The "Yellow Dog" Contract

Julius November
employer refuses to hire and gives as his reason, lack of ability of the applicant. Yet that very employer might not be hiring because of race, color or creed but there is no reason other than the employer who is the judge of the ability of the applicant. Nor need the employer give any reason if he did hire and immediately thereafter discharged the employee. As a result, it would seem that unless the employer expressed discrimination because of the applicant's race, color or creed, there would be little efficacy to the act. That the convictions under such a statute would be few indeed is quite evident.

George J. Schaefer.

The "Yellow Dog" Contract.—The campaign waged by organized labor on the so-called "yellow dog" contract gained legislative sanction in 1887, when the New York Legislature passed a statute making it a misdemeanor for "any *** employer *** (to) coerce or compel any *** employee to enter into any agreement *** nor to join or become a member of any labor organization, as a condition of such person securing employment, or continuing in the employment of any such employer." Similar statutes were passed in fourteen states, and Congress not only imposed a similar restriction on interstate carriers but in addition forbade discrimination against employees by reason of their membership in labor unions.

These attempts to make use of criminal sanction to outlaw the anti-union contract fell under constitutional laws as constituting an unconstitutional interference with liberty of contract.

40Coppage v. Kansas, supra note 4, 10, "So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the service of such employee." See Prudential Ins. Co. v. Cheek, supra note 7.

1Such a contract usually provides that the employer will run his business non-union and that the employee will not become a member of any labor union during the course of his employment nor molest, nor interfere with the employer's business. See Note (1928) 41 Harv. L. Rev. 770. A "yellow dog" agreement is set forth in Hitchman v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65 (1917).

2N. Y. Penal Code, §1171a, L. 1887, c. 688. It was held unconstitutional in People v. Marcus, 185 N. Y. 257, 77 N. E. at 1073 (1906).

3Erdman Act, June 1, 1898, c. 370 §10.

4Adair v. U. S., 208 U. S. 161, 28 Sup. Ct. 277 (1908); Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240 (1915). In addition about a dozen state supreme court decisions to the same effect have established that it cannot be made a criminal offense for employers to require their employees to agree that they would not join unions.
Beginning with the Hitchman decision, the "yellow dog" became a powerful ally to anti-union employers in fighting unions. Previously, such agreement, while lawful, had been but little used, and were enforceable only through the employer's right to discharge those of his workers who joined unions. In fact, they seem to have been thought of not as contract, but as a condition of employment which the employer might insist on but could not get the court to aid him in maintaining. But now, employers could use such agreements to secure injunctions to prohibit unions from organizing the workers or inducing them to join in strikes. With this development, "yellow dog" contracts became valuable to anti-union employers. Since the Hitchman case there have been more than 60 cases where such contracts have been before the courts. In none of them did the employers bring suit against those who signed them. Invariably injunctions were sought against unions as interfering third parties.

At the session of the New York Legislature that recently terminated, there was proposed in the Senate a bill declaring void provisions in contracts of employment whereby either party promises not to join or belong to a labor or employer's organization during the continuance of the employment. The lead was taken by Wisconsin in 1929, and in 1931 statutes similar to one proposed in the New York Legislature were passed in Ohio, Oregon, Colorado, and Arizona. Their provisions are embodied in section 4 of the proposed Shipstead Federal Anti-Injunction Bill.

The text of the proposed New York statute, which in the main is derived from a bill introduced in the Ohio Legislature in 1925, with the active backing of the State Federation of Labor, reads:

"Every undertaking or promise heretofore or hereafter made, whether written or oral, express or implied, constituting or contained in, any contract or agreement of hiring or employment between any individual, firm, company, association or corporation, and any employee or prospective employee of the same, whereby (a) either party to such contract or agreement undertakes or promises not to join, become or remain a member of any labor organization or

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5 Supra note 1.
6 See Wis. L. Rev. 21, 24 (1930) for list of cases involving "yellow dog" contracts taken from the Nicol reports or from Law and Labor.
7 Senate Bill No. 201—proposed June 19, 1932.
10 S. 2497, 71st Cong., 2nd session. See generally, Frankfurter and Green, The Labor Injunction (1930). As this is being written, the Norris-LaGuardia Anti-Injunction Bill was signed and became law, March 23, 1932. However, much of organized labor's joy over the statute was erased by the opinion of the Attorney General released by President Hoover at the time of signing the bill. See editorial N. Y. L. J., March 30, 1932. The Bill is H. R. 5315.
any organization of employers, or (b) either party to such
case arising under the "yellow dog" contract it becomes very evident that the statute will not have a
great effect on the contractual relationship between employer and employee. Under the wording of the bill, it is apparent that if a
condition of the hiring is a non-union promise, it will be disregarded,
and this will give rise to an action against the employer if he were
to discharge his employees for breaching such condition.

The main importance of the proposed bill and the real reason
for its being introduced is to prevent the employer from obtaining
injunctions against labor unions.11

Senator Wagner of New York during the debate on the nomination
of Judge Parker to the Supreme Court stated "the use of this
instrument ("yellow dog" contract) is a unique one. No employer
ever sued any employee for violating it. No employer ever ex-
pects to do so. That is not its purpose. Its utility lies solely in
the fact that it affords a basis upon which to apply for an injunction
restraining anyone from attempting to persuade the employees to
unionize."12

As regards the constitutionality of the proposed statute the Su-
preme Judicial Court of Massachusetts in two advisory opinions to
the Legislature has declared, that a statute akin to the New York
one, if passed, would violate the due process clause of the Fourteenth
Amendment.18 The argument that the proposed legislation is un-
constitutional is based to a great extent upon the Hitchman case,14
and upon the other cases in which statutes penalizing employers for
discharging or refusing to employ workmen because of union mem-
bership have been declared unconstitutional.

11 Daskow, Statutes Outlawing "Yellow Dog" Contracts (1930) Vol.
XVII, A. B. A. J., p. 516. See also the "Yellow Dog" Devise as a Bar to
the Union Organizer (1928) 41 Harv. L. Rev. 770; Frankfurter, Congres-
sional Power Over the Labor Injunction (1931) 31 Col. L. Rev. 385.
12 Congressional Record, April 30, 1930, pp. 8336, 8340.
13 Opinion of the Justices, 271 Mass. 598, 171 N. E. 234 (1930); opinion
14 Supra note 1.
The New York courts are looked to as affording an avenue for upholding the proposed statute. There are decisions in New York to the effect that the "yellow dog" contract is only a condition of employment—a mere understanding as distinguished from an enforceable contract.\(^\text{15}\)

However, in these cases the court found that the contract was one at will, or that it was so full of loopholes in the Interborough cases, that the I. R. T. could terminate the employment almost at will, thus leaving the contract wholly without mutuality. The New York decisions still leave open the possibility that contracts may be drawn which will meet the requirements of mutuality and consideration. Where there was a \textit{bona fide} agreement for a definite term, no New York case went so far as to refuse an injunction.\(^\text{16}\)

Hence, the legislation will have to hurdle formidable barriers.

Professor Walsh is of the opinion that the true solution of the whole vexing question would be a holding by the courts that inducing a breach of such contracts to extend the organization of labor in an industry is privileged as fair competition.\(^\text{17}\)

It is pointed out that nowhere in the \textit{Hitchman}\(^\text{18}\) case were the social implications and consequences of the enforcement of "yellow dog" contracts through injunctions so much as mentioned. Even so, three judges dissented, and perhaps in the next case, with the purposes and results appearing so clearly, the Supreme Court might depart from its prior decisions.\(^\text{19}\)

\textbf{JULIUS NOVEMBER.}

\textbf{SECTION 52-A. VEHICLE AND TRAFFIC LAWS.—}The Legislature of the State of New York during the 1931 session extended the right to obtain personal service on defendants in motor vehicle...