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STATUTES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 514

BYRON THORNHILL,

Petitioner,

vs.

THE STATE OF ALABAMA

ON THE WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALABAMA

BRIEF OF THE PETITIONER

I

Nature of Appeal and History of Procedure

This is an appeal from the judgment of the Court of Appeals of Alabama, Sixth Division, rendered on January 17, 1939, which affirmed a judgment of the Circuit Court of Tuscaloosa County, State of Alabama, rendered on the 20th day of December, 1937, wherein Byron Thornhill was found guilty of violating Section 3448, Code of Alabama, 1923, entitled "Loitering or Picketing Forbidden." Ap-

plication for rehearing having been filed and denied, a writ of certiorari was petitioned for in the Supreme Court of Alabama (T. R. page 20). On June 15, 1939, the Supreme Court of Alabama denied the petition for certiorari. Certificate of judgment, based on such denial, was recorded on the 15th day of June, 1939 (T. R. page 22). The Court of Appeals of Alabama filed a written opinion (T. R. page 16). Said opinion is reported at 189 So. 914 (July 20, 1939), and is also set forth in Appendix "A", printed together with the petition for writ of certiorari on file herein.

II

Jurisdiction

The statutory provision is Judicial Code, Section 237-B, as amended by the Acts of February 13, 1925, 28 U. S. C. A., Section 344, page 205.

III

Provisions of the Constitution in Question and Statutes Involved

The Federal right claimed by the petitioner is that the Statute under which he was convicted is upon its face, as applied to him, unconstitutional in denying to him due-process of law under the *XIVth Amendment to the Constitution of the United States.* This claim is grounded upon the contention that Alabama's anti-picketing law, which prohibits picketing, even though peaceful, deprives the petitioner of freedom of speech and assemblage; and that the Court of Appeals of Alabama denied him the protection of the "due-process" clause of the XIVth Amendment, by extending the purview of the statute to the petitioner's actions on the occasion in question. The statute in question is as follows:

Section 3448, Code of Alabama, 1923:

> "Loitering or Picketing Forbidden.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

IV

Statement of the Case

Petitioner was charged with "picketing and loitering" in connection with a labor dispute in violation of the above statute. Petitioner's action on the occasion in question consisted of asking another employee without threats, or show of force, direct or implied, not to resume his employment in an industrial plant until a strike, then in progress, was settled (R. 9-13). The Court of Appeals held that the constitutionality of the statute was established by two previous decisions of the Supreme Court of Alabama, *Hardie-Tynes* v. *Cruise,* 189 Ala. 66, 66, So. 657, and *O'Rourke* v. *City of Birmingham,* 169 So. 206, 27 Ala. App. 133. (See Appendix "B" and "C" of the petition for writ where these decisions are set forth.) The Court interpreted the statute in the case at bar as preventing any picketing whatsoever, regardless of whether or not it was peaceful, and further construed the statute as preventing one worker asking another worker not to accept employment in an employer's plant.

The foregoing is the statement of the case as set forth in the petition for writ of certiorari (page 11). However, in view of the statement of certain facts and the omission of their qualifying and explanatory facts, set out in the brief of the Attorney General of Alabama, the petitioner considers it necessary to call to the Court's attention certain additional portions of the record.

In the Attorney General's brief the statement is made that the picket line was on company property, the inference being that the petitioner was a trespasser. The record shows, however (R. 12), that Brownville is a company town:

> "The union meets on property of Brown Wood Preserving Company; the company has not made demand on the men since the strike was called, not to come on company property. The employees get their mail from a United States' Post Office located on company property—practically all the men who work in the plant of the Brown Wood Preserving Company live on company property—the picket post which I have referred to were tents in which the men stayed to keep warm in cold weather."

The State hints at intimidations and coercions by pointing out that 6 or 8 men were in and around these tents or picket posts, but as shown by the Record (R. 10) the prosecuting witness for the State testified:

> "none of the other men said anything to me",

and further

> "neither Mr. Thornhill nor any other employee threatened me on the occasion testified to."

The prosecuting witness goes further and, without objection on the part of the State, testified to the state of his own mind:

"Mr. Thornhill approached me in a peaceful manner *and did not put me in fear;* he did not appear to be mad."

The only other witness for the state testified as follows:

"At the time Mr. Thornhill and Clarence Simpson were talking to each other there was no one else present, and I heard no harsh words and saw nothing threatening in the manner of either man."

V

Errors Assigned

1. That the courts of Alabama erred in holding that *Section 3448 of the Code of Alabama, 1923, supra,* was not violative of the *XIVth Amendment to the Constitution of the United States.*

2. That the courts of Alabama deprived the petitioner of the protection of the due-process of law clause of the XIVth Amendment, by extending the purview of Section 3448, *supra,* to the petitioner's actions on the occasion in question. (Both errors assigned will be discussed together.)

ARGUMENT

Point 1

That the Alabama Anti-Picketing Statute, Section 3448 of the Code of Alabama, 1923, Supra, Violates the VIXth Amendment to the Constitution of the United States

It is clear from the facts in this case that we are dealing with a conviction for peaceful picketing and that the Alabama Court construed the statute to prohibit peaceful picketing. That statute must be tested in the light of its construction by the courts of Alabama. *Truax* v. *Corrigan,* 257 U. S. 312. There is no room for question that the Court construed the statute as prohibiting peaceful picketing. It based its

decision in this case on *O'Rourke* v. *City of Birmingham,* 168 So. 206; and *Hardie-Tynes Mfg. Co.* v. *Cruise, et al.,* 66 So. 657.

In the *O'Rourke* case the Court said:

> "Defendant spoke to no person, simply walking slowly and peacefully back and forth along the sidewalk immediately in front of said theatre with said sign or placard being exhibited so as to be visible to persons walking along the street near said theatre and was so conducting himself when he was arrested.
>
> * * * * * * *
>
> "The purpose of the defendant's conduct, as above described, was to advise customers of said theatre and prospective customers of said theatre, of the relationship existing between the Ritz Theatre and its employees, and to influence such customers and prospective customers not to patronize said theatre on account of said theatre's failure and refusal to employ persons who were members of Labor unions affiliated with the American Federation of Labor."

In the *Hardie-Tynes Mfg. Co.* case, the Court said:

> "The meaning and purpose of these provisions are, we think, too plain for serious discussion. Sections 6394 and 6856 are broad enough to include even the peaceful persuasion of would-be employees not to serve an employer, if its intention and effect is to prevent the operation of a lawful business. * * * Perhaps our Legislature has taken the view, adopted by some of the courts, that in actual practice there is and can be no such thing as peaceful picketing or peaceful persuasion. Certainly this is the effect of our statutes."

As so construed, is the statute constitutional?

In *Peoples* v. *Harris,* 91 Pac. (2d) 993, the Supreme Court of Colorado recently held that Colorado's Anti-Picketing Statutes was unconstitutional in that it violated the "due-

process'' clause of the *XIVth Amendment to the Constitution of the United States.* For the purpose of comparison and to show the identical nature of these two statutes, the Colorado statute declared unconstitutional and the Alabama statute here challenged are set out in parallel columns.

SECTION 90, CHAPTER 97, 1935, COLORADO STATUTE ANNOTATED	SECTION 3448, CODE OF ALABAMA, 1923, ''LOITERING OR PICKETING FORBIDDEN''
''It shall be unlawful for any person or persons to loiter about or patrol the streets, alleys, roads, highways, trails or place of business of any person, firm or corporation engaged in any lawful business, for the purpose of influencing, or inducing others not to trade with, buy from, sell to, work for, or have business dealings with such person, firm or corporation, or to picket the works, mine, building or other place of business or occupation of such other person, persons, firm or corporation, for the purpose of obstructing or interferring with or injuring any lawful business, work, or enterprise; provided, that nothing herein shall prevent any person from soliciting trade, custom or business for a competitive business.''	''Any person or persons, who without a just cause or a legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation or association of people, engaged in a lawful business, for the purpose, or with the intent of influencing or inducing other persons not to trade with, buy from, sell to, having business dealings with, or be employed by such other persons, firm, corporation, or association, or who pickets the works or place of business of such other person, firm, corporation, or associations of persons, for the purpose of hindering, delaying or interferring with, or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; nothing herein shall prevent any person from soliciting trade or business from a competitive business.''

In its discussion of the above statute the Colorado Court said at page 990:

> "Section 90, *supra,* was enacted by the legislature in 1905. *Only one other state, Alabama, has a similar law.* No litigation involving its construction has ever reached this Court.
>
> "Every student of the law will readily admit that changes have occurred since the enactment of Section 90, *supra,* relating to labor disputes. Much statute law has since been enacted in the interest of labor and in its lawful rights to secure reasonable wage levels. It is quite universally conceded now that labor has a right to organize and to lawfully protect its economic interest. * * * It is generally admitted that the right of collective bargaining is here to stay. The need in our economic life of organized labor as an important factor in maintaining wage levels is generally accepted."

The Colorado Court further said — this case, at page 991:

> "By a great weight of authority, peaceful picketing, so long as it does not in fact involve force, intimidation, breach of the peace, or coercion, has been sustained in many cases."
>
> *Pope Motor Car Company* v. *Keevan C. C.,* 150 Fed. 148.
>
> *Niles* v. *Bement-Pond Company* v. *The Iron Moulders' Union, D. C.,* 246 Fed. 851.
>
> *Great Northern Railway Company* v. *Brosseau,* 286 Fed. 414.
>
> *American Steel Foundries* v. *The Tri-City Central Trades Council,* 257 U. S. 184, 42 S. Ct. 72.
>
> *Senn* v. *Tile Layers' Union,* 301 U. S. 468, 57 S. Ct. 857.

See also the recent case of *The City of Yakima* v. *Gorham,* decided September 27, 1939, 94 Pac. (2d) 180.

In the majority of jurisdictions in this country peaceful picketing is legal. It is true that some jurisdictions have legislation which expressly legalizes peaceful picketing.

However, in those jurisdictions in discussing the legislation the Court refer to the fact that prior to the adoption of the legislation peaceful picketing was legal in said states.

Exchange Bakery & Restaurant v. *Rifkin,* 245 N. Y. 260, 157 N. E. 130;

Bayonne Textile Corp. v. *American Federation of Silk Workers,* 116 N. J. Eq. 146, 172 A. 551;

Steffes v. *Motion Picture Mach. Operators Union,* 136 Minn. 200, 161 N. W. 524;

Kirmse v. *Adler,* 311 Pa. 78, 166 A. 566;

United Chain Theatres v. *Philadelphia Moving Picture M. O. Union (D. C.),* 50 F. (2d) 189;

S. A. Clark Lunch Co. v. *Cleveland Waiters & Beverage Dispensers,* 22 Ohio App. 265, 154 N. E. 362;

Blumauer v. *Portland Moving Picture M. O. P. Union,* 141 Or. 399, 17 P. (2d) 1115;

Cinderella Theatre Co. v. *Sign Writers' Local Union, (D. C.),* 6 F. Supp. 164;

Fenske Bros. v. *Upholsterers' International Union,* 358 Ill. 239, 139 N. E. 112, 97 A. L. R. 1318;

Dean v. *Mayo (D. C.),* 8 F. Supp. 73;

Miller Parlor Furniture Co. v. *Furniture Workers' Industrial Union, (D. C.),* 8 F. Supp. 209;

National Protective Asso. v. *Cumming,* 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648;

Mann v. *Raimist,* 255 N. Y. 307, 174 N. E. 690, 73 A. L. R. 669;

Wise Shoe Co. v. *Lowenthal,* 266 N. Y. 264, 194 N. E. 749;

Curran v. *Galen,* 152 N. Y. 53, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496;

Jacobs v. *Cohen,* 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, 5 Ann. Cas. 280;

Kissam v. *United States Printing Co.,* 199 N. Y. 76, 92 N. E. 214;

Roddy v. *United Mine Workers,* 41 Okla. 621, 139 P. 126, L. R. A. 1915D, 789;

Shaughnessy v. *Jordan,* 184 Ind. 499, 111 N. E. 622;

Grace Co. v. *Williams,* (*D. C.*), 20 F. Supp. 263;

L. L. Coryell & Son v. *Petroleum Workers Union,* (*D. C.*), 19 F. Supp. 749;

American Furniture Co. v. *I. B. of T. C. & H.,* 222 Wis. 338, 268 N. W. 250, 106 A. L. R. 335;

Geo. R. Wallace Co. v. *International Asso. M. M. H. L.,* 155 Or. 652, 63 P. (2d) 1090;

Starr v. *Laundry & D. C. W. L. Union,* 155 Or. 634, 63 P. (2d) 1104;

Levering & G. Co. v. *Morrin* (C. C. A. 2d) 71 F. (2d) 284, writ of certiorari denied in 293 U. S. 595, 76 L. Ed. 688, 55 S. Ct. 110;

La France Elec. Supply Co. v. *International Brotherhood of Elec. Workers,* 108 Ohio St. 61, 140 N. E. 899;

McCormick v. *Fisher & Local Union #216 Hotel and Rest. Employees,* 13 Ohio Cir. Ct. R. (N.S.) 545;

Riggs v. *Cincinnati Waiters Alliance Local,* 5 Ohio N. P. 386, 8 Ohio S. & C. P. Dec. 565;

Jones v. *Van Winkle Gin & Mach. Works,* 131 Ga. 336, 340, 17 L. R. A. (N.S.) 848, 127 Am. St. Rep. 235, 62 S. E. 236;

Karges Furniture Co. v. *Amalgamated Woodworkers Local Union,* 165 Ind. 421, 430, 431, 2 L. R. A. (N.S.) 788, 75 N. E. 877, 6 Ann. Cas. 829;

Everett Waddey Co. v. *Richmond Typographical Union,* 105 Va. 188, 197, 5 L. R. A. (N.S.) 792, 53 S. E. 273, 8 Ann. Cas. 798;

Stoner v. *Robert,* 53 Wash. L. Rep. 437;

Empire Theatre Co. v. *Cloke,* 53 Mont. 183, L. R. A. 1917E, 383, 163 Pac. 107;

Mills v. *United States Printing Co.,* 99 App. Div. 605, 91 N. Y. Supp. 185, affirmed in 199 N. Y. 76, 92 N. E. 214;

Ex Parte Sweitzer, 13 Okla. Crim. Rep. 154, 162 Pac. 1134;

White Mountain Freezer Co. v. *Murphy,* 78 N. H. 398, 101 Atl. 357;

American Engineering Co. v. *International Moulders' Union,* 25 Pa. Dist. R. 564;

Iron Moulders' Union v. *Allis-Chalmers Co.,* 20 L. R. A. (N.S.) 315, 91 C. C. A. 631, 166 Fed. 45;

St. Louis v. *Gloner,* 210 Mo. 502, 15 L. R. A. (N.S.) 973, 124 Am. St. Rep. 750, 109 S. W. 30.

The above are among a legion of cases holding that, in the absence of legislation on the subject, peaceful picketing is lawful. At page 992 of *People* v. *Harris, supra,* the Colorado Court further said in discussing picketing:

> "It is an appeal to the public and to the members of the union not to patronize an employer who does not conform to the standards of organized labor relative to wages, hours, and conditions of employment. The mere fact that an employer may sustain loss of business as a result of such picketing does not warrant intervention. It is *damnum absque injuria* * * * such loss, under our social and economic system, is merely the result of a conflict of interest between capital and labor."

Further at page 993

> "It is argued that peaceful picketing is a crime under section 90, *supra.* If the legislative intent requires such a construction, then the law must, within the limits of the stipulated facts, be held to be unconstitutional as being a denial of freedom of speech. Those who seek reversal necessarily must contend that said section prohibits peaceful picketing of any kind, at any time, at any place near the employer's premises, and in any manner. If this contention is upheld, we have what amounts to an exercise of arbitrary power *in violation of the due-process of law provision contained in*

> *Amendment XIV.*" * * * "we are not here concerned with a statute which only regulates peaceful picketing, but one which forbids it. This unqualified prohibition would, in our opinion, violate 'those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'."

The Colorado Court further said in the same case at page 993,

> "The case of *Hardie-Tynes Manufacturing Company* v. *Cruise,* 189 Ala. 66, 66 So. 657, 661 (*one of the cases on the authority of which the conviction of the petitioner in the instant case was affirmed*) is cited as authority to the point that Section 90 *supra,* forbids peaceful picketing. That, undoubtedly, is the effect of the case. The question of the constitutionality of the Alabama Act was there raised and the Court said 'no intimation is offered as to what provision of the Constitution is hereby offended and we can think of none'. We may assume that since no criminal offense was involved in the *Hardie-Tynes* Case that the Constitutional questions presented in the instant case was not seriously considered in that litigation."

But, on rehearing in the *O'Rourke* Case, the other case on the authority of which the petitioner's conviction was sustained, the Alabama Court directly held that the Alabama statute did not deprive the defendant of the protection of the due-process of law clause of the XIVth Amendment. (Appendix "B" Brief in support of Petition for Certiorari.)

And further at page 994,

> "It cannot be successfully maintained that guarantees of freedom of speech are less important than guarantees relating to property * * * whatever our individual views may be on economic controversies such as involved here, we cannot consent to legislative invasion of constitutional guarantees to the extent for which contention is made in this case. The line of

> demarcation between police power and constitutional guarantees is not always well defined. Where a law, such as Section 90, here under consideration, impairs freedom of speech as it does, in view of the stipulated facts before us, we have no doubt that it constitutes an invasion of constitutional guarantees, both under the State and Federal due-process of law clauses and the mandatory provision prohibiting the enactment of laws impairing the freedom of speech".

The conflict between human rights and property rights was discussed in *Ex Parte Lyons,* 81 Pac. (2nd) 192:

> "Petitioner bases his right, to peacefully picket, on the provisions of the first and fourteenth amendments to the Federal Constitution, U. S. C. A. Const. Amends. 1, 14, and on section 9 of article 1, of the state Constitution which guarantee the unrestricted right of free speech. Thus we have here a recurrence, in a somewhat novel form, of that struggle between property rights and personal rights which has occupied the attention of the courts of the land since the organization of the Republic. The courts have always been zealous to protect the rights of persons to acquire, own and enjoy property. They have been more zealous, if possible, to protect the personal right of free speech and perhaps justly so, for free discussion contains the germ of progress which keeps flowing the blood stream of the Republic."

Since the filing of this petition, this Court, through Mr. Justice Roberts, delivered an opinion, on November 22nd, 1939:

> In Re: *Clara Schneider* v. *The Town of Irvington;*
> *Tim Young* v. *California;*
> *Snyder* v. *Milwaukee;*
> *Nichols et al.* v. *Massachusetts.*

These cases appeared as numbers 11, 13, 18, and 29, of the present term docket, and were considered together. These

cases are too fresh in the minds of the court to require extended citation.

These were all cases involving freedom of the press; yet the Court said in its opinion:

> "The freedom of *speech* and of press secured by the First Amendment against abridgement by the United States is similarly secured to all persons by the XIVth Amendment against abridgement by a State".

This statement of Mr. Justice Roberts emphasizes the equal sacredness of freedom of speech and of freedom of press. In *Snyder* v. *Milwaukee, supra,* No. 18, the Court states the facts to be this,

> "The petitioner, who was acting as a picket, stood in the street, in front of a meat market, and distributed to passing pedestrians hand-bills which pertained to a labor dispute with the meat market, and asking citizens to refrain from patronizing it".

In the case at bar, the petitioner merely stood at the entrance of an industrial plant, and orally requested a fellow employee to refrain from accepting reemployment during a strike. If the Court held in the *Snyder* Case, *supra,* that it was not within the police power of the State to limit freedom of *press,* even in an industrial dispute, it must necessarily follow that it is not within the police power of the state to limit freedom of *speech* in an industrial dispute, and therefore the conviction of the petitioner was wrongful. It is further significant that each of the above statutes and ordinances were declared unconstitutional. A clever attempt was made by the legislative authority to conceal the real purpose for which the legislation was enacted, and to insert into each of these pieces of legislation some clause, or catch phrase, on which they might be held constitutional. This Court, in each case, removed the tinsel and condemned the bad apple hidden underneath.

This Court further said in these cases:

> "In every case, therefore, where legislative abridgement of the right is asserted, the Court must be astute to examine the effects of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."
>
> "This Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this Court, the importance of preventing the restriction of enjoyment of these liberties."

This Court recently said in the case of *C. I. O.* v. *Hague,* 59 S. Ct. 958.

> "It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due-process clause of the Fourteenth Amendment".

Mr. Justice Butler, in his dissenting opinion in the case of *Senn* v. *Tile Layers Union,* 57 S. Ct. at page 867, 81 L. Ed. 1229, said:

> "The right of workers, parties to a labor dispute, to strike and picket peacefully to better their condition does not infringe any right of the employer".

Yet the Alabama Court, in the *Hardie-Tynes* case, 66 So. at 657, *supra,* as previously pointed out, said:

> "Perhaps our Legislature has taken the view, adopted by some of the Courts, that in actual practice

> there is and can be no such thing as peaceful picketing or peaceful persuasion. Certainly this is the effect of our statute".

If that is the "effect of the statute" then it must fall. By the express statement of the prosecuting witness in the case at bar, the petitioner's actions were entirely peaceful. There was probably never a "peaceful election", yet it would be absurd to argue that simply because elections are not peaceful that the right of citizens to discuss them is not protected by the guarantee of freedom of speech; and that the State under the guise of its police power can restrict a citizen's right to discuss or hold elections.

In the case of *Herndon* v. *Lowry,* 301 U. S. 242, this Court said,

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the State. Legislation which goes beyond this need violates the principle of the Constitution".

And applicable to this situation is also the statement of Mr. Justice Holmes in *Schenck* v. *United States,* 249 U. S. 47, at page 52:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

There is certainly no question involved in this case of the safety of the State. But the right here sought to be

protected by the Legislature is the employer's right to maintain the *status quo* without interference by his employees. For the Alabama courts to hold that one American workman cannot freely speak his sentiments to another American workman, concerning their mutual working conditions, is to indoctrinate our law with a philosophy foreign to English speaking people, and strike down the fundamental guarantees they have won in their Bill of Rights.

The court of Alabama, in the case of *Hardie-Tynes* v. *Cruise, supra,* further said in discussing picketing:

> "The 'liberty' guaranteed by the Constitution (article 1, paragraph 1) is liberty regulated by law and the social compact; and in order that all men may enjoy liberty it is the tritest truism to say that every man must renounce unbridled license".

To hold that peaceful discussion of working conditions is, "unbridled license", is to stretch the imagination beyond the breaking point. The rights of peaceful assembly and freedom of speech, are sacred rights wrung from despotic sovereigns, intent, on exercising "unbridled license" in the government of their subjects.

The Alabama court further said in the *Hardie-Tynes* case, *supra,*

> "If one man asserts the constitutional right of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of the other to pursue his business unmolested?"

The petitioner confesses that he knows of no constitutional right that the employer has to "pursue his business unmolested", especially a right to pursue that business unmolested by reasonable, and peaceful argument, on the part of his employees, for humane treatment and a decent standard of living. As to this argument Colorado said in the case of *People* v. *Harris, supra,*

> "The mere fact that an employer may sustain loss of business as a result of such picketing does not warrant intervention. It is damnum absque injuria".

Recently, the case of *City of Reno* v. *The Second Judicial District Court of the State of Nevada* was decided by the Supreme Court of the State of Nevada. (Not yet printed in the advance sheets.) Our labors have been very much lightened by the completeness of this decision and its exhaustive citations of all relevant authority. We have, therefore, printed it in full at the end of this brief, and we respectfully refer the Court to the same.

Point II

The Petitioner's Conviction Was Without Due-Process of Law in Violation of His Right of Freedom of Speech

The Court of Appeals of Alabama in its opinion in this case (R. 20) said:

> "The evidence adduced upon the trial was sufficient to bring the appellants actions, for which he was being prosecuted, within the purview of the prohibition implied in the statute."

Are citizens to be convicted for the violation of prohibitions that are merely "implied in the statute"? If so, clearly, the courts are exercising arbitrary authority in violation of the due-process of law clause of the *XIVth Amendment.*

The criminal misconduct for which the petitioner was convicted consisted of requesting his fellow worker not to return to work until a strike was settled. Certainly there is nothing in the petitioner's action here to justify a reasonable apprehension of danger to the organized government of the State so as to admit an abridgment of freedom of speech. In *De Jonge* v. *Oregon,* 299 U. S. 363, the Chief

Justice in speaking of the Legislature's right to abridge freedom of speech and assembly said:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.
>
> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

It is well settled that it is not only the interpretation of a statute which controls, but also the manner in which the statute is applied to the facts in the particular case. See *Herndon* v. *Lowry, supra.* An examination of the facts in this case and the case of *O'Rourke* v. *City of Birmingham, supra,* will show that this statute is being ruthlessly applied in Alabama to protect the economic interest of the employer against the human rights of the worker. It is regrettable that the published opinions do not contain more instances of the manner in which the statute is applied. In the vast majority of these "applications" the prisoner is unable to appeal.

Freedom of speech is a part of the political inheritance which Americans derived from the mother country; it is our birthright and it is the duty of the State to which we have delegated the right to govern us, to protect and enforce it; but only through stubborn resistance to the exer-

cise of arbitrary power will it be preserved to us. The fact that picketing is distasteful to a group of legislators should not be warrant to them, under pretext of exercising the police power to preserve order, to abridge freedom of speech.

A mere threat of disorder cannot be seized upon as valid excuse for abridging the fundamental guarantees of the Bill of Rights. As Mr. Justice Brandeis said of the generation that included those who inserted these guarantees into the Constitution:

> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. Whitney *v.* California, 274 U. S. 357, at 377."

The State's Defense

The State's defense of its statute here challenged, as appears from its brief filed in opposition to the petition for certiorari, seems to be entirely one of technical evasion. If the Attorney General of Alabama had desired not to meet the merits of this case, he might well have done as the Attorney General of Colorado did in the case of *Peoples* v. *Harris, supra.* It will be noted in the opinion in this case on page 990, paragraph 5:

> "The position of the people is supported here by Amicus Curiae, while the Attorney General joins with counsel for defendant urging the invalidity of the statute".

Without attempting to defend the merits of the statute, the Attorney General put forward in his brief the two following arguments:

A. That the Federal question was not properly raised.

B. That the case presented to the Court was not one of peaceful picketing.

These two points will be dealt with briefly.

A. An examination of the Record (R. 4) will show that, to the affidavit and warrant filed in the Inferior Court of Tuscaloosa County, the petitioner filed the following demurrers:

> "5. That the statute which the defendant is charged with violating in said complaint is repugnant to the XIVth Amendment of the Constitution of the United States."
>
> "6. That the statute which the defendant is charged with violating in said complaint is repugnant to the Constitution of the United States in that it refuses him the right of peaceful assemblage as guaranteed by Constitution of the United States."
>
> "7. That the statute which the defendant is charged with violating in said complaint is repugnant to the Constitution of the United States in that it contravenes the defendant's right of freedom of speech."

And in the Circuit Court of Tuscaloosa County, Alabama, the above three demurrers, 5, 6, and 7, were refiled to the complaint of the State (R. 7). Further, in the Circuit Court, the constitutionality of the statute was again raised on motion to exclude the State's evidence (R. 13).

The Court of Appeals of Alabama, in its opinion affirming the conviction of the petitioner in the Circuit Court, said:

> "so, as conceded by able counsel here representing appellant, 'the one question involved in this appeal is the constitutionality vel non of Section 3448 of the Code of Alabama, 1923'".

The Court of Appeals then further said, that it must affirm the conviction on the authority of *O'Rourke* v. *The City of Birmingham,* 27 Ala. Ap. 133, 168 So. 206, certiorari denied 232 Ala. 355, 168 So. 209; and *Hardie-Tynes Manufacturing Company* v. *Cruise et al.,* 189 Ala. 66, 66 So. 657. It will

further be noted in the *O'Rourke* Case on rehearing the Court said:

> "This Court having no inclination to deprive the appellant of any legal right or retard in any manner his full right of review of every pertinent question involved, therefore grants the request aforesaid and holds directly which is already in said opinion been impliedly held, from the authorities cited, by which we are governed and controlled, that in over-ruling the demurrers to the complaint in this cause, the application of the provisions of *Chapter 91 of the Code of Alabama, 1923,* the trial Court acted without error, *168 So. 206, 27 Ala. App. 133.* We are of the opinion that the ruling complained of had no tendency to deprive the appellant of his rights, powers, privileges and immunities as secured and guaranteed to him by the provisions of the *XIVth Amendment to the Constitution of the United States.*"

It is difficult to conceive of a more definite adjudication of the Federal question involved in the case at bar than the foregoing statement in its parent *O'Rourke* Case. The only merit in the State's argument in this particular seems to be the conjecture that the Court of Appeals might have overlooked the opinion on rehearing in the *O'Rourke* Case in deciding the case at bar.

The State further takes the highly technical position that, as certiorari was denied in the *O'Rourke* Case as well as in the case at bar, it was not a decision of *"the highest Court of the State"*. However, the jurisdictional statute, here relied on, does not require a decision by *"the highest Court of the State"* but merely by the *highest Court of a State in which a decision could be had.* The Court of Appeals of Alabama is the *highest Court of the State of Alabama in which a decision could be had* as a matter of right. The granting of Certiorari by the Supreme Court of Alabama is a matter of grace.

While it would not be necessary to give this Court jurisdiction of this proceeding, the petitioner prayed a Writ of Certiorari of the Supreme Court of Alabama, in which petition he assigned as error:

> "5. That the Court of Appeals erred in holding that Section 3448 of the Code of Alabama, 1923, was not violative of the XIVth Amendment of the Constitution of the United States."
>
> "8. That the Court of Appeals erred in holding that Section 3448 of the Code of Alabama, 1923, was not violative of the Constitution of the United States."

It should further be noted that, under the jurisdictional statute here relied on, it is not necessary that the "*highest Court of a State in which a decision could be had*" 'decide', on the face of its opinion, the Federal question, but merely that the Federal issue be *drawn in question.*

B. The next technical safeguard by which the State attempts to protect its statute is the argument that the facts at bar do not constitute a case of peaceful picketing, and that there was implied intimidation in this case. The record completely negatives such contention. Quoting from the record (R. 10):

> "neither Mr. Thornhill nor any other employee threatened me on the occasion testified to. Mr. Thornhill approached me in a peaceable manner, and did not put me in fear; he did not appear to be mad."

The State's witness, J. M. Waldon, further testified (R. 12):

> "at the time Mr. Thornhill and Clarence Simpson were talking to each other there was no one else present, and I heard no harsh words, saw nothing threatening in the manner of either man."

The implication of the Attorney General's argument is that Mr. Simpson should have been afraid of Mr. Thornhill, be-

cause Mr. Thornhill was a union man and Mr. Simpson was not. Simpson and Waldon were the only two witnesses called by the State. The proposition of law, that a party calling a witness is bound by the testimony of that witness, is too well established to require citation of authority. We are confronted with the situation of the two State witnesses testifying that Mr. Thornhill's actions on the occasion in question were entirely peaceful; the argument of the Attorney General, that it could not possibly have been peaceful since Mr. Thornhill was a "picket", and that the word "picket" is borrowed from the nomenclature of warfare. (Brief in opposition to petition, page 18.)

As was said in the case of *George B. Wallace Company* v. *International Association,* 155 Or. 652, 63 Pac. (2d) 1080:

> "It is urged here, and some courts have held (as did the Alabama Court in the *Hardie-Tynes* Case, *supra*) that there can be no such thing as peaceful picketing but picketing is per se a species of coercion and intimidation. That doctrine has long since been discarded."

We need go no further than to cite *Senn* v. *Tile Layers' Union,* 301 U. S. 468, wherein Justice Brandeis, speaking for the Court, said:

> "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.
>
> * * * * * * *
>
> "It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. Compare Pennsylvania Railroad Co. *v.* United Railroad Labor Board, 261 U. S. 72. It is true,

> also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right."

Statute Violates Established Rules Requiring Certainty of Specification of Charge

In addition to the inherent viciousness of the statute and its tendency to strip the petitioner of his constitutional guarantees, we think the statute violates all the established rules of certainty of specification of charge and standard of guilt. In affirming the petitioner's conviction by the trial court (R. 20), the Court of Appeals of Alabama said that the petitioner's actions were "within the purview of the prohibition implied in the statute". One of the fundamental principles of English-speaking justice is that a person charged with crime shall be informed of the charge against which he is called upon to defend, and the crime must be defined with certainty in order that citizens may gauge the effect of their conduct in advance of their actions. Only those acts which are stated with certainty by the legislative authority to be criminally reprehensible can carry criminal responsibility. There is no implied crime; criminal statutes must definitely define acts which amount to criminal conduct.

On this aspect of the statute the Colorado Court said, in speaking of their own Anti-Picketing Law, in *Peoples* v. *Harris, supra:*

> "The constitutionality of section 90, *supra,* also is challenged on the ground of uncertainty, in that there is a failure to sufficiently define standards of guilt to meet constitutional requirements. See *United States* v. *Reese,* 92 U. S. 214, 219, 220, 23 L. Ed. 563; *United States* v. *Brewer,* 139 U. S. 278, 288, 11 S. Ct. 538, 35 L. Ed. 190; *Todd* v. *United States,* 158 U. S. 278,

282, 15 S. Ct. 889, 39 L. Ed. 982; *United States* v. *L. Cohen Grocery Co.,* 255 U. S. 81, 89, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045; *Herndon* v. *Lowry,* 301 U. S. 242, 263, 57 S. Ct. 732, 81 L. Ed. 1066; *Lanzetta* v. *State,* 59 S. Ct. 618, 82 L. Ed. —; *People* v. *Mooney,* 87 Colo. 567, 290 P. 271. There is merit in this contention, but, in view of the conclusions reached, we deem it unnecessary to decide that and other questions raised."

Conclusion

The Supreme Court of Alabama said in *Hardie-Tynes* v. *Cruise, supra,* one of the cases on authority of which the Court of Appeals of Alabama upheld the petitioner's conviction;

> "Perhaps our Legislature has taken the view adopted by some of the courts that in actual practice there can be no such thing as peaceful picketing, or peaceful persuasion. Certainly this is the effect of our statute."

From the above statement and the Court's action in the present case, there can be no doubt that the Alabama Courts have adopted the credo of the intrenched reactionary forces who have continually maintained and constantly urged the superiority of property rights over human rights. The dislike of any movement which tends to disturb the status quo is probably best expressed by the hysterical statement in *Moore* v. *Union,* 402, 179 Pa. 417; and *Atcheson, T. S. F. Ry. Co.* v. *Gee et al.,* 139 Fed. 582 (1905).

> "There can be no such thing as peaceful picketing, any more than there can be chaste vulgarity or peaceful mobbing, or lawful lynching."

Those who would strip the people of their constitutional liberties, in order to protect their vested property interests, might well harken to the warning set out in *Ex Parte Lyons,* 81 Pac. (2nd) at 197:

> "In a Republic it is necessary that the right of freedom of speech and freedom of press be zealously guarded by the Court. These rights form the life stream of liberty. History teaches us that when these rights are suspended the right to possess and enjoy private property rapidly vanishes."

We have undertaken to show that the Alabama Legislature, in forbidding peaceful picketing, has violated one of the most necessary and sacred of American rights—the right of freedom of speech.

The construction placed upon the statute by the Alabama courts is such as to deny workers the right to peaceably assemble and peaceably discuss their working conditions with their fellow workers in the vicinity of their employer's plant.

The petitioner submits that the relief prayed should be granted and the decision of the Court of Appeals reversed.

Respectfully submitted,

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