in the present cases permit a state to make 'illegal' any discrimination against non-union workers on account of that status in relation to securing or retaining employment; strikes for 'illegal objects' are 'unlawful'; 'unlawful' strikes may be enjoined; a strike by union members against working with non-union employees is a strike for an 'illegal object'; therefore such a strike may be enjoined." (69 S.Ct. 260, 268.)

union under federal law may lawfully engage in concerted activity in support of the demand, would be inconsistent with the federal law, and consequently invalid.

Perhaps the better way out lies in a proposal such as that sponsored by Senator Thomas of Utah.²³ He would amend Section 8(3), among others, to read, "*Provided, That nothing in this Act, or in any state law, shall preclude an employer engaged in commerce or whose activities affect commerce, from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . .*" (Italics supplied.) This, at least, would have the merit of freeing an employer from a dilemma that might seriously threaten his undoing.

ROBERT B. SHAW

LIBEL AND SLANDER—LIMITATION OF ACTIONS—SINGLE PUBLICATION RULE—Defendant publisher commenced distribution of the final printing of "Total Espionage," an allegedly libelous book, in March 1944, and released copies from stock in the year immediately preceding July 2, 1946, the date of suit. *Held*, that the publication of a single printing of a libelous book affords only one cause of action, which arises when the first copy is released by the publisher for sale in accord with trade practice, and that subsequent sales from stock do not give rise to new causes of action, although they may be considered in assessing damages. Hence, the action was barred by a one-year statute of limitations.¹ The court thus extended the "single publication" rule,² adopted for magazines and newspapers, to books. *Gregoire v. G. P. Putnam's Sons*, 298 N.Y. 119, 81 N.E. (2d) 45 (1948).

Several policy considerations have led a number of jurisdictions³ to adopt the "single publication" rule and to abandon the common law rule which holds that each time a libel is brought to the attention of a third person a new publication occurs⁴ and that each publication is a new cause of action.⁵ These

23. This bill is a substitute for the original S. 249, introduced by Senator Thomas. The original bill did not have the proviso excluding state laws.

1. Thompson's Laws of New York (1939) C.P.A. § 51(3).

2. *McGlue v. Weekly Publications, Inc.*, 63 F. Supp. 744 (D.C. Mass. 1946); *Age-Herald Publishing Co. v. Huddleston*, 207 Ala. 40, 92 So. 193, 37 A. L. R. 898 (1921); *Winrod v. Time, Inc.*, 334 Ill. App. 59, 78 N.E.(2d) 708 (1948); *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S.W. 496 (1907); *Wolfson v. Syracuse Newspapers, Inc.*, 4 N.Y.S. (2d) 640, 254 App. Div. 211, affirmed 279 N.Y. 716, 18 N.E.(2d) 676 (1939).

3. See note 2, *supra*.

4. *Duke of Brunswick v. Harmer*, 14 Q.B. 185, 117 Eng. Rep. 75 (1849);