St. John's Law Review

Volume 9, May 1935, Number 2 Article 12

Constitutional Law--Dismissal of Complaint Upon Its Face--Necessity of a Hearing Upon Evidence (Borden's Farm Products Co., Inc. v. Baldwin, Comm'r of Agriculture, et al., 55 S. Ct. 187 (1934))

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Although one recent case [8] seems to be in opposition, a perusal of the adjudications interpreting subdivision 2 seems to indicate that the element necessary to constitute an act "wilful and malicious" is that the act be done with a *design* against someone.[9] The boundaries are clearly defined. On the one hand, it is well established that "malice" does not signify hatred or ill will.[10] It is not even necessary that the person seeking the discharge should have participated in,[11] or even have had knowledge of, the act; as in a case where the liability was incurred by the agent without the consent of the principal.[12] On the other hand, a mere showing that there has been a conversion [13] is insufficient to prevent a claim from being discharged. The party opposing the discharge has the burden [14] of presenting facts showing that the design above stated is present as where the conversion would amount to a larceny.[15] A discharge has been allowed where the wrongful act was less innocent than that in the instant case, where a custom of dealing explained the technical conversion and negatived the existence of the design to injure.[16]

J. O'D.

CONSTITUTIONAL LAW—DISMISSAL OF COMPLAINT UPON ITS FACE—NECESSITY OF A HEARING UPON EVIDENCE.—The plaintiff brought suit to enjoin the enforcement of the New York Milk Control Law of April 10, 1933,[1] which law authorized the Milk Control

[8] Brown v. Garey, 241 App. Div. 370, 272 N. Y. Supp. 312 (1st Dept. 1934). A strong dissenting opinion maintained that the conversion therein was merely accidental, though negligent, and therefore dischargeable. For discussion of this case, see 12 N. Y. U. L. Q. 126.

[9] Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505 (1904); McIntyre v. Kavanaugh, *supra* note 5; *In re* Dixon, 21 F. (2d) 565 (1927); *In re* Vena, 46 F. (2d) 81 (D. C. N. Y. 1909); *In re* Arnao, 210 Fed. 395 (D. C. N. Y. 1914); Matter of Levitan, 224 Fed. 241 (D. C. N. Y. 1915); *In re* Nordlight, 3 Fed. Supp. 486 (1934); *In re* Binsky, 6 Fed. Supp. 789 (1934); Ulner v. Doran, 167 App. Div. 259, 152 N. Y. Supp. 655 (1st Dept. 1915).

[10] Tinker v. Colwell, *supra* note 9; Matter of Barbery v. Cohen, 183 App. Div. 424, 170 N. Y. Supp. 762 (1st Dept. 1919); COLLIER, BANKRUPTCY (11th ed. 1919) 436.

[11] Castle v. Bullard, 23 How. 172 (——); Matter of Peck, 206 N. Y. 55, 99 N. E. 258 (1912).

[12] McIntyre v. Kavanaugh, *supra* note 5.

[13] McIntyre v. Kavanaugh, *supra* note 5; *In re* Dixon, *supra* note 9; *In re* Burchfield, 31 Fed. 118 (D. C. N. Y. 1929); *In re* Ennis & Stoppani, 171 Fed. 755 (D. C. N. Y. 1909); Wood v. Fisk, 215 N. Y. 233, 109 N. E. 177 (1915).

[14] Kreitlein v. Ferger, 238 U. S. 21, 35 Sup. Ct. 685 (1915); Matter of Levitan, *supra* note 9; *In re* Kneski, 290 Fed. 406 (D. C. N. Y. 1903); Manheim v. Loewe, 185 App. Div. 601, 173 N. Y. Supp. 260 (1st Dept. 1918); Miles v. Havens, 198 App. Div. 546, 190 N. Y. Supp. 656 (1st Dept. 1921).

[15] McIntyre v. Kavanaugh, *supra* note 5; *In re* Arnao, *supra* note 9.

[16] *In re* Dixon, *supra* note 9.

[1] Laws of 1933, c. 158 (N. Y. AGRICULTURE AND MARKETS LAW §§300-319).

Board to fix minimum prices for sales of fluid milk in bottles by milk dealers to stores in a city of more than one million inhabitants and established a differential of one cent a quart in favor of dealers not having a "well advertised trade name." The Board determined that the phrase "well advertised trade name" referred to four dealers of which the complainant is one.[2] Plaintiff alleges that this law is "arbitrary, oppressive, and discriminatory" and has no relation to the public welfare or to any of the objects or purposes for which the statute was enacted and is therefore violative of the due process clause. On appeal from the dismissal of the complaint, *held,* complaint sufficient to state a cause of action based on infringement of due process and equal protection clauses of the Fourteenth Amendment. *Borden's Farm Products Co., Inc.* v. *Baldwin, Comm'r of Agriculture, et al.,* — U. S. —, 55 Sup. Ct. 187 (1934).

The courts have no jurisdiction to determine the constitutionality of a statute without first having presented to them the factual basis upon which they can rest a conclusion.[3] It is elementary that the state, in the exercise of its broad powers of regulation, is given great leeway with respect to the making of group classifications.[4] In the determination of the arbitrary nature and/or unreasonableness of such classifications, it may be that the statute attacked will show clearly on its face that the classification therein made is arbitrary.[5] But, where this arbitrary nature does not appear on the face

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[2] Dealers deemed to have a "well-advertised trade name" are Borden's Farm Products Co., Inc., Sheffield's Farms Co., Dairymen's League Co. and M. H. Renken Dairy Co.

[3] Chicago, Milwaukee & St. Paul R. Co. v. Thompkins, 176 U. S. 167, 20 Sup. Ct. 336 (1900); United States v. Rio Grande Dam & Irrigation Co., 184 U. S. 416, 22 Sup. Ct. 428 (1902); Lincoln Gas & Electric Light Co. v. Lincoln, 223 U. S. 349, 32 Sup. Ct. 271 (1912); Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458 (1921); Chastleton Corp. v. Sinclair, 264 U. S. 543, 44 Sup. Ct. 405 (1924); Hammond v. Schappi Bus Line, 275 U. S. 164, 48 Sup. Ct. 66 (1927); Liggett Co. v. Lee, 288 U. S. 517, 53 Sup. Ct. 481 (1933); Equity Rule 70½ (28 U. S. C. A. §723).

[4] Central Lumber Co. v. South Dakota, 266 U. S. 157, 33 Sup. Ct. 66 (1912) (the legislature of a state may direct its police regulations against what it deems an existing evil without covering the whole field of possible abuses); Miller v. Wilson, 236 U. S. 377, 35 Sup. Ct. 342 (1915) (in determining the constitutionality of a state police statute the question is whether its restrictions have reasonable relation to a proper purpose, and reasonable regulations limiting the hours of labor of women are within the scope of legislative action); Berkines Van Lines v. Riley, 280 U. S. 80, 50 Sup. Ct. 64 (1929); Silver v. Silver, 280 U. S. 117, 50 Sup. Ct. 57 (1929); Carley & Hamilton v. Snook, 281 U. S. 66, 50 Sup. Ct. 204 (1930).

[5] Lindsley v. National Carbonic Gas Co., 220 U. S. 61, 78, 31 Sup. Ct. 337 (1911). The rule therein stated is that "the equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of the police laws, but admits the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. When the classification in such a law is called in question, if any

of the statute, it is necessary to present the facts to the court so as to enable it to pass upon the reasonableness of the groupings.[6]

While the presumption is that the statute enacted by the legislature is valid,[7] yet a complaint, based upon the alleged unconstitutionality of that statute, should not be dismissed without a hearing of the evidence for otherwise the right of the people to guard against an infringement of their rights would be seriously impaired.[8]

V. A. P.

EVIDENCE—ADMISSION OF JUDGMENT ROLL OF CIVIL ACTION IN CRIMINAL TRIAL.—The defendant was convicted of extortion.[1] At the trial the defendant claimed that the complaining witnesses were acting in bad faith and were motivated by a desire to punish the defendant for his part in obtaining a contract from the said complaining witnesses for a labor union. To rebut and partially discredit this position of the defendant, the state introduced the judgment roll in a prior civil action upon labor union contracts wherein the said contracts were held unenforceable because they had been obtained by duress practiced by this defendant's union.[2] It was not

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state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." Rast v. Van Deman & Lewis Co., 240 U. S. 342, 36 Sup. Ct. 370 (1916); Tanner v. Little, 240 U. S. 369, 36 Sup. Ct. 379 (1916); Radice v. People of State of N. Y., 264 U. S. 292, 44 Sup. Ct. 325 (1924); Clark v. Deckeback, 274 U. S. 392, 47 Sup. Ct. 630 (1927); Ohio Oil Co. v. Conway, 281 U. S. 146, 50 Sup. Ct. 310 (1930); State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 51 Sup. Ct. 540 (1931); Smith v. Calhoon, 283 U. S. 553, 51 Sup. Ct. 582 (1931).

[6] Southern Railway Co. v. Greene, 216 U. S. 400, 30 Sup. Ct. 287 (1910); Air-way Electric Appliance Corp. v. Day, 286 U. S. 71, 45 Sup. Ct. 12 (1924); Concordia Fire Ins. Co. v. Illinois, 292 U. S. 535, 54 Sup. Ct. 830 (1934).

[7] Lindsley v. Natural Carbonic Gas Co., *supra* note 5; Hammond v. Schappi Bus Line, *supra* note 3; O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251, 51 Sup. Ct. 130 (1931).

[8] Chastleton Corp. v. Sinclair, Hammond v. Schappi Bus Line, Inc., both *supra* note 3; Equity Rule 70½ (28 U. S. C. A. §723).

[1] N. Y. PENAL LAW (1909) §850.

[2] The material and relevant portions of the judgment roll are:

> EIGHTH: That the said instrument was extorted from the defendants by the plaintiff and others acting on behalf of the plaintiff, by duress and coercion in so threatening the ruin of the defendant's business, in consequence of which and in fear and apprehension thereof, the defendant, Kleen Laundry Service, Inc., signed and executed the instrument.