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Labor Law - The Right to Membership in a Union Holding a Closed Shop Contract

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A change of the Wisconsin statute is overdue, and, in effect, now ordered by the Supreme Court. The state is not completely free to determine to what extent its courts shall entertain transitory actions, where the causes of action arise in other jurisdictions. Under the constitutional limitation imposed by the full faith and credit clause, the Supreme Court has limited the area in which local policy is permitted to dominate. The room left for the play of conflicting policies of sister states narrows.

ARTHUR J. SCHMID, JR.

Labor Law — The Right to Membership in a Union Holding a Closed Shop Contract — Plaintiff was a lifelong resident of Toledo and a motion picture operator by trade, but was unable to obtain employment since all employers in the area were under closed shop contracts with the defendant union, which refused to accept plaintiff as a member. Plaintiff brought suit against defendant to restrain it from interfering with him in securing a position as an operator and, further, that defendant be required to accord plaintiff all right of membership in the union. *Held*: The union was restrained from interfering with plaintiff in securing a position; the court holding that a union cannot arbitrarily restrict its membership so as to deprive men of the right to earn a livelihood. *Seligman v. Toledo Moving Picture Union, Local 228, et al.*, 98 N.E. (2d) 54, (Ohio, 1947).*

Early decisions on the right of trade unions to restrict their membership resulted in the "country club" theory that the admission of new members was entirely within the discretion of the union, and that the courts could not force another man's company on the group.¹ Refusal of an injunction was also based on the theory that there was no property right that equity could enforce, for such membership involved only a personal right.² An allegation that he could not otherwise obtain work did not aid one plaintiff, but there no closed shop contracts were alleged.³ Under closed shop fact situations the courts were more willing to grant relief, finding a property right which could be enforced to protect the right to earn a livelihood. The principal case made reference to the United States and Ohio constitutions in finding a property right to pursue a lawful calling, which right the court placed ahead of the right to union security.⁵ But a recent Massachusetts case held that

* Although this case was decided in 1947, it was not published until 1951.

¹ Baird v. Wells, 44 Ch. Div. 661, 59 L.J. Ch. 673 (1890).

² Frank v. National Alliance of Bill Posters, 89 N.J.L. 380, 99 A. 134 (1916).

³ Feinne v. Monahan, 196 Misc. 407, 92 N.Y.S. (2d) 112 (1949).

⁴ Seligman v. Toledo Moving Pictures Operators Union, Local 228, et. al., 98 N.E. (2d) 54, (Ohio, 1947).

⁵ "It seems to me necessarily to follow that the union must either surrender its monopoly or else admit to membership all qualified persons who desire

though the union held a closed shop contract it would not grant relief as no monopoly of the labor market was shown.⁶

Under the Taft-Hartley Act and many state statutes the unions' right to restrict its membership is limited. When the union holds no closed or union shop contract employers are forbidden to discriminate against a man who refuses to join a union under both Federal and Wisconsin law; such discrimination constituting an unfair labor practice under both statutes.⁷ Under the National Labor Relations Act, which permits only the union shop, the employer may not discriminate against an employee for non-membership in the union holding the union shop contract if he believes that membership was denied the employee for reasons other than non-payment of dues or a reasonable initiation fee.⁸ The union is not to attempt to force the employer to discriminate against an employee who was wrongfully denied membership.⁹ If a member meets the usual requirements as to initiation fees and dues the union cannot require him to do more to be eligible for membership.¹⁰ The Wisconsin Employment Peace Act permits the all-union (closed) shop after an election, but requires that the Board declare such a contract terminated if the union unreasonably denies membership to an employee.¹¹ The statute seems rather penal in its action, but in practice the Board merely orders the union to accept the employee as a member.¹² Sixteen states have statutes regulating the admission of workers to unions; Colorado and Hawaii have statutes identical with that of Wisconsin.¹³ There are few decisions on these state statutes.¹⁴

to carry on the trade. . . . Otherwise such persons are, by the act of the union, deprived of the right to earn a livelihood." The court ordered the union to cease interfering with plaintiff in his position. *Wilson v. Newspaper and Mail Deliverers Union of New York and Vicinity*, 123 N.J.Eq. 347, 197 A. 720 (1938). Cf. *James v. Marinship Corp.*, 25 Cal. (2d) 721, 155 P. (2d) 329, 160 A.L.R. 900 (1945).

⁶ *Walter v. McCarvel*, 309 Mass. 260, 34 N.E. (2d) 677 (1941). *Contra*: *Williams v. International Brotherhood of Boilermakers Union*, 25 Cal. (2d) 586, 165 P. (2d) (1946).

⁷ Section 8 (a) (1) of the N.L.R.A. makes it an unfair labor practice to interfere with the rights granted employees under section 7, which includes the right to join or refrain from joining a labor union, unless a closed shop contract is in effect. Wisconsin Statutes (1949) provide that employees shall have the right to join or refrain from joining labor unions (111.04), and it shall be an unfair labor practice for an employer to interfere with his employees in exercising these rights (111.06 (1) (a)).

⁸ 61 Stat. 140 (1947), 29 U.S.C. §158 (a) (3), (Supp. 1949).

⁹ 61 Stat. 141 (1947), 29 U.S.C. §158 (b) (2), (Supp. 1949).

¹⁰ *Union Starch and Refining Co. v. N.L.R.B.*, 186 F. (2d) 1008, (7th Cir., 1951) held a union cannot require an oath to support the union from a candidate for membership even though such an oath is required from all members.

¹¹ Wis. STATS. (1949), Sec. 111.06 (2).

¹² *Chauffeurs, Teamsters and Helpers Union, Local 579 v. Nu Icy Bottling Co.*, W.E.R.B., Decision No. 76, (June 17, 1940), where the board found as a conclusion of law that the union unreasonably refused membership to a driver.

¹³ See Aaron and Komaroff, *Statutory Regulation of Internal Affairs of Unions*, 44 ILL. L. REV. 425 (1949).

Except for the Massachusetts case which requires a "labor market monopoly" before granting relief, it appears that even in states not having statutes to protect the right to work a man can obtain relief against a union holding a closed shop contract that will not grant him membership.

LEO M. McDONNELL

Practice—Estoppel to Deny Jurisdiction of Federal Court After Removal Without Right—Plaintiff, a citizen of Texas, brought action in a state court of Texas against the American Fire and Casualty Company, a Florida corporation, the Indiana Lumbermen's Mutual Insurance Company, an Indiana corporation, and one Reiss, her insurance broker, who was also a citizen of Texas, to recover in the alternative on one of the two insurance policies or from Reiss for damage to her house caused by a fire. The action was removed to the United States District Court on the petition of the two insurance companies where judgment was entered against the American Fire and Casualty Company which then appealed. *Held*: There was no right of removal under 28 U.S.C.A. §1441, and the defendant was not estopped from protesting the lack of jurisdiction of the district court although it itself had invoked it. *American Fire & Casualty Co. v. Finn*, 71 S.Ct. 534 (1951).

The Supreme Court in reviewing this code section on certiorari held that there was no right of removal since there was no diversity of citizenship between the plaintiff and one of the defendants, Reiss, and no "separate and independent claim or cause of action which would be removable if sued upon alone," the plaintiff having suffered only one wrong and being entitled to only one relief. The question then arose whether a defendant who had removed a suit to a federal court was estopped from appealing from an adverse judgment on the grounds that the court was without jurisdiction to render a judgment because there was no right of removal.

As a rule the parties before the court may waive a lack of jurisdiction over their persons and proceed to trial as long as the court has jurisdiction over the subject matter of the suit. The party invoking the jurisdiction is then concluded by the judgment and estopped to protest the jurisdiction of the court.¹ Thus when the parties removing a suit to a federal court have no right to remove it since they do not come within the provisions of 28 U.S.C.A. §1441, the court may retain the action if it would have had original jurisdiction of it.² This occurs when a party is sued in his home state by a non-resident. In such case,

¹⁴ 160 A.L.R. 918.

¹ 15 J.T.A. 273.

² *Hanley-Mack v. Godchaux*, 2 F. (2d) 435, 437 (6th Cir., 1924).