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NON-NATURAL PERSONS AND THE GUARANTEE OF "LIBERTY" UNDER THE DUE PROCESS CLAUSE

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Perhaps no case before the Supreme Court from *Schechter Poultry Corporation* v. *United States*[1] to the present has attracted more widespread attention and interest than *Hague* v. *Committee for Industrial Organization*[2] decided during the last term of court. Having affirmed, in substantial measure, a lower court decree enjoining Mayor Hague and other Jersey City officials from deporting C. I. O. speakers and sympathizers, arresting them without bringing them to trial, and preventing the holding of meetings and the distribution of leaflets and printed matter, the decision has been hailed as a sweeping victory for civil liberties.

The stress placed upon the significance of the affirmance, however, has tended to obscure at least one particular in which the lower court decree was held erroneous. The bill for the injunction had been brought, *inter alia,* by the C. I. O. and several other unincorporated labor unions, and by the American Civil Liberties Union, a corporation whose avowed purpose is to aid in the preservation of "civil liberties." The lower courts had recognized the standing of these parties as entitling them to the relief sought. The Supreme Court, while substantially sustaining the decree as to the individual plaintiffs, held that the constitutional protection could be invoked only by natural persons as distinguished from "artificial" ones and dismissed the proceedings as to the labor associations and the

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[1] 295 U. S. 495, 55 Sup. Ct. 837 (1935).

[2] — U. S. —, 59 Sup. Ct. 954 (1939).

American Civil Liberties Union.[3] It is to a consideration of this part of the decision denying the right of non-natural persons to claim protection as to "civil liberties" that this paper is dedicated.

In the Federal Constitution, the chief source of immunity, whether of real or artificial persons, against unreasonable state encroachment upon freedom of speech and assembly or property is the Fourteenth Amendment. Two clauses of the first Section thereof were variously relied upon by the majority in sustaining the decree as to the individual plaintiffs. Mr. Justice Roberts, in an opinion receiving the concurrence of Mr. Justice Black, held that federal jurisdiction in the case found its basis in defendants' violation of the privileges and immunities clause.[4] On the other hand, Mr. Justice Stone, with the concurrence of Mr. Justice Reed and apparently that of Chief Justice Hughes, denied the propriety of invoking that clause and instead saw federal jurisdiction arising from defendants' violation of the due process clause.[5] Which of the two theories more properly justifies assumption of jurisdiction is a question that has received attention elsewhere.[6] It is noteworthy, however, that the opinion of Mr. Justice Roberts is not necessarily at odds with that of Mr. Justice Stone as to the propriety of basing jurisdiction on the due process clause. For while Mr. Justice Stone denied that the record indicated a violation of the privileges and immunities clause, there is no attempt in the opinion of Mr. Justice Roberts to deny that the facts involved a violation of the due process as well as of the privileges and immunities clause.[7]

If, in cases like *Hague* v. *Committee for Industrial Organization,* seeking immunity for free speech and assembly, the latter clause were the only applicable constitutional provision, the

[3] Specifically, only the American Civil Liberties Union was mentioned in the opinions. However, it is clearly stated that "only the individual respondents may . . . maintain this suit," *Id.* at —, 59 Sup. Ct. 954, 963; and all the judges composing the majority apparently concurred in dismissing "as to all save the individual plaintiffs." *Id.* at —, 59 Sup. Ct. 954, 965.

[4] "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States."

[5] "Nor shall any state deprive any person of life, liberty, or property without due process of law."

[6] *The Hague Case in the Supreme Court,* International Juridical Association Monthly Bulletin, Vol. 8, No. 1, p. 1, July 1939.

[7] *Id.* at 6.

right of non-natural persons to invoke its aid would stand opposed by a long line of cases holding that a corporation is not a citizen within the meaning of the privileges and immunities clause of the Fourteenth Amendment.[8] There appears to be no authority determining whether an unincorporated association will be deemed a citizen within that clause, but it is hardly likely that such an association would be given preferential treatment over corporations, especially in view of the reliance placed by the corporation cases upon the language of *Paul* v. *Virginia,* that "only natural persons" are protected by the privileges and immunities clause.[9]

On the other hand, if immunity for speech and assembly comes from the due process clause, as suggested by Mr. Justice Stone, the composite story of the rights of non-natural persons presents a different picture. A line of cases, imposing for its length as for uniformity of result achieved, supports the view that a corporation is a "person" within the due process clause insofar as it forbids deprivation of property. Indeed, the protection accorded to the property of corporations under this clause has been so extensive as to provoke criticism.[10] Similarly,

[8] Grosjean v. American Press Company, 297 U. S. 233, 56 Sup. Ct. 444 (1936); see cases collected in 3 U. S. Const. Anno. p. 15, note 19, as supplemented. *Cf.* the interstate privileges and immunities clause of the Constitution, art. iv, Sec. 2, cl. 1, as construed by Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357 (U. S. 1869), and cases collected in 2 U. S. Const. Anno. p. 373, note 3. Rottschaeffer, HANDBOOK OF AMERICAN CONSTITUTION LAW, p. 124. Cases refusing to treat corporations as citizens within the privileges and immunities clause of the Fourteenth Amendment have often done so in reliance on the analagous construction given by Paul v. Virginia to the interstate privileges and immunities clause under which only natural persons may claim. See Orient Insurance Company v. Daggs, 172 U. S. 561, 19 Sup. Ct. 281 (1899); Grosjean v. American Press Company, 297 U. S. 233, 244, 56 Sup. Ct. 444, 447.

Apart from the effect of these cases, the scope of the protection accorded by the privileges and immunities clause would be narrower than that of the due process clause in two other particulars: (1) The former would apply to "citizens" but not to aliens, the latter to all "persons." (2) The former would not give protection to speech or assembly not related to some *national* issue. See opinion of Mr. Justice Stone, Hague v. Committee for Industrial Organization, — U. S. —, —, 59 Sup. Ct. 954, 968, and United States v. Cruikshank, 92 U. S. 542, 552, 23 Sup. Ct. 588, 591 (1876).

[9] See note 8, *supra.*

[10] *Compare* the dissenting opinions of Mr. Justice Black in McCart v. Indianapolis Water Company 302 U. S. 419, 423, — Sup. Ct. —, — (1937), and in Connecticut General Life Insurance Company v. Johnson, 303 U. S. 77, 83, — Sup. Ct. — (1938); and note his failure to concur in the third part of Mr. Justice Stone's majority opinion in United

unincorporated associations have been accorded immunity under this provision.[11]

However, the Supreme Court's position as to whether non-natural persons are entitled to the "liberty" guaranteed by the due process clause is not entirely clear. The opinions in *Hague* v. *Committee for Industrial Organization,* in giving a negative answer make no attempt at explanation beyond citing two earlier cases as precedent: *Northwestern National Life Insurance Company* v. *Riggs*[12] and *Western Turf Association* v. *Greenburg.*[13] As the supposedly leading cases denying to non-natural persons the protection of the "liberty" guaranteed by the due process clause, these two decisions invite examination.

The former involved the validity of a Missouri statute which, as applied to a foreign insurance company, cut off any defense on its insurance policies based upon false statements of insured on his application, unless the matter misrepresented actually contributed to insured's death. Pointing out that the same statute, as applied to a local insurance company, had previously been sustained by it, the Supreme Court again upheld the act as a reasonable exercise of the state police power to correct abuses resulting from the insertion of clauses in insurance policies which enabled insurers to avail themselves of insured's misrepresentations, however remote their relation to the cause of death, without a return of premiums paid by insured. Concluding that the statute did not deprive the insurance company of its "liberty" or "property" without due process, the court said:

> "The business of life insurance is of such a peculiar character, affects so many people, and is so intimately connected with the common good that the state . . . may, without transcending the limits of legislative power, regulate their affairs, so far, at least, as to prevent them from committing wrong or injustice in the exercise of their corporate functions."[14]

It will be noted that the ultimate disposition of this case, unlike *Hague* v. *Committee for Industrial Organization,* did not require resort to any doctrine disqualifying non-natural persons

States v. Carolene Products Company, 304 U. S. 144, 155, — Sup. Ct. — (1938) where some recognition is given to the so-called substantive effect of the due process clause.

[11] *Cf.* Flexner v. Farson, 248 U. S. 289, 39 Sup. Ct. 97 (1919).

[12] 203 U. S. 243, 27 Sup. Ct. 126 (1906).

[13] 204 U. S. 359, 27 Sup. Ct. 384 (1907).

[14] 203 U. S. 243, 254, 27 Sup. Ct. 126, 129.

from invoking the "liberty" or "property" guarantees of the due process clause. As a reasonable exercise of the police power, the insurance statute would not have been violative of the rights or immunities even of natural persons. But the *Hague* case denies to non-naturals protection otherwise accorded to natural persons against admitted abuses. When, therefore, the Court, in *Northwestern National Insurance Company* v. *Riggs,* concludes with the statement that "the liberty referred to in that amendment is the liberty of natural, not artificial persons,"[15] this observation must be recognized as dictum. Moreover, it should be observed that no explanation or authority is given in support.

The second case, *Western Turf Association* v. *Greenberg,* involved the validity of a California statute which made it unlawful for "any corporation, person, or association," operating an amusement resort, to refuse admittance to any person presenting a ticket of admission, unless such person was drunk, unruly, boisterous, or otherwise objectionable. In an action by a ticket holder to recover a penalty from a corporation operating a race track, for violation of the statute, the Supreme Court, denying that the act was arbitrary or oppressive, upheld the statute as within the police power of the state. As in *Northwestern National Insurance Company* v. *Riggs,* the statue would not have violated the "liberty" or "property" provisions of the due process clause even in respect to natural persons. Again, therefore, the utterance in the ticket cases that the guarantee of "liberty" inures only to natural persons[16] is pure dictum.

Still a third case, not mentioned in *Hague* v. *Committee for Industrial Organization,* pays lip service to the dogma. In *Pierce v. Society of Sisters,*[17] a state statute compelling parents to send children to public schools was held unconstitutional as depriving an incorporated private school of *property* without due process. Mr. Justice McReynolds, having found the Society entitled to injunctive relief on that ground, his denial (again unsupported by reasoning or explanation, and merely referring to the first two cases) that corporations may claim immunity

[15] *Id.* at 255, 27 Sup. Ct. 126, 129.

[16] 204 U. S. 259, 363, 27 Sup. Ct. 384, 386. Again, no explanation or reason is given, and only Northwestern Insurance Company v. Riggs is cited as authority.

[17] 268 U. S. 510, 45 Sup. Ct. 570 (1925).

as to their "liberty" is mere dictum. In a word, therefore, *Hague* v. *Committee for Industrial Organization,* in repeating this doctrine of disqualification, rests only upon dicta for which no reasoning or explanation has ever been advanced.

The juxtaposition of "liberty" with "property" in the due process clause hardly lends plausibility to a construction which simultaneously envisions non-natural persons as within the scope of the protection of the one term but not within the protection of the other. It may, of course, be suggested that the word "liberty" implies freedom only from physical restraint and that, in that sense of the term, non-natural or fictitious persons, having no physical form capable of being restrained, are not *pro tanto* intended beneficiaries of the due process clause. In fact, writers from time to time have argued, on the basis of historical data, that the term "liberty" should be construed narrowly as safeguarding freedom only from personal confinement.[18]

Accepting for the moment this narrow interpretation of the term, and conceding the lack of realism in permitting an artificial person to set up an alleged deprivation of "liberty" in that sense, it is perhaps reasonable, nonetheless, to inquire whether there is any greater realism in assuming that an artificial person may "possess" and "own" property within the meaning of the due process clause, or in assuming that a non-natural entity may be personified for the purpose of subjection to charges of libel or contempt. There is, it would seem, as much fiction in the one as in the other unless realism is measured in terms of common practice and acceptance.

Whatever the speculations as to the proper interpretation of "liberty" on the basis of historical data, and however well founded they may be, there can be no doubt that the pronouncements of the Supreme Court give the term the broadest scope.[19] Not only has the Court expressly denied that "liberty" con-

[18] Shattuck, *The True Meaning of the Term "Liberty" In Those Clauses in the Federal and State Constitutions which Protect "Life, Liberty, and Property"* (1891) 4 Harv. L. Rev. 365, 2 Selected Essays on Constitutional Law 185. Warren, *The New "Liberty" Under the Fourteenth Amendment* (1926) 39 Harv. L. Rev. 431, 2 Selected Essays on Constitutional Law 237.

[19] Even writers advocating the narrower interpretation concede that the Court's policy has been to broaden the content of the term. See articles cited in note 18, *supra.*

notes freedom only from physical restraint,[20] but it has affirmatively construed the term:

"To embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."[21]

Similiarly, freedom of speech and of the press has been held within the scope of "liberty".[22] Whatever the difficulties inherent in establishing that an artificial person can be physically restrained, it would seem that the labor associations in *Hague* v. *Committee for Industrial Organization* would not be any more hard put to show deprivation of liberty under the broad definition of the Court, than to show deprivation of property.

Nor has the Court contented itself with adopting a broad construction of "liberty" as respects the protection extended to natural persons. Ignoring the dicta in *Northwestern National Life Insurance Company* v. *Riggs, Western Turf Association* v. *Greenberg,* and *Pierce* v. *Society of Sisters,* the Supreme Court had squarely held, prior to *Hague* v. *Committee for Industrial Organization,* that corporations are persons entitled to the guarantee of "liberty".

In *Grosjean v. American Press Company,*[23] a unanimous Court held that a Louisiana state tax on certain corporate newspaper publishers was so oppressive as to violate freedom of the press. After holding that the term "liberty" embraces freedom of speech and of the press, Mr. Justice Sutherland, while conceding that corporations are not citizens within the privileges and immunities clause, denied the contention that corporations were not entitled to invoke the protection of the due process

[20] Allgeyer v. Louisiana, 165 U. S. 389, 17 Sup. Ct. 427 (1897); Smith v. Texas, 233 U. S. 630, 34 Sup. Ct. 681 (1914); Grosjean v. American Press Company, 297 U. S. 233, 56 Sup. Ct. 444 (1936); *Cf.* Hardware Dealers' Mutual Fire Insurance Company of Wisconsin v. Glidden Company, 284 U. S. 151, 52 Sup. Ct. 69 (1931). For other cases, see 3 U. S. Const. Anno. p. 58, notes 30 and 31.

[21] 165 U. S. 389, —.

[22] Grosjean v. American Press Company, 297 U. S. 233, 56 Sup. Ct. 444 (1936); Near v. State of Minnesota, 283 U. S. 697, 51 Sup. Ct. 625 (1931). For other cases see 3 U. S. Const. Anno. p. 58, note 30, and supplement.

[23] 297 U. S. 233, 56 Sup. Ct. 444 (1936).

clause. The earlier dicta were not honored by reference. In turn, *Hague* v. *Committee for Industrial Organization* does not mention *Grosjean* v. *American Press Company*.

In *Adkins* v. *Children's Hospital*,[24] a divided Court held a minimum wage law unconstitutional as violating the "liberty" guaranteed by the due process clause of a corporate employer freely to contract. The Court implicitly recognized that a corporation was within the protection of the term "liberty". Of that case, too, *Hague* v. *Committee for Industrial Organization* makes no mention. Similarly, in *Carter* v. *Carter Coal Co.*,[25] by holding, *inter alia*, that delegation, to producers of two-thirds of the annual tonnage of coal (some of the producers being corporations), of legislative power to fix wages and hours for miners constituted an "unconstitutional interference with the personal liberty and private property"[26] of producers of the other one-third in violation of the due process clause of the Fifth Amendment, the Court implicitly recognizes that corporations may avail themselves of the guarantee of "liberty".

To these cases, extending the mantle of the due process clause to the "liberties" of corporations, it may be objected that essentially economic or property interests were being protected, rather than pure "civil liberties", and that the immunity found in the due process clause against deprivation of property suffices to justify the results. The answer, of course, is that protection of "liberties", as that term has been defined by the Court, invariably results in protection of property interests, and vice versa. Conversely, even a natural person may not be deprived of "liberty" without effecting an incidental restraint upon his enjoyment of his property. The Supreme Court, too, has sensed the fusion of the interests in "liberty" and "property". Thus, unreasonable interference with the "right" to labor, pursue an occupation, or engage in business, has been viewed at one time as an interference with "liberty",[27] at another, as an interference with "property".[28] Indeed, this fusion exposes the fallacy of simultaneously construing the

[24] 261 U. S. 525, 43 Sup. Ct. 394 (1923). Overruled on other grounds by West Coast Hotel Company v. Parrish, 300 U. S. 379, 57 Sup. 578 (1937).

[25] 298 U. S. 238, 56 Sup. Ct. 855 (1936).

[26] *Id.* at 312, 56 Sup. Ct. 855, 873.

[27] See cases collected in 3 U. S. Const. Anno. p. 58, note 30.

[28] See cases collected in 3 U. S. Const. Anno. p. 60, notes 39–41.

two terms, "liberty" and "property", variously as regards their application to non-natural persons, notwithstanding their side-by-side existence. For attempts at separation of one from the other must inevitably follow the same illusory course and are doomed to the same failure that has marked efforts to enforce a rigid separation of executive, legislative, and judicial functions under the so-called "separation of powers" doctrine.

Pausing, then, to take stock of the authorities, it appears that the dismissal of the suit as to non-natural persons in *Hague* v. *Committee for Industrial Organization* can be supported only on the basis of dicta, and that it ignores a number of square or implicit holdings sustaining a contrary viewpoint. There remains for consideration only a brief appraisal of the consequences of precluding invocation by corporations and other non-natural persons of the "liberty" guarantee.

Sporadically, the wisdom of allowing corporations to take shelter *anywhere* within the due process clause has been questioned.[29] Aside from Mr. Justice Black, however, no member of the Court has indicated any disposition to withdraw from non-natural persons the immunity against deprivation of "property" without due process. No argument, apart from that of interpretation already discussed, has been advanced or suggests itself which, while justifying recognition of that immunity, impels denial of that against deprivation of "liberty". Rather, the implications of such a policy are no less than alarming. Thus, to recede from the position of *Grosjean* v. *American Press Company* in this day of corporate radio and newspaper activity merely because of the artifical character of the litigant, would be to deny protection as to free speech at the necessary and principal sources of public information where such protection is most needed.

As regards labor, its freedom to organize, to appeal to the public for support, and to openly air its grievances against the employer has been recognized as a hard-won, lawful, effective, and almost indispensable aid for economic advancement. But recognition of the necessity and lawfulness of labor organization will be a futile gesture if the union is not to be accorded immunity as to its "liberty" to speak frankly and openly for its membership. To restrict the benefits of the guarantee of

[29] See note 10, *supra*.

"liberty" to natural persons is backhandedly to impair and discourage the function of the union. To be sure, individual members may sue in their own names to restrain unreasonable interference with their freedom of speech. But to compel all the members to sue severally or to join in one action brought in their own names is to retreat from the Supreme Court's position in *United Mine Workers of America* v. *Coronado Coal Co.* (the *Coronado Coal Case*[30]) which pointed out that:

> "Out of the very necessities of the existing conditions, and the utter impossibility of doing justice otherwise, the suable character of such an organization as this has come to be recognized in some jurisdictions, and many suits for and against labor unions are reported in which no question has been raised as to the right to treat them in their closely united action and functions as artificial persons capable of suing and being sued."[31]

As for the American Civil Liberties Union, as to which the suit was also dismissed in *Hague* v. *Committee for Industrial Organization,* more facts than those indicated by the opinions in the case are necessary for a proper appraisal of the Court's action. If its representatives were restrained by the defendants from circulating leaflets on its behalf or from otherwise advancing its purposes by speech or writing, the Union's right to enjoin the defendants would appear to be no less than that of the publishers in *Grosjean* v. *American Press Company* to enjoin interference with its publications. On the other hand, if the American Civil Liberties Union was complaining solely on behalf of the labor unions, the dismissal of the suit as to it might well be sustained on the principle that one not himself aggrieved may not invoke constitutional safeguards on behalf of third persons who are affected.[32]

Readverting to the fact that the majority in *Hague* v. *Committee for Industrial Organization* divided upon the question whether jurisdiction was based upon infringement of the due process clause, on the one hand, or the privileges and immunities clause, on the other, it need not necessarily follow that the resuscitation of the policy in *Grosjean* v. *American Press Com-*

[30] United Mine Workers of America v. Coronado Coal Company 259 U. S. 344, 42 Sup. Ct. 570 (1922).

[31] *Id.* at 387, 42 Sup. Ct. 570, 575.

[32] *Cf.* George Moore Ice Cream Company v. Rose, 289 U. S. 373, 53 Sup. Ct. 620 (1933); Young Company v. McNeal-Edwards Company, 283 U. S. 398, 51 Sup. Ct. 538 (1931); Adams v. American Agricultural Chemical Company, 78 Fla. 362, 82 So. 850 (1919).

pany will be obstructed by the association, in the opinion of Mr. Justice Roberts, of freedom of speech and of the press with the privileges and immunities clause, the protection of which has been uniformly denied to corporations. For, as noted earlier, Mr. Justice Roberts, while basing jurisdiction on the privileges and immunities clause, does not deny that the due process clause may also be available for the same purpose.

In recent months, the Court has shown a disposition to re-examine authorities. Reason rather than precedent seems the order of the day. May there be early reconsideration of this doctrine of disqualification first enforced in *Hague* v. *Committee for Industrial Organization,* and may the result, whether it be to affirm or overrule, rest on reasoning and analysis instead of merely reflecting homage to unquestioned dicta of the past.