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Constitutional Law - Due Process of Law - Right of Free Association and Right to Work Laws

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liability on the contract. A majority of the United States Courts hold the infant liable on the theory that the action is one purely in tort, independent of the contract.[9]

The general rule, in the absence of statute,[10] is that the doctrine of estoppel has no application to infants.[11] In other jurisdictions[12] including the State of Georgia,[13] the courts have not strictly adhered to this rule and have held that fraudulent misrepresentations by the infant regarding his majority will estop him from setting up his disability where the other party to the contract has acted in good faith and without negligence.

Modern conditions have brought infants into trade and commerce to an extent not contemplated when the common law doctrine regarding infancy originated. In attempting to promote greater freedom in commercial transactions and in recognizing that most infants who are artful enough to successfully practice (such subterfuge as fraud) are also of sufficient intelligence to be charged with the contractual responsibilities of their deceit, many courts have devised different theories to hold the infant responsible. Some states hold the infant liable in tort for his fraud in the inducement of the contract[14] while others apply the doctrine of estoppel to preclude his plea of minority.[15] Some courts allow the infant to rescind but require him to reimburse the seller for depreciation and use of the property while in his possession.[16] Still others by statute, require an infant above the age of 18 years to restore the consideration or its value as a condition precedent to rescission.[17]

The result of the instant case, although following the minority view, appears preferrable in the light of reason and logic since it prevents the shield of infancy from being used as a sword.

WALTER AURAN

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RIGHT OF FREE ASSOCIATION AND RIGHT TO WORK LAWS* — On suit of plaintiff non-union railroad employees, the District Court enjoined the defendant railroad and defendant labor organizations from executing union shop agreements permitted by the

9. *E.g.*, Rice v. Boyer, 108 Ind. 472, 9 N.E. 420 (1886); Wisconsin Loan & Finance Corp. v. Goodnough, 201 Wisc. 101, 228 N.W. 484 (1930).

10. *E.g.*, Iowa Code § 599.3 (1950), Friar v. Rae-Chandler Co., 192 Ia. 427, 185 N.W. 32 (1921); Kansas Gen.Stat. § 38-103 (1949), Dillian v. Burnham, 43 Kan. 77, 22 Pac. 1016 (1890); Wash. Rev. Stat. § 5830 (1922); Thosaath v. Transport Motor Co., 136 Wash. 565, 240 Pac. 921 (1925).

11. Myers v. Hurley Motor Co., 273 U.S. 18 (1927); Simo v. Everhardt, 102 U.S. 300, 313 (1880) (dictum).

12. *E.g.*, County Board of Education v. Hensley, 147 Ky. 441, 144 S.W. 63 (1912); Klinck v. Reeder, 107 Neb. 342, 185 N.W. 1000 (1921); La Rosa v. Nichols, 92 N.J.L. 375, 105 Atl. 201 (1918); Tuck v. Payne, 159 Tenn. 192, 17 S.W.2d 8 (1929).

13. Clemens v. Olshine, 54 Ga.App. 290, 187 S.E. 711 (1936); Hood v. Duren, 33 Ga. App. 203, 125 S.E. 787 (1924).

14. See not 9 supra.

15. See note 12, supra.

16. Myers v. Hurley Motor Co., 273 U.S. 18 (1927); Murdock v. Fisher Finance Corp., 51 Cal.App. 372, 251 Pac. 319 (1926).

17. Cal. Civ. Code § 35-37, Murdock v. Fisher Finance Corp., 51 Cal.App. 372, 251 Pac. 319 (1926); N.D. Rev. Code § 14-1011 (1943), In Re Campbells Guardianship. 56 N.D. 60, 215 N.W. 913 (1927); Easement v. Callaghan, 35 N.D. 27, 159 N.W. 77 (1916); S.D. Code § 43.0105 (1939).

* Subsequent to the preparation of this paper, the Supreme Court of the United States granted an appeal to the defendants in this case. As yet, no decision has been rendered by them.

Federal Railway Labor Act,[1] but prohibited by the state constitution.[2] The Supreme Court of Nebraska in affirming the lower court's denial of the Defendant's motion for a new trial *held* that §152(11) of the Federal Railway Labor Act is unconstitutional. Since Article XV of the Nebraska Constitution provides that no person shall be denied employment because of membership or nonmembership in a union organization, and since any union shop agreements involving railroads in that state would therefore depend for their validity upon §152(11) of the Federal Railway Labor Act, such dependence would be governmental action within the meaning of the Due Process Clause of the Fifth Amendment and violative of the First Amendment which guarantees the right of free association. *Hanson v. Union Pacific Ry.*, 160 Neb. 669, 71 N.W.2d 526 (1955).

Congress in the execution of its power over interstate commerce may regulate the relations of railroads and their employees while they are engaged in interstate commerce, subject always to the limitations prescribed by the Constitution and to the qualification that the regulations must have a real or substantial connection with the interstate commerce in which the employees are engaged.[3] Pursuant to this authority Congress on January 10, 1951 amended the Railway Labor Act to "permit" employers and union organizations to enter into agreements whereby union membership could be required as a condition of continued employment notwithstanding any state law to the contrary.[4] Prior to this amendment, union shops were not permitted by the Railway Labor Act.[5]

In the absence of statutory prohibition, labor-management contracts requiring union membership as a condition of continued employment have been upheld by courts which based their decision on the employer's freedom of contract.[6] The early cases of *Adair v. United States*,[7] and *Coppage v. Kansas*,[8] in holding invalid statutes outlawing "yellow dog" contracts, stated that an employer's freedom of contract enables him to discriminate against union members. This position has since been abandoned and the right of workers to organize and to bargain collectively without fear of discrimination by employers is now universally recognized.[9] Paradoxically, the employers right to freedom of contract which was at one time used to justify contracts prohibiting workers from joining a union, has now been used to justify contracts compelling workers to join a union.

Eighteen states, however, have enacted various legislation generally known as "Right to Work" Laws which have outlawed union shops. In general these laws provide that no employer shall deny any person employment be-

1. 64 Stat. 1238 (1951), 45 U.S.C. §152(11).
2. Neb. Const. art. 15, §13.
3. Mondou v. New York, N. H. & H. R.R., 223 U.S. 1, 48, 49 (1912) (dictum).
4. Hanson v. Union Pacific R.R., 160 Neb. 669, 71 N.W.2d 256, 540 (1955) (dictum).
5. *Id.* at 533.
6. International Ass'n of Machinists v. State, 153 Fla. 672, 15 So.2d 485 (1943); Jacobs v. Cohen, 90 N.Y.Supp. 854, 76 N.E.5 (1905). *Contra*, Barnes v. Berry, 156 Fed. 72 (6th Cir. 1907); Curren v. Galen, 28 N.Y.Supp. 1134, 46 N.E. 297 (Ct. of Appeals 1897).
7. 208 U.S. 161 (1908).
8. 236 U.S. 1 (1915).
9. NLRB v. Jones and Laughlin Steel Inc., 301 U.S. 1 (1937); American Steel Foundries v. Tri-City Central Trade Council, 257 U.S. 184, 209 (1921) (dictum).
10. Benewitz, *Nature and Effect of State Right to Work Laws*, 1 Wayne L.Rev. 165 (1955), (the states as cited are Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Dakota, South Carolina, Tennessee, Texas, Utah, and Virgina). See N.D. Const. art. I §23.

cause of membership or nonmembership in a labor organization.[11] Prior to the 1951 Amendment to the Railway Labor Act, the validity of state "Right to Work" laws was upheld by the Supreme Court of the United States.[12] Presumably this holding would also govern labor agreements involving interstate commerce where Congress had not acted since, in the absence of congressional legislation on the subject, state laws which are not regulations of the interstate commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce.[13]

Recently the Supreme Court of Texas, acting upon facts identical with those in the instant case, upheld the validity of the Federal statute and declared it to be controlling over that state's "Right to Work" laws in areas of conflict.[14] The case may be criticized, however, on the grounds that the court apparently assumed its conclusion by stating as an initial premise that §152(11) is a valid exercise of the commerce power of Congress.[15] It would seem that whether the statute was a valid exercise of the commerce power would depend upon whether it had the effect of denying constitutional rights. Right of free association was not raised in the Texas case, but violation of other First Amendment rights was considered as was the violation of rights under the Fifth, Ninth, Tenth and Thirteenth Amendments. In reversing the lower court's decision, the court said that to strike down alleged violations of the first ten amendments, it was a condition precedent that "governmental action" be found, but that no governmental action was taken on the behalf of unions by the amendment of §152(11). In denying the alleged violation of the Thirteenth Amendment, the Texas court also stated that there was no governmental action because the statute was "permissive" in nature, and further that the ultimate execution of the contract, which the unions could lawfully negotiate because of their fundamental right to collective bargaining, was left solely to the union and the employer.[16] From this it might be implied that had the statute been directive rather than permissive it would be unconstitutional. In other words, what it permitted by indirection is prohibited by direction.

This instant case argues convincingly that where a union shop agreement relies upon a Federal statute for its validity, the Federal statute amounts to "governmental action" within the meaning of the Due Process Clause of the Fifth Amendment.[17] Furthermore, the Nebraska court takes the position that since Nebraska has a "Right to Work" law, a union shop contract may not depend for its validity upon the right of collective bargaining, but instead, must look to the Federal statute. Once it is found that there is governmental action, the determining factor would then become whether the governmental action has the effect of denying an individaul his constitutional rights. Or, as in the instant case, does an individual have the right to work without being required to join a union?

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11. *Id.* at 168.
12. Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525 (1949); Whitaker v. North Carolina, 335 U.S. 525 (1949).
13. Cooley v. Board of Wardens, 53 U.S. (12 How.) 341 (1951).
14. International Ass'n of Machinists v. Sandsberry, 277 S.W.2d 776 (Tex. Civ. App. 1954).
15. *Id.* at 779.
16. *Id.* at 780.
17. Hanson v. Union Pacific Ry., *supra* note 4 at 546. (An argument might be made that whenever enforcement of a union shop contract is attempted in Federal court, it would also be "governmental action".) *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1948).

The issue is a controversial one. Advocates of union security say that an employee's right to work is always conditioned by such reasonable requirements as an employer may wish to impose (*i.e.* loyalty, punctuality, industry), and that union membership is one such reasonable and necessary requirement. They also argue that since all employees share the benefits of collective bargaining, all employees should share the attendent expense.[18] In rebuttal, proponents of the open shop admit that an employer should be free to impose reasonable conditions of employment, but they insist that in most cases the requirement of union membership represents a condition which the union has coerced the employer to impose under pressure of collective bargaining. Moreover, while agreeing that it is reasonable to require all employees to share in the expense of collective bargaining, they contend that union membership means much more. It includes supporting not only the economic and political ideals of the union, but also strike benefits, insurance and many other things which an individual may not wish to support.

It may be significant to observe that only public rights are superior to private rights, and only where there is great necessity and an appreciably greater resulting benefit may be abridgement of private rights be justified.[20] It is questionable whether union shop agreements meet these requirments.

Although the right of free association is not spelled out by the First Amendment of the Constitution, it would seem to be a necessary corralary of the freedom of religion and peaceable assembly.[21] It may be argued that union shop agreements in themselves do not violate the right of free association since the employee is free to sever his employment relationship rather than join the union. While technically this may be true, as a practical matter few employees would reject the condition of union membership where the alternative would be unemployment. This it could well be in highly industrialized areas where union shops are the rule. In a recent address to the American Bar Association Convention, England's Lord Justice Denning, Lord Justice of Appeal cited the closed shop[22] as an illustration of an abuse to the individual's right to freedom of association. He stated that in England the chairman of the Trade Union Congress recently said, "We cannot face the men with the alternative, belong or starve."[23] In the United States, union shops have been declared illegal where the employer hired the majority of the workers in the community, with the effect of making unemployment an alternative to union membership.[24]

It is to be noted that the United States was among those members of the United Nations General Assembly which unanimously adopted Article 20 of the "Universal Declaration of Human Rights" which provides that, "No one may be compelled to belong to an association."[25] It is difficult to reconcile

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18. Benewitz, *op. cit. supra* note 10 at 177, 178.
19. Hanson v. Union Pacific Ry., *supra* note 4 at 547.
20. *Cf.* Schenk v. United States, 249 U.S. 47 (1919).
21. Denning, *The Price of Freedom*, 41 A.B A.J. 1012 (1955).
22. Closed shop contracts require that the worker belong to the union before being hired, while union shop contracts require that the worker join the union within a short period of time after he has been hired. Both forms of contracts require union membership as a condition of continued employment so that for purposes of this paper there would seem to be little, if any difference between the two.
23. Denning, *op. cit. supra* note 21 at 1013.
24. Curran v. Galen, 28 N.Y. Supp. 1134, 46 N.E. 297, (1897).
25. U.N. General Assembly Off. Rec., 3 Sess., Plenary, Part I, p. 71 (1948) (1948 UN Yearbook 467).

this with §152(11) of the Railway Labor Act which would permit agreements compelling workers to join a union as a condition of continued employment.

It would seem that employers, who may not legally discriminate against union members, should also be prohibited from discriminating against non-union workers. The "right to organize" becomes in effect compulsion to organize under a union shop agreement. A right ceases to be a right, where it must be exercised in any event.

Perhaps the most powerful denouncement of the closed shop was made in a dissent by Mr. Justice Frankfurter who cited with approval a great exponent or organized labor, Mr. Justice Brandeis as saying, "But the American people should not, and will not accept unionism if it involves the closed shop. They will not consent to the exchange of the tyranny of the employer for the tyranny of the employee."[26]

FRANCIS BREIDENBACH

CONSTITUTIONAL LAW — EMINENT DOMAIN — VALUE TO OWNER AS BASIS FOR COMPENSATION — Plaintiff, the owner of a leasehold interest in property sought to be condemned by defendant, city housing authority, instituted proceedings to recover the market value of such interest. The defendant appealed from the trial court's charge to the jury that the Georgia constitution[1] did not require the use of the fair market value of the leasehold interest as the basis for determining just compensation; that the just and adequate compensation to which an owner is entitled is the value of property to him, not to a condemner, and that the measure of damages is not necessarily the market value of property, but may be the fair and reasonable value thereof. On appeal it was *held,* two justices dissenting, that the charge correctly stated the law as to the proper measure of compensation. *Housing Authority Of Savannah v. Savannah Iron & Wire Works,* 87 S.E.2d 671 (Ga. 1955).

It is universally held that property shall not be taken for a public purpose without the payment of "just compensation."[2] The Fifth Amendment to the Federal Constitution expressly imposes this limitation on the power of Congress, and the Fourteenth Amendment has been interpreted by the Supreme Court to impose a similar limitation on the power of all the states.[3] Most of the states have a "just compensation" clause in their own constitutions.[4] "Just compensation" means "the full and perfect equivalent in money of the property taken"[5] and that "the owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken".[6]

26. AFL v. American Sash and Door Co., 335 U.S. 538, 551 (1949) (dissent).

1. Ga. Const. Art 1 § 3 par. 1. "Private property can not be taken or damaged for public purposes without just and adequate compensation being first paid."

2. United States v. Wheeler Township, 66 F.2d 977 (8th Cir. 1933); Campbell v. Chase National Bank of New York, 5 F.Supp. 156, 171 (S.D.N.Y. 1933) (dictum).

3. McCoy v. Union Elevator Railroad Company, 247 U.S. 354 (1918); Chicago, Burlington, and Quincy Railroad Company v. Chicago, 166 U.S. 226 (1897).

4. The interpretation of the constitutional provision in the instant case may well find reception throughout the country since a similar clause is contained in the constitution of all but two states, North Carolina and New Hampshire.See Staton v. Norfolk, 111 N.C. 278, 16 S.E. 181 (1892) where the court read this requirement into the North Carolina Constitution by implication under the due process clause.

5. United States v. Miller, 317 U.S. 369 (1943).

6. *Ibid.*