St. John's Law Review

Volume 14, April 1940, Number 2 Article 12

Colleges and Universities--Removal of a Law Professor--Mandamus for Reinstatement (Cobb v. Howard University, 106 F.2d 860 (App. D.C. 1939))

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been readily at hand to prevent the damage, and by reason of the application of the federal rule in a case of this kind, the decision is not inconsistent with the law as applied to the facts of a case where preventive measures were within reach of the negligent carrier.[13]

C. B. D.

COLLEGES AND UNIVERSITIES—REMOVAL OF A LAW PROFESSOR—MANDAMUS FOR REINSTATEMENT.—James A. Cobb instituted suit in equity against Howard University for a mandatory injunction directing the defendant to reinstate plaintiff as a part-time professor of law and accord him permanent tenure as such. Defendant refused to reappoint the plaintiff after June 30, 1938, because of his action in appearing before a congressional committee in opposition to university appropriations. Plaintiff was hired as a part-time professor in defendant's law school in 1917 for one year during which time he would be on probation and if his work met with the approval of the dean he would be given indefinite tenure. Plaintiff contends that during his second year of employment he was orally appointed by the dean and secretary for a permanent term and that the termination of his services by the defendant's Board was in violation of his contract rights. The defendant justifies its action on the ground that the plaintiff's tenure was from year to year since 1931.[1] The District Court of the United States for the District of Columbia dismissed the bill after a hearing on the merits. On appeal to the United States Court of Appeals for the District of Columbia, *held,* affirmed. The plaintiff is not entitled to reinstatement since the conduct of the Board of Trustees of Howard University in dismissing the plaintiff is sustained by the Act incorporating the defendant which rendered the Board incapable of making such contract as alleged by the plaintiff, and even if such contract were permitted, plaintiff has no right to reinstatement but his remedy lies in an action for damages for wrongful discharge, if the dismissal were without cause. *Cobb* v. *Howard University,* 106 F. (2d) 860 (App. D. C. 1939).

With the exception of state universities,[2] colleges and universities are classed as private corporations created by the state in which they are situated.[3] If the university is not within a state,[4] but is

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[13] Chesapeake & Ohio Ry. v. Walton, 99 F. (2d) 270 (C. C. A. 4th, 1938).

[1] On June 27, 1931, the Executive Committee of the Board adopted a resolution making all appointments to the law faculty for 1931–1932 to be "for the duration of one year", including that of plaintiff. Thereafter, such resolution was adopted annually.

[2] Vinanheller v. Reagan, 69 Ark. 460, 64 S. W. 278 (1901).

[3] Chegaray v. New York, 13 N. Y. 220 (1885).

[4] Maiatiro Construction Co. v. United States, 79 F. (2d) 418 (App. D. C. 1935).

within a territory or the District of Columbia, as in this case,[5] it is created by an Act of Congress and classed as a private corporation. A professor employed by the Board of Directors of a university occupies a contractual position as an employee.[6] Where a statute incorporating the Board authorized it to remove any professor, when, in their judgment the interests of the university shall require it, as in the suit at bar,[7] such provision became a condition of the contract for the employment of a professor.[8] Therefore, since such provision became a part of the employment contract which existed between the appellant and the appellee, the corporation is incapable of making any contract with a professor for permanent tenure or for a specific period and not terminable at the discretionary will of the Board of Trustees.[9] Consequently, if such a contract were made, it is null and void.

However, there are cases which do not interpret the statutory provision as strictly as the above. These cases hold that, although such provision permits the Board to remove a professor at any time, the Board can make a contract for a specified length of time, not subject to removal without cause.[10] The theory is that if the courts were to hold otherwise, it would be difficult for a university to secure competent talent for its teaching staff, since men of superior ability might be more interested in a position that gives greater security than one whose tenure is subject to every whim and fancy of the Board of Trustees.[11]

However, whether such contract is permissible or not, the trustees are not prevented from discharging a professor prior to the expiration of the contract period, and if they do so without sufficient cause, the professor, although not entitled to reinstatement, may recover the consequent damages.[12] The mere fact that damages may

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[5] 14 STAT. 438 (1867).

[6] Brookfield v. Drury College, 139 Mo. App. 339, 123 S. W. 86 (1909).

[7] Section 7 of Act of Incorporation provided: "That the board of trustees shall have power to remove any professor or tutor or other officers connected with the institution, when, in their judgment, the interest of the university shall require it."

[8] Ward v. Board of Regents of Kansas State Agricultural College, 138 Fed. 372 (C. C. A. 8th, 1905); Hartigan v. State Univ. Bd. of Regents, 49 W. Va. 14, 38 S. E. 698 (1901).

[9] Ward v. Board of Regents of Kansas State Agricultural College, 138 Fed. 372 (C. C. A. 8th, 1905); Devol v. Board of Regents, 6 Ariz. 259, 56 Pac. 737 (1899); Hyslop v. Board of Regents, 23 Idaho 341, 129 Pac. 1073 (1913); Gillan v. Board of Regents of Normal Schools, 88 Wis. 7, 58 N. W. 1042 (1894); State *ex rel.* Hunsicker v. Board of Regents of Normal Schools, 209 Wis. 83, 244 N. W. 618 (1932).

[10] State Board of Agriculture v. Meyers, 20 Colo. App. 139, 77 Pac. 372 (1904); Board of Regents v. Mudge, 21 Kan. 223 (1878); Board of Education v. Cook, 3 Kan. App. 269, 45 Pac. 119 (1896).

[11] Board of Regents v. Mudge, 21 Kan. 223, 230 (1878).

[12] State Board of Agriculture v. Meyers, 20 Colo. App. 139, 77 Pac. 372 (1904); Board of Regents v. Mudge, 21 Kan. 223 (1878).

be awarded, does not mean that the Board cannot remove the appellant.[13]

C. G.

CONSTITUTIONAL LAW—FOREIGN CORPORATION—VALIDITY OF STATE STATUTE LEVYING TAX FOR PRIVILEGE OF DOING INTRASTATE BUSINESS.—Petitioner, incorporated under laws of Michigan, owns and operates a large manufactory of motor vehicles and maintains assembly plants in Texas. Parts are shipped to Texas, assembled and sold in intrastate commerce, through dealers, to the public. The State of Texas imposes a tax upon the gross receipts of the business done in Texas, in proportion, as that bears to the total gross receipts of the corporation from its entire business throughout the United States. Petitioner maintains, (1) the tax imposed by statute [1] is a burden on interstate commerce, in violation of Article I, Section 8, of the Constitution; [2] (2) that the tax operates to deprive him of his property without due process of law in violation of the Fourteenth Amendment. The District Court upheld validity of the tax. The Court of Appeals affirmed the judgment of the District Court. Upon *certiorari* to the Supreme Court, *held,* the tax is not unconstitutional. "In a unitary enterprise, property outside the state, when correlated in use with property within the state, necessarily, affects the worth of the privilege within the state." *Ford Motor Company* v. *Tom L. Beauchamp, Secretary of State of the State of Texas, et al.,* 308 U. S. 331, 60 Sup. Ct. 273 (1939).

There is no question but that the state has the power to make a charge against a domestic or foreign corporation for the privilege of transacting intrastate business,[3] nor is the state required by the Constitution, in levying this charge, to adopt the best possible taxation

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[13] State Board of Agriculture v. Meyers, 20 Colo. App. 139, 77 Pac. 372 (1904).

[1] VERNON'S TEXAS STATUTES (1936). "Article 7084. Amount of tax.—(A) Except as herein provided, every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas, shall, * * * each year, pay * * * a franchise tax * * *, based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures, other than those maturing in less than a year from date of issue, as the gross receipts from its business done in Texas bears to the total gross receipts of the corporation from its entire business, which tax shall be computed at the following rate for each one thousand ($1,000) dollars or fractional part thereof, one ($1.00) dollar to one million ($1,000,000) dollars, * * *."

[2] U. S. CONST. Art. I, § 8: "Congress shall have power to regulate commerce among the several states. * * *."

[3] American Mfg. Co. v. City of St. Louis, 250 U. S. 459, 39 Sup. Ct. 522 (1919); Matson Navigation Co., *et al.* v. State Board of California, 297 U. S. 441, 56 Sup. Ct. 553 (1936).