

# Constitutionality of the "Yellow-Dog" Contract Statute

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title to be in the person taxed. Possession is not merely a badge of ownership, *it is title*,<sup>106</sup> and, further, it is stated, that the authority to seize *any* property in the possession of the person taxed for the payment of the tax, even though it is a bailment,<sup>107</sup> or sold on a conditional sales contract, is due process of law, and is constitutional.<sup>108</sup> This statute has been upheld by our courts, but the authors have found no decisions of the United States Courts on this point. What treatment it will receive there, in the light of the eminent domain and the due process clauses, is speculative. Suffice it to say our courts have held it to be constitutional time and again.<sup>109</sup>

As yet, of course, there has been no litigation under the New York City Sales Tax. It has been the purpose of this review to present the possible points of conflict with a view to determining the social and legal aspects involved.

CARL E. ALPER AND MOSES J. KATZ.

#### CONSTITUTIONALITY OF THE "YELLOW-DOG" CONTRACT STATUTE.

"The widespread use of this type of contract and the injunction against labor is slowly impeding a large number of our population to such an extent that many workers are beginning to look upon the courts as allies of the employer class. If the laborer feels that justice cannot be obtained through the medium of the courts, he will use his own methods. Industrial peace is extremely difficult to maintain if the workers are not permitted to associate openly, since secret, underground organizations will then flourish. When responsible trade-unionism was driven out of Colorado some years ago, radical labor organizations stepped in with ensuing violence and lawlessness."<sup>1</sup>

Such is the attitude of organized labor toward the use and effect of the "yellow-dog" labor contract, that instrument by which an employee is required to bind himself, as a condition of his employment, that he will not remain or become a member of a labor organization (except, possibly, a "company" union).

Congress, and many of the states, long ago began making efforts to ban the use of such contracts by passing laws rendering them un-

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<sup>106</sup> *Hersie v. Porter*; *Lake Shore El. Ry. Co. v. Roach*; see *Sheldon v. Van Buskirk*, all *supra* note 95.

<sup>107</sup> *Pauley v. Wahle*, 29 Hun 116, 16 Week. Dig. 462 (N. Y. 1883).

<sup>108</sup> *Sheldon v. Van Buskirk*, *supra* note 95; *Coie v. Carl*, 82 Hun 360, 31 N. Y. Supp. 565, 64 St. Rep. 155 (1894).

<sup>109</sup> *Supra* notes 106, 107 and 108.

<sup>1</sup> O'Leary, *The Case Against the Yellow-Dog Labor Contract* (March 1932) AMERICAN FEDERATIONIST 304.

lawful. In every instance these attempts were blocked by the courts, which unflinchingly held the statutes to be unconstitutional.<sup>2</sup>

But the effort has continued unabated, and now New York has finally followed the lead of Ohio, Wisconsin, Oregon, Arizona and Colorado and the United States Congress, and has passed legislation<sup>3</sup> sponsored by the American Federation of Labor in an effort to devise a statute which will overcome the objections to the previous enactments.<sup>4</sup>

<sup>2</sup> United States: 30 STAT. 426 (U. S. Comp. St. 1901), p. 3210, declared unconstitutional in *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277 (1908); *Railroad Telegraphers v. Louisville & N. R. Co.*, 148 Fed. 437 (1906), *appeal dismissed*, 214 U. S. 529, 29 Sup. Ct. 695; and *United States v. Scott*, 148 Fed. 431 (D. C. 1906).

California: PENAL CODE §679 (1923), declared unconstitutional in *Montgomery v. Pacific Electric R. Co.*, 294 Fed. 680 (C. C. A. 9th, 1923), *cert. denied*, 264 U. S. 586, 44 Sup. Ct. 334 (1924).

Colorado: Sess. Laws of 1911, c. 5, declared unconstitutional in *People v. Western U. Telegraph Co.*, 70 Colo. 90, 198 Pac. 146, 15 A. L. R. 326 (1921).

Illinois: HURD'S REV. STAT. 1899, c. 48, §32, declared unconstitutional in *Gillespie v. People*, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283 (1900).

Kansas: Laws of 1903, c. 22, §§4674 and 4675, GEN. STAT. KANS. (1909) declared unconstitutional in *Coppage v. Kansas*, 236 U. S. 1, 35 Sup. Ct. 240 (1915); Laws of 1897, c. 120, declared unconstitutional in *Coffeyville Vitriified Brick & Tile Co. v. Perry*, 69 Kan. 297, 76 Pac. 848, 66 L. R. A. 185 (1904).

Minnesota: Rev. Laws of 1905, §5097, declared unconstitutional in *State ex rel. Smith v. Daniels*, 118 Minn. 155, 136 N. W. 584 (1912).

Missouri: Statute declared unconstitutional in *State v. Julow*, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257 (1895).

New York: Laws of 1884, c. 688, adding §171-a to the Penal Code, declared unconstitutional in *People v. Marcus*, 185 N. Y. 257, 77 N. E. 1073, 7 L. R. A. (n. s.) 282 (1906).

Nevada: Laws of 1903, c. 111, p. 207, declared unconstitutional in *Goldfield Consol. Mines Co. v. Goldfield Miners' Union*, 159 Fed. 500 (C. C. 1908).

Ohio: BATES' ANN. STAT. §§4367-68 (1892), declared unconstitutional in *State v. Bateman*, 7 Ohio N. P. 487, 10 Ohio D. N. P. 68 (1900); and OHIO GEN. CODE §12943, declared unconstitutional in *Re Berger*, 15 Ohio C. C. N. S. 81, 33 Ohio C. C. 289 (1912), *aff'd*, 92 Ohio St. 130, 110 N. E. 732 (1915).

Oklahoma: Comp. Laws of 1909, §4041, declared unconstitutional in *Bemis v. State*, 12 Okla. Crim. Rep. 114, 152 Pac. 456 (1915).

Wisconsin: Laws of 1899, c. 332, declared unconstitutional in *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 90 N. W. 1098, 58 L. R. A. 748 (1902).

In only one case (*Davis v. State*, 30 Ohio L. J. 342), so far as I have been able to find, has the constitutionality of such a statute been sustained, and this decision was rendered by an inferior court before the rendition of any of the decisions of the higher courts cited above, and was repudiated in the same state by the later cases of *State v. Bateman*, *supra*, and *Re Berger*, *supra*.

It is interesting to note that many of the decisions declaring these statutes invalid antedated the decisions of the United States Supreme Court in the *Adair* and *Coppage* cases, *supra*, and so were not based on the authority of those cases. This was true of the New York case of *People v. Marcus*, *supra*.

<sup>3</sup> N. Y. Laws of 1935, c. 11, adding §17 to the CIVIL RIGHTS LAW (Cons. Laws, c. 6).

<sup>4</sup> Briefly summarized, the major reasons advanced by the courts for the unconstitutionality of these statutes are about as follows:

(a) They are violative of the due process clauses of the federal constitution and the constitutions of the various states. (U. S. CONST., FOURTEENTH AMEND. §1; FIFTH AMEND.; N. Y. CONST., art. I, §6.) "An employer has

To determine whether or not this attempt is likely to prove successful, is the purpose of this note. It may be stated at the outset that bills embodying almost identical provisions have been introduced in the legislatures of Massachusetts and New Hampshire, but failed of passage on being held unconstitutional in advisory opinions of the Supreme Courts of those states.<sup>5</sup>

The new statute is different in form from its predecessors which have had such an unfortunate history in this country. They were of two classes: Those which rendered it unlawful to threaten an employee with discharge if he joined a labor union; and those which declared it unlawful and criminal for an employer to enter into a contract with an employee by which the latter agreed not to join a

the same right to prescribe terms on which he will employ one to labor as an employee has to prescribe those on which he will sell his labor, and any legislation which disturbs this equality is an unjustifiable interference with the liberty of contract." (*Adair v. United States*, *supra* note 4.) "Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will." (*Coppage v. Kansas*, *supra* note 4.)

(b) They are violative of the "equal protection of the laws" clauses of the federal and state constitutions. (U. S. CONST., FOURTEENTH AMEND. §1.)

(c) The enactment of such statutes is not a valid exercise of the police power, in that they do not tend to promote the public health, welfare, comfort or safety; nor do they prevent the commission of any offense or other manifest evil. Labor unions "are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare." (*Coppage v. Kansas*, *supra*.)

(d) Such statutes constitute an invasion of the inalienable right of personal liberty.

(e) For the courts to uphold such legislation would create a dangerous precedent. "Once admit that the legislature has the power to restrain the individual from conducting his business in his own way, when such restraint is not required for the public welfare, then there is no limit to the restraint which can be imposed; and that would be despotism pure and simple." (*State v. Bateman*, *supra* note 4.)

(f) The doctrine of *stare decisis* is conclusive, even in the case of statutes practically identical to the New York statute. See *Re Opinion of Justices (N. H.)* and *Re Opinion of Justices (Mass.)*, both *infra* note 5. In the former case, after citing the *Adair* and *Coppage* cases, the court said: "It is true that these decisions have been the subject of adverse comment; but the arguments thus advanced were fully and ably presented to the court and received careful consideration in the opinions rendered. It is useless to argue that the decisions are wrong. They are the supreme law of the land, to which we are required to yield obedience."

<sup>5</sup> 5 MASS. HOUSE DOC. No. 299 (1930), held unconstitutional in *In re Opinion of Justices*, 271 Mass. 598, 171 N. E. 234, 68 A. L. R. 1265 (1930); MASS. HOUSE DOC. No. 976 (1931), held unconstitutional in *In re Opinion of Justices*, 275 Mass. 580, 176 N. E. 649 (1931); NEW HAMP. HOUSE BILL No. 148 (1933), held unconstitutional in *In re Opinion of Justices (N. H.)*, 166 Atl. 640 (1933).

union. In the present law, nothing about such a contract is ruled to be unlawful. There is no penalty imposed for making it. The section simply states that such contracts are contrary to public policy and wholly void, and shall not afford a basis for legal or equitable relief in the courts. If this difference is of substance as well as of form, perhaps the law has some chance of surviving. But if it is merely a matter of form, I fear that the act will go the way of those which have preceded it.

As there is nothing unlawful in the making of the contract, it is only when the aid of the courts in enforcing it is sought to be invoked that the question of constitutionality will arise. When will this aid be sought?

Not when the employee joins a union and quits his employment, will the employer seek to restrain him from joining a union, for the right to quit (except, of course, in the rare cases of employment for a definite period) at any time and for any or no reason at all, is well-recognized.<sup>6</sup>

Nor, as a practical matter, and for the same reasons, will relief in the courts be sought by an employee to compel his employer to retain him once he has joined a union. Even in the absence of a contract, the laborer has no such right.<sup>7</sup> Indeed, as far as employer and employee alone are concerned, the law is of little importance.

The reason for its enactment and its clear purpose is found in the last few lines: "\* \* \* [Such contract] shall not afford any basis for the granting of legal or equitable relief \* \* \* against any other persons who may advise, urge or induce, without fraud, violence, or threat thereof, either party thereto to act in disregard of such undertaking or promise." The true object of the law is to prevent the use of such a contract by employers for the purpose of obtaining injunctions restraining labor organizations from efforts to unionize their employees. It is this right and the effect of the statute thereon that will be raised in the courts and that will determine the validity of the law.

It is clear that in the absence of any contract between employer and employee, the right to unionize another's employees by means of peaceful persuasion, when the object in view is lawful, is well recognized.<sup>8</sup>

But where a contract is involved, the situation is different. It is a general rule that intentional interference, without justification, with the contractual rights of another, with knowledge thereof, is a

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<sup>6</sup> National Protective Ass'n v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902). Even if the fact that the employee "quit" constituted a technical breach, the inability of the employer to prove any damages, or to collect them if he could, would render a damage suit useless.

<sup>7</sup> National Protective Ass'n v. Cumming, *supra* note 6.

<sup>8</sup> International Organization, U. M. W. v. Red Jacket Consol. Coal & Coke Co., 18 F. (2d) 839 (C. C. A. 4th, 1927), *cert. denied*, 275 U. S. 536, 48 Sup. Ct. 31 (1927); Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65, 159 N. E. 863, 63 A. L. R. 188 (1928).

legal wrong, and an action will lie to recover damages resulting therefrom.<sup>9</sup> And, what is more important here, injunction is an available remedy in cases of attempts to procure another to breach his contract.<sup>10</sup>

These general rules were applied by the United States Supreme Court to the activities of a labor organization in inducing the breach of a "yellow-dog" contract, in the celebrated *Hitchman* case.<sup>11</sup> Criticized though that case may be, in most respects, it still represents the law.<sup>12</sup> Although it is true that the New York courts have not been as free in granting labor injunctions as some of the other courts,<sup>13</sup> and although the Court of Appeals has indicated that a "yellow-dog" contract is not a real contract at all, because of lack of mutuality,<sup>14</sup> nevertheless, despite their well-known liberality, the New York courts have often enjoined third persons from endeavoring to persuade employees to breach such a contract, or condition, of employment.<sup>15</sup>

It must be noted in this connection that where an employee is under a contract not to join a union during his employment, a distinction must be made between persuasion to join a union and persuasion to breach the contract or condition. The persuasion to join the union, in itself, is not unlawful; but the persuasion to get the employee to join the union, and at the same time remain in his employment, and thus breach the contract, is unlawful.<sup>16</sup>

<sup>9</sup> *Hornstein v. Podwitz*, 254 N. Y. 448, 173 N. E. 674, 84 A. L. R. 1 (1930). Further, the use of the word "malicious" in describing the tort of maliciously inducing the breach of a contract, "does not necessarily mean malice or ill will, but the intentional doing of a wrongful act without legal or social justification." (*Campbell v. Gates*, 236 N. Y. 457, at 460, 141 N. E. 914, at 915 [1923].)

<sup>10</sup> *Eagle Glass & Mfg. Co. v. Rowe*, 245 U. S. 275, 38 Sup. Ct. 80 (1917); *Standard Fashion Co. v. Siegel-Cooper Co.*, 30 App. Div. 564, 52 N. Y. Supp. 433 (1898), *aff'd*, 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854 (1898).

<sup>11</sup> *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65, L. R. A. 1918C (1917).

<sup>12</sup> See *United Chain Theatres, Inc. v. Philadelphia Moving Picture Mach. Operators Union*, 50 F. (2d) 189 (D. C. E. D. Pa. 1931). However, the jurisdiction of the Federal District Courts to issue such injunction has been limited. See *infra* note 27.

<sup>13</sup> *Stillwell Theatre, Inc. v. Kaplan*, 259 N. Y. 405, 182 N. E. 63, 84 A. L. R. 6 (1932); *Interborough Rapid Transit Co. v. Lavin*, *supra* note 8.

<sup>14</sup> See *Exchange Bakery & Restaurant v. Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1927); *Interborough Rapid Transit Co. v. Lavin*, *supra* note 8.

<sup>15</sup> See *Third Ave. Ry. Co. v. Shea*, 109 Misc. 13, 179 N. Y. Supp. 43 (1919), *aff'd*, 191 App. Div. 949, 181 N. Y. Supp. 956 (1920); *Michaels v. Hillman*, 111 Misc. 284, 181 N. Y. Supp. 165 (1920); *Meltzer v. Kaminer*, 131 Misc. 813, 227 N. Y. Supp. 459 (1927); *Vail-Ballou Press, Inc. v. Casey*, 125 Misc. 689, 212 N. Y. Supp. 115 (1925). *Contra*: *Interborough Rapid Transit Co. v. Green*, 131 Misc. 682, 227 N. Y. Supp. 258 (1928); *cf.* *Stillwell Theatre v. Kaplan*, *supra* note 13; *Interborough Rapid Transit Co. v. Lavin*, *supra* note 8. The general attitude of the New York courts may perhaps be summed up by stating that each individual case is to be considered in connection with its own facts and circumstances, with a view to sound public policy.

<sup>16</sup> *Bitner v. West Virginia Pittsburgh Coal Co.*, 15 F. (2d) 652 (C. C. A. 4th, 1926); *International Organization, etc. v. Red Jacket, etc.*, *supra* note 8.

It is obvious that the former is not what organized labor wants. It is of no advantage to it to secure new members, without at the same time increasing the organization of industry. Otherwise, the competition in the organized portion of the industry would be increased, while non-union men would take the place of those induced to join the union and quit their employment in the unorganized factory. Such activities in furtherance of the unionization of an employer's shop where the "yellow-dog" contract system is in force are just what can be restrained. As the court said in the *Red Jacket* case:<sup>17</sup>

"To make a speech or to circulate an argument under ordinary circumstances dwelling upon the advantages of union membership is one thing. To approach a company's employees, working under a contract not to join the union while remaining in the company's service, and induce them, in violation of their contracts, to join the union and go on strike for the purpose of forcing the company to recognize the union or of impairing its power of productiveness, is another and very different thing."

In other words, the employer's aim in requiring his employees to enter into a contract not to become members of a union, is to prevent the unionization of his business.<sup>18</sup> That he has the right to do this, and that it is a right protected by the constitutions of both nation and state, is recognized in all the applicable cases cited herein.

Just how does the New York statute under consideration affect this right? It seems to me that the answer is simple: The right is denied to the employer as effectually as if the making of the contract were declared utterly unlawful. The mere privilege of entering into a contract which from its inception is wholly void and unenforceable, and which specifically is declared not to afford a basis for granting to the employer the only relief in which he has any interest, is at best an empty and naked right.

I am fully familiar with the powerful economic and social arguments against the "yellow-dog" contract and in favor of laws prohibiting its use as an effective method of blocking the laborer in his efforts to achieve collective bargaining.<sup>19</sup> Likewise, I am cognizant

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<sup>17</sup> *Supra* note 8.

<sup>18</sup> As a matter of fact, union officials are reluctant to attempt to organize industries where the "yellow-dog" contract system prevails, because of the probability that expensive court proceedings will result. Thus the likelihood of an added drain on the union finances acts as a retarding influence on organizing work. See O'Leary, *The Case Against the Yellow-Dog Labor Contract*, *supra* note 1.

<sup>19</sup> These arguments, as advanced by labor leaders, are set forth at some length in SIEDMAN, *THE YELLOW-DOG CONTRACT* (Johns Hopkins Press, Baltimore, 1932).

that the Supreme Court in a number of instances, both before and since the *Coppage* and *Adair* cases,<sup>20</sup> has departed from the strict letter of the premise on which those decisions were based—that any interference with the right of an employer to hire and “fire” as he sees fit is unconstitutional. I am also well aware that the refusal of Congress and many state legislatures to acquiesce in the doctrine, as is instanced by repeated attempts to render “yellow-dog” contracts illegal,<sup>21</sup> might well have some weight with the courts. Nor am I ignorant of the fact that the courts have at times been willing to vary the meaning of “due process” to meet changing economic and social conditions,<sup>22</sup> and that the due process clause is to serve simply to limit legislative activity to what is reasonable.

In fact, if the question were arising for the first time, when the labor injunction has attained such widespread and general use as a weapon of the employer,<sup>23</sup> the courts might be constrained to regard the legislation more favorably, in spite of the rule that, in general, economic and moral theories are not to be considered in determining the constitutionality of statutes.<sup>24</sup>

But since the question has been before the highest courts in the land many times, and always with the same unvarying results, I cannot conceive, if the doctrine of *stare decisis* has any meaning (as unquestionably it has<sup>25</sup>), that either the New York or the federal courts will reverse their former positions and hold that this statute, restricting as it does the right of employers and employees to enter into a lawful contract of employment, is not forbidden by the due process clauses of the state and federal constitutions.<sup>26</sup>

<sup>20</sup> *Supra* note 2.

<sup>21</sup> See statutes cited, *supra* note 2. See also *Due Process and the Employment Contract* (1931) 44 HARV. L. REV. 1287.

<sup>22</sup> See *United States Rys. v. United States*, 280 U. S. 234, 50 Sup. Ct. 123 (1930).

<sup>23</sup> See *SIEDMAN, op. cit. supra* note 19; also cases cited in 32 C. J. 230 (§365).

<sup>24</sup> “The Federal and state constitutions are the charter which mark the extent and limitations of legislative power, and under our form of government courts must regard all economic, philosophical and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be molded into statutes without infringing upon the letter or spirit of our written constitutions.” (*Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, at 287, 94 N. E. 431 [1911].)

<sup>25</sup> As was said by Ruger, Ch. J., in *Lahr v. Metropolitan Elevated R. Co.*, 104 N. Y. 268, at 287, 10 N. E. 528 (1887): “The doctrine of the *Story* case, therefore, although pronounced by a divided court, must be considered as *stare decisis* upon all questions involved therein, and as establishing the law, as well for this court as for the people of the State, whenever similar questions may be litigated.”

<sup>26</sup> The principles of the *Adair* and *Coppage* cases have been reiterated and these cases cited with approval by the Supreme Court in the following recent cases: *Prudential Insurance Co. v. Cheek*, 259 U. S. 530, at 536, 42 Sup. Ct. 516 (1921); *Adkins v. Children's Hospital*, 261 U. S. 525 at 545, 43 Sup. Ct. 344, 24 A. L. R. 1238 (1922); *Highland v. Russell Car & Snow Plow Co.*, 279 U. S. 253 at 261, 49 Sup. Ct. 314 (1928); and the *Marcus* case in New York

In short, I conclude: That as far as practical results are concerned and as far the primary intent of the legislature is involved, the difference between this and the penal statutes is one without a real distinction. In the one, the exercise of a right guaranteed by the constitution is branded as an offense; in the other, it is declared to be a meaningless formality. If the legislature has no power to prevent persons who are *sui juris* from making any lawful contract they see fit, relative to their own labor, it has no power to declare such contract a nullity, for the net result is the same—the use of the contract is as effectually barred in the one case as in the other. In both, the right to hire and discharge freely is hindered and restricted; and both laws are an interference with the right of employer and employee to prescribe the terms of labor, an interference which has been repeatedly held not to be sanctioned by the police power.<sup>27</sup>

I am therefore irresistibly forced to the conclusion that the new Section 17 of the Civil Rights Law is a clear violation of the rule laid down by the Court of Appeals, that:

“The free and untrammelled right to contract is a part of the liberty guaranteed to every citizen by the Federal and State Constitutions. Personal liberty is always subject to restraint when its exercise affects the safety, health or moral and general welfare of the public, but subject to such restraint an employer and employee may make and *enforce* such

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has been cited by the Court of Appeals as recently as last year, in *Sherman v. Abeles*, 265 N. Y. 383 at 390, 193 N. E. 241 (1934).

<sup>27</sup> The fact that the Norris-La Guardia Anti-Injunction Bill (47 STAT. 90, March 23, 1932; 29 U. S. C. A. §§101-115) has to date been upheld by the courts is by no means indicative that the instant statute will be. The constitutionality of that act was sustained upon the ground that Congress has the power to withdraw the jurisdiction of the Federal District Court from labor disputes in the instances specified in the law. “Congress may give either whole or restricted jurisdiction in its discretion, provided there is no extension beyond the boundaries fixed by the Constitution [citing cases], and Congress has the power to regulate the power which it grants. (*Levering & Garrigues Co. v. Morrin*, 71 Fed. (2d) 284 [C. C. A. 2d, 1934], *cert. denied*, 289 U. S. 103, 55 Sup. Ct. 110 [1934]; *Cinderella Theatre Co. v. Sign Writers Local Union*, 6 Fed. Supp. 164 [D. C. Mich. 1934]; see also *Kline v. Burke Construction Co.*, 260 U. S. 226 at 233, 43 Sup. Ct. 79 [1922].) There is a “fundamental distinction between the power of Congress to regulate procedure and limit the jurisdiction of the Federal courts inferior to the United States Supreme Court, and the power of the legislature to regulate procedure and limit the jurisdiction of the courts created by the Constitution of a state.” (*A. J. Monday Co. v. Automobile, Aircraft & Vehicle Workers*, 171 Wis. 532, 177 N. W. 867 [1920].) In fact, this limitation on the jurisdiction of the New York Supreme Court is an additional and strong argument against the constitutionality of the statute under consideration, into which I have not gone as I believe the due process and equal protection of the laws arguments to be decisive. (See N. Y. CONSR., art. VII, §1.) For the same reason, I have not gone into any possible effect of the National Industrial Recovery Act (48 STAT. 195), particularly of the noted §7 (a) thereof. For a general discussion of this subject, see Annotation, 92 A. L. R. 1464, particularly at 1470 and 1471; also *Sherman v. Abeles*, *supra* note 26.

contracts relating to labor as they may agree upon." (Italics interpolated.)<sup>28</sup>

And further, I believe that it unquestionably falls within the prohibition prescribed by the United States Supreme Court, that:

"\* \* \* since a State may not strike them [life, liberty or property] down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view."<sup>29</sup>

The act attempts to make legal what otherwise would be illegal—the interference with a contractual condition of employment. The fact that it assumes only to restrict the remedy does not save it, since the effect of taking away the only adequate remedy to protect a right is to take away the right infringed upon.

WESLEY DAVIS.

THE NEW YORK MORTGAGE COMMISSION.—Continuing to stress the chaotic conditions which have warranted past mortgage legislation,<sup>1</sup> the legislature of the state of New York passed an enactment creating a Mortgage Commission<sup>2</sup> to supersede the authority of the state superintendent of insurance and the state superintendent of banks under the Schackno Act.<sup>3</sup> To outline the conditions calling for this legislative action would be a needless repetition of that which is common knowledge and of that which has been the subject of much discussion in previous issues of this Review.<sup>4</sup>

The Mortgage Commission Act presents problems similar in character to those encountered in the preceding mortgage legislation. It is thus advisable for us to retrace and delve back into past legislative actions and court decisions to determine the constitutional restrictions by which the courts have bound statutes of this type.

<sup>28</sup> *People v. Marcus*, *supra* note 2, at 259.

<sup>29</sup> *Coppage v. Kansas*, *supra* note 2, at 17-18.

<sup>1</sup> Note (1934) 8 ST. JOHN'S L. REV. 208; *id.* 315; Legis. (1934) 9 ST. JOHN'S L. REV. 266; Feinberg, *The New York Mortgage Moratorium Statute* (1934) 9 ST. JOHN'S L. REV. 71; (1934) 34 COL. L. REV. 663.

<sup>2</sup> Laws of 1935, c. 19.

<sup>3</sup> Laws of 1933, c. 745.

<sup>4</sup> *Supra* note 1.