

THE USE OF INJUNCTIONS IN LABOR DISPUTES

PART III.

INJUNCTION IN RELATION TO PICKETING.

PICKETING DEFINED. Picketing is a more or less militant weapon of the union which is employed to assist in making effective both the strike and the boycott. Generally, it may be said to be a concomitant with the strike—that is, a strike rarely occurs without an accompanying action by pickets. As soon as the strike has been ordered, it is the purpose of the union both to prevent the employer from obtaining other servants and to compel him to grant their demands by injuring his business in so far as they can—usually by means of a boycott. Both of these purposes are speedily and officially accomplished by the picket. Instances are numerous, particularly in local industrial circles, of the ruinous results of the strike and boycott, as often put into effect by the assemblage of workers appealing to the sympathies and prejudices of their brother laborers and the public in general.

Most of the cases which have come to the higher courts, however, have arisen from picketing used in the strike, with but little reference to its boycotting aims. Thus the definition commonly accepted by the courts is that which is found in Black's Law Dictionary (page 897): "Picketing, by members of a trade union on strike, consists in posting members at all the approaches to the works struck against, for the purpose of observing and reporting the workman going to or coming from the works, and of using such influence as may be in their power to prevent the workmen from accepting work there." Further definitions of the term will be found in the cases cited below, which will be classified according to the position they assume concerning picketing as lawful or unlawful.

PICKETING AS UNLAWFUL PER SE. The lawfulness or unlawfulness of picketing is determined when it is shown whether the acts of the unionists constitute either peaceable persuasion or intimidation. However, this general rule requires some modification. In practice it is most difficult for the courts to decide exactly when peaceable persuasion ceases and intimidation begins. Moreover, much care must be exercised in issuing the injunction, so that it will permit the lawful persuasion while preventing the unlawful intimidation. Open threats, much less actual violence, are not an indispensable accompaniment or condition of intimidation. In fact, in many instances that which on the surface appears to be peaceable persuasion may in the last analysis amount to intimidation by virtue of the intent which lies behind it or the circumstances which surround it. For example,

it may well happen in the stress and strain of a bitterly contested strike that although merely peaceable persuasion is intended, the action of the strikers becomes unlawful coercion because of the timidity or unprotected condition of the persons molested. Even when the picketing appears to be in good faith and is carried out peacefully to all intents and purposes, it very often tends to intimidate such frightened or unprotected workers.

Because of this tendency, a very few cases have held that the picket is unlawful *per se*, under all conditions and without particular reference to intimidation. Such decisions, however, have generally included in their statement of the basis for the injunction granted, facts which indicate that the picketing was accompanied by threats or other conduct amounting to intimidation.

Thus, in *Vegelahn v. Gunter*,¹ the court held, among other things, that the picketers might not congregate before the plaintiff's place of business for the purpose of preventing persons from entering or remaining in it. This prevented any intercourse with the non-union men even though there were no threats nor intimidation offered. It was also expressly stated in this case that the injunction should be so limited as to relate only to persons who are bound by contract, but should also prevent the strikers from interfering with persons seeking to enter the employment, and persons already employed, but not under contract.

Another case which similarly held the picket to be unlawful was that of *Beck v. Railway Teamsters' Protective Union*.² Here it was decided that the injunction must broadly enjoin picketing, without any qualification as to intimidation or force. The court declared that to place pickets upon the complainants' premises in order to prevent teamsters or other persons from going there, was unlawful. The mere act was found to be intimidation, and as such constituted an unwarranted interference with the right of free trade. The opinion declares, "It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce. As applied to cases of this character the lexicographers thus define the word 'pickets': 'A body of men belonging to a trades' union, sent to watch and annoy men working in a shop not belonging to the union, or against which a strike is in progress.' (Century Dict.: Webster's Dict.) The word had no such meaning. This definition is the result of what has been done

¹ 167 Mass. 92-1896.

² 118 Mich. 497-1898.

under it and the common application that has been made of it. This is the definition the defendants put upon it in the present case."

In *Otis Steel Co. v. Local Union No. 218*,³ the decision maintained that picketing *per se* was to be prohibited without any reference to force or violence. An interesting method of reasoning was employed in arriving at the illegality of this picket. The court declared that in the final analysis, the unionists by the use of their pickets virtually attempted, without the assistance of a court, to enjoin the Steel Co. from operating its plants.

The laborers proceeded to enforce their injunction not only against the Steel Co., but also against all non-union molders. Now it is evident that no possible law could give the union a right to dictate in a fashion which would indicate that it is the exponent of some higher law than that which may be administered by the courts. If, accordingly, it was unlawful for the workers to attempt to issue an injunction in such a manner, the means wherewith to enforce the injunction were certainly equally unlawful. And therefore, since it appeared that the picketing was the one admittedly effective means, it follows that the court cannot possibly permit its use.

Speaking of the matter of persuasion, the opinion states that no group of men have the right to force their opinions upon others by physical demonstrations. It is conclusively shown that the only way by which the picketing could have been made effective was for it to have resulted in intimidation. Moreover, persuasion, if it be too emphatic or too long and persistently continued, was held to constitute a nuisance and an unlawful coercion. The court concludes, "that no harm can result to the defendants by the granting of the injunction, except that they will be deprived of what they apparently conceived to be their right to enforce the unauthorized injunction which they themselves have issued."

District Judge McPherson, in *Atchison, T. & S. F. Ry. v. Gee*,⁴ after pointing out that all manner of threats, abuse, and violence had been used by the picketers, that the picketing had been maintained for a year with little respect for the rights of anyone, declared in forceful language that there can be no such thing as peaceful picketing. He concludes that peaceful picketing does not exist any more than chaste vulgarity, or peaceful mobbing, or lawful lynching. "When men want to converse or persuade, they do not organize a picket line. When they only want to see who are at work, they go and see, and then leave, and disturb no one physically or

³ 110 Fed. 698-1901.

⁴ 139 Fed. 582-1905.

mentally. The argument seems to be that anything short of physical violence is lawful. One man can be intimidated only when knocked down. But the peaceful, law-abiding man can be and is intimidated by gesticulations, by menaces, by being called harsh names, and by being followed or compelled to pass by men known to be unfriendly. . . . The frail man must be protected, and the company has the right to employ such."

In a decision of Judge Sanborn, in *Allis-Chalmers Co. v. Iron Molders' Union No. 125*,⁵ we find again that not much faith is put in the possibility of any actual "peaceful picketing." The mere fact that there were a large number of pickets acting together was held to make acts unlawful which if accomplished by one man would have been lawful. The persistent following of the workmen to and from their work, day after day for months, was shown to constitute *per se* a constant threat producing fear and alarm among them. Also, if after repeated acts of violence which were clearly illegal the strikers continued to resort to picketing and created an unfriendly atmosphere about the workers, such continued action amounted to an unlawful conspiracy and could be properly enjoined. The picketing had passed from the peaceful purpose of promoting the economic ends of the union men, and had entered the unlawful stage of malicious injury.

A very recent decision following the precedent of *Beck v. Railway Teamsters*,⁶ makes it appear that any form of picketing is illegal. *In re Langell*⁷ presents the acme of judicial bigotry in connection with the subject. An injunction had been issued from the circuit court which forbade the strikers from picketing the premises of their former employer. Shortly after this, one of the leaders stationed himself opposite the premises while the employees of the company were going to work. He said nothing to any one and made no attempt to interfere with them in any fashion. A dissenting opinion declared that the evidence showed that his action was not a part of any organized scheme to annoy or to watch. He merely went on the street of his own motion. Despite all these facts, he was found guilty of contempt of the injunction, and upon appeal to the supreme court the verdict was upheld by a majority. Chief Justice McAlvay makes the sweeping statement that all picketing is illegal, and that such a rule is more reasonable than that which holds certain acts of picketing lawful. He quotes the following as authority: "The doctrine that there may be a moral intimidation which is illegal, an-

⁵ 150 Fed. 155-1906.

⁶ Cited *supra*.

⁷ 178 Mich. 305-1914.

nounced by the supreme court of Massachusetts,⁸ was among the first judicial steps taken in this country toward overturning the rule permitting peaceable picketing, . . . and was a forerunner of the later rule that there can be no such thing as peaceable picketing, and consequently that all picketing is illegal." This quotation, coming as it does from a Cyclopaedia of Law and Procedure, indicates the extent to which some courts will go in following precedent, even though such precedent be not accurately and thoroughly established.

PICKETING AS A LEGAL ACT. After the foregoing review of the important cases which held picketing unlawful *per se*, we come to an analysis of those decisions which concede that under certain circumstances it may be considered as a lawful act. In general, no injunction will issue against the picket, if it be strictly and in good faith confined to the purpose of gaining information concerning the persons remaining in, or about to seek employment, or of peaceably persuading such persons, if not under contract, to leave their employment, or not to accept employment. Thus, in *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Association*,⁹ it was firmly stated that the mere act of picketing without some other act evidential of coercion, is not in itself evidence of intimidation. It was pointed out that the decision of the question must rest upon the circumstances surrounding each case—such for example, as the size of the picket, the extent of their occupation, and what they say and do. If the strikers are stationed for the purpose of seeing who can be made the subject of peaceable persuasion, no injunction will issue against them.

Justice Holmes, now of the U. S. Supreme Court, in a dissenting opinion handed down in *Vegeahn v. Gunter* (reviewed above), maintains that the picket does not always carry with it a threat of bodily harm. He feels that the more intelligent workmen realize full well that they cannot resort to force since they clearly have nothing to gain by such action. On social grounds, the Justice declares that the employees have as much right to use any justifiable weapons in their competition with capital, as have various competing units of capitalistic organizations. He declares that the policy of free competition applies to all conflicts of temporal interests. He adds, "It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on

⁸ *Vegeahn v. Gunter*—cited *supra*.

⁹ 59 *New Jersey Equity* 49-1899.

so fast, means an ever increasing *might and scope of combination*. *It seems to me futile to set our faces against this tendency."*

Here we have an excellent example of one view within the courts, assuming conditions to be progressive, and attempting to make the law conform to the conditions. The spirit of this decision is thus in direct contradistinction to that of the majority of the court (detailed above), which follows closely the letter of the law.

That the lawfulness or unlawfulness of the picket depends upon the purpose with which it is carried on and the effect which is produced by it, is the substance of another important opinion, handed down in *Fletcher Co. v. International Machinists*.¹⁰ If the purpose and effect are shown to be to intimidate, to interfere with the employer's right to have labor flow freely to him so that a reasonably courageous person would be prevented from offering his labor, then the picketing is held to be patently unlawful. The court summarizes the conditions of lawful picketing in the following concise manner: "If, however, the picketing is carried on for the mere purpose of conveying information to persons seeking or willing to receive the same, or even, in some cases, for the purpose of bringing orderly and peaceable persuasions to bear upon the minds of men who desire to listen to the same, the object of such persuasions not including in any way the disruption of an existing contract for labor, then there may be no unlawful element in the picketing, and carrying it on may found no action even at law, and certainly not call for any interference on the part of a court of equity."

Judge Taylor, in *Pope Motor Car Co. v. Keegan*,¹¹ takes a position in some respects similar to that of Justice Holmes (*Vegeahn v. Gunter*). Here it is maintained that the more intelligent artisans realize that law-abiding tactics will advance them to a larger extent than unlawful force; and hence, that it is wrong to assume that picketing by all classes of men at all times is illegal. The court believes that with the self-restraint which is gradually growing among the workers, picketing may be properly conducted. Agreeing with Judge Hadley's opinion in *Karges Furniture Co. v. Amalgamated Woodworkers' Local Union*,¹² the Pope Company case finds that argument and persuasion are proper methods of the strikers so long as they leave the persons solicited feeling at liberty to comply or not, as they please.

The Supreme Court of Georgia ordered, in *Jones v. Van Winkle*

¹⁰ 55 Atlantic 1077-1903.

¹¹ 150 Fed. 148-1906.

¹² 75 N. E. 877-1905.

Gin and Machine Works,¹³ that the injunction be modified so that the strikers be not enjoined from using all form of persuasion. Legitimate and moral suasion are permitted to the picketers so long as they do not thereby resort to coercive or intimidating measures, and do not obstruct the public thoroughfares.

The Illinois Court of Appeals, in *Christensen v. Kellog Switchboard and Supply Co.*,¹⁴ while severely condemning the use of picketing accompanied by force and violence, admits that peaceable argument or persuasion is not unlawful and will not be restrained by a court of equity.

When it is demonstrated to the court's satisfaction, as in *Everett-Waddey Co. v. Richmond Typographical Union*,¹⁵ that the members of the union have not, by their numbers or by any threats or violence of gesture or language, kept employees away from a printing establishment, and have not prevented any person from seeking employment there—then the court will hold that the employer is not entitled to the extraordinary relief by injunction.

Justice Andrews, of the New York Supreme Court, in *Foster v. Retail Clerks' International Protective Association*,¹⁶ assumes the broadest and most favorable position concerning several aspects of picketing, which may be found in the whole line of decided cases. It was shown that two of the picketers were not at all personally interested in the lot of the retail clerks, that they were not members of the union, and were at the utmost merely sympathizers with the efforts of fellow workmen to improve their condition. The question then arose—Did these men have any justifiable motive for their action, and in the absence of such motive did not the picketing constitute an unlawful conspiracy? The court by way of answering, held that only in certain well-established legal actions, such, e. g., as malicious prosecution and slander of title, did motive constitute an element of civil wrong. To attempt to extend this doctrine of motive beyond these exceptional cases in such a way as to make it cover injuries inflicted by picketing would have been to violate precedent and to make new rules of law without any sufficient reason. Therefore, it was declared that peaceful picketing, irrespective of the underlying motive, was at all times lawful, provided there be no threat or intimidation.

A second important principle was affirmed in this case. If it be

¹³ 131 Georgia 336-1908.

¹⁴ 110 Ill. Appeals 61-1903.

¹⁵ 53 S. E. 273-1906.

¹⁶ 39 Misc. Reports 48-1902.

assumed that picketing by an individual is lawful, it does not become unlawful because of an agreement between two or more. The court points out that many decisions have held that combination makes the act unlawful; but this point of view is shown to be fallacious. Two bases for such decisions are thus refuted: "By some it is said that the reason is that the combined acts of several are likely to be more harmful than the act of one. 'A man may encounter the acts of a single person, yet not be fairly matched against several.' But why should this consideration convert a right into a wrong? It may effect the remedy. It may justify, for instance, an injunction to protect against a conspiracy to libel, notwithstanding the rule that a libel by an individual may not be enjoined. It can hardly do more. Others have said that the reason is based upon the maxim *de minimis non curat lex*. The injury done by one is so small that the law will not regard it. But is that so? Is the injury done by one necessarily, and this is the test, so trivial that it need not be recognized by the courts? Might not a man of great influence conceivably work much more harm than a combination of others less well known? The whole theory is, I think, erroneous. A conspiracy is an agreement to do an unlawful act or to do a lawful act by unlawful means. There can be no conspiracy if the act aimed at is lawful and if the means employed also are lawful." Accordingly, it was found that the picketers committed no wrong when they combined with others peaceably to induce persons by persuasion to refrain from trading with the Foster Company.

Three very recent decisions in the United States Circuit Courts of Appeals evidence a decided unanimity of opinion in holding that picketing is legal when peaceable. It is probable, accordingly, that in the future, federal courts will follow the rule established in these cases. However, it must be noted that the statement of the legality of the picket in itself is regularly connected with a condemnation of violence and intimidation as they actually occur in the cases at issue.

In *Kolley v. Robinson*,¹⁷ Judge Reiner found the very plan of picketing to constitute a substantial exhibition of force. Abuse, threats, obstruction, physical assaults—all were cited as sufficient cause for the issue of an injunction which would never have been granted had the picketers resorted merely to peaceful means in persuading others to leave their employment.

That the size of the picket contributes largely to its status as intimidation, was held in *Sona v. Aluminum Castings Co.*¹⁸ Moreover,

¹⁷ 187 Fed. 415-1911.

¹⁸ 214 Fed. 936-1914.

here the court refused to review the evidence, since it held the lower tribunal competent to decide whether the acts complained of constituted intimidation and obstruction of the employees. Again, the possibility of legal persuasion was recognized along with the unlawfulness of the intimidation as established.

In the final case, that of *Bittner v. West Virginia-Pittsburgh Coal Co.*,¹⁹ the court expressly declared that an injunction restraining the employees from peaceful picketing should not have been granted. As a result, the injunction was modified and the lower court issuing it overruled.

RIGHT OF EMPLOYER TO INVOKE POWER OF EQUITY. The above cited cases relate to injunctions which have been issued or refused upon the application of the employer whose premises were picketed. Few of these cases consider the ground upon which the right of the employer to invoke the power of equity rests. In *Jersey City Printing Co. v. Cassidy*,²⁰ however, the situation is discussed by Vice Chancellor Green from a point of view which the trade-unionist would probably denounce as dangerously capitalistic in sentiment. Here, it is bluntly stated, that the purpose of the injunction is to provide the employer the right to enjoy a free and natural flow of the labor market. The decision apparently holds to a *laissez-faire* doctrine when it maintains that every man has the right of *absolute freedom* to employ or to be employed. Then it is pointed out that the basis of what is called the employer's "probable expectancy" of a free labor market is a peculiar, possibly friendly interest which he has in the freedom of another. The court in attempting to fortify its position as a defender of the employer's right of "probable expectancy," holds up before us the following social justification: "A large part of what is most valuable in modern life seems to depend more or less directly upon 'probable expectancies.' When they fail, civilization, as at present organized, may go down. As social and industrial life develops and grows more complex these 'probable expectancies' are bound to increase. It would seem to be inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing wants of an increasingly complex social order, will discover, define and protect from undue interference more of those 'probable expectancies.'"

Although the opinion is careful to insist that the same freedom must exist for employee as for employer, it also makes clear that neither the common law nor equity has as yet sufficiently advanced

¹⁹ 214 Fed. 716-1914.

²⁰ 63 N. J. Eq. 759-1902.

as to actually give that freedom to the employee. As a matter of fact, when employees, whether legally or not, are blacklisted, they are most decidedly deprived of their freedom and of their "probable expectancy." No impartial student can read the decision without becoming possessed by the feeling that a burning injustice is here inflicted upon the employees. Without attempting to refute the statements quoted above, it is sufficient to point out that the court instead of assuming a progressive and enlightened attitude in the matter of the labor market, takes the undignified position of attempting to *make* law upon a reactionary basis. When the decision speaks of "growing wants of an increasingly complex social order," it turns its countenance to the employer while it is blind to the needs and expectancies of the employee. It is evident that Vice Chancellor Green proceeds upon the theory that the best method to advance is to ignore one-half of the situation.

PART IV.

INJUNCTION AND PROCEEDINGS IN CONTEMPT.

CONTEMPT DEFINED. Contempt of court has been defined as a "despising of the authority, justice, or dignity of the court; and he is guilty of contempt whose conduct is such as tends to bring the authority and administration of the law into disrespect or disregard."²¹ Courts have declared that their usefulness and efficiency would not possibly exist without this power to enforce obedience to their orders and to remove any unlawful or unwarranted interference with their dispensation of justice. In general, contempt is classified as direct or constructive. Direct contempts are said to be those committed in the presence of the court. Contempts are constructive when they are committed beyond the court, and are such acts as tend to obstruct, embarrass, or prevent the proper administration of justice. Again, constructive contempts may be either criminal—that is, conduct directed against the dignity or authority of the court itself; or civil—that is, conduct directed against some civil right of a party to judicial proceedings.²²

In labor disputes, contempt proceedings have been invoked against violators of injunctions, at times, by the judges who issue the restraining order, and again, at the request of the employer who claims to be injured by the violation of the order. Thus, for the

²¹ Dahnke v. People, 168 Ill. 102-1897.

²² Note: 10 L. R. A. (N. S.) 1098.

purpose of this discussion, we shall confine our consideration to the criminal and civil aspects of contempt proceedings arising in the manner indicated.

CONTEMPT AS CIVIL OR CRIMINAL PROCEEDING. To place contempt proceedings in the proper category as civil or criminal has caused our courts much effort. Extreme confusion exists when an attempt is made to draw from the decisions any conclusions as to general principles concerning the matter. The question is a vital one, for many of the most important cases hinge upon it as the controlling point. No single opinion can be pointed to as being finally authoritative, but it will suffice to state the views of the United States Supreme Court in obtaining a reasonably comprehensive view.

In the long extended series of cases arising from the dispute between the Federation of Labor and the Buck's Stove and Range Co., many issues affecting the fortunes of the trade unionist and its powerful weapon, the boycott, came up for decision. Among these issues, contempt, in the later stages of the conflict, took the place of pre-eminence. In order to gain a proper understanding of the situation, however, a somewhat detailed resumé of the various proceedings is necessary.

When it became clear that Mr. Van Cleave, president of the National Association of Manufacturers, as well as president of the Buck's Co., was firm in his intention not to yield a single point to the unionists, the American Federation took up the tongs for the local polishers, and Mr. Gompers placed the name of the firm on the "We Don't Patronize List." The Federation, by means of its centralized machinery, put into operation an effective, nation-wide boycott against Mr. Van Cleave's product.

Upon request of the injured concern, a most sweeping injunction was granted restraining the Federation, its officers, and the local union from "interfering in any manner with the sale of the products of the plaintiff, and from declaring or threatening any boycott against the complainant, or in any manner assisting such boycotts, or printing or distributing through the mails any paper which contained any reference to the name of the complainant, its business or product in connection with the term 'Unfair' or 'We Don't Patronize' list, or from publishing or otherwise circulating any statement or notice, calling attention to complainant's customers, or of dealers or tradesmen, or the public, to any boycott against the complainants, or from coercing or inducing any dealer not to trade with complainant."

Gompers and two other officials of the Federation, in Decem-

ber, 1908, were pronounced guilty of contempt of court and were given prison sentences. About three months later, Justice Robb, of the Court of Appeals of the District of Columbia,²² upon appeal, modified the original injunction, so that most of the acts of Gompers and his associates became legal. In spite of this decision, upon appeal from the 1908 contempt proceedings, the defendants were again declared guilty.²⁴ Both injunction and contempt cases were merged into one, and the matter was finally brought to the Supreme Court of the United States. During the year 1910, however, the death of Mr. Van Cleave, and the ensuing change of management, together with the great evident loss from the boycott, caused the Buck's people to compromise the struggle and make peace with the union. The Federation, thereupon widely advertised the settlement, and friends of labor were requested to patronize the company. In view of this situation, the injunction proceedings were dismissed.²⁵

The case of *Gompers v. Buck's Stove and Range Co.*²⁶ was a review by the Supreme Court of the judgment of 1909, committing Gompers, Morrison and Mitchell for contempt. The opinion, after declaring that the boycott was an unlawful conspiracy, passes on to a discussion of whether the contempt was criminal or civil and to the effect of such distinction upon the case at issue.

First of all, it was pointed out that contempts are neither wholly civil nor altogether criminal. However, Mr. Justice Lamar declared that the character and purpose of the punishment often serve to make clear the distinction. If the purpose be remedial, that is, for the benefit of the complainant, the contempt is said to be civil; if it be punitive, that is, to vindicate the authority of the court, the contempt is classified as criminal. When it is maintained that imprisonment is often ordered for civil contempt, it follows that punishment may be remedial as well as punitive. Thus many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But in these cases the imprisonment was inflicted not as a punishment, but as a remedial measure intending to coerce the defendant to perform the affirmative act required by the court's order. If imprisoned, he is said to carry the keys of his prison in his own pocket.²⁷

²² *A. F. of L. v. Buck's Co.* 33 App. D. C. 83-1909.

²⁴ *Gompers v. Buck's Co.* 33 App. D. C. 516-1909.

²⁵ *Buck's Stove and Range Co. v. A. F. of L.* 219 U. S. 581-1911.

²⁶ 221 U. S. 418-1911.

²⁷ *In Re Nevitt*, 117 Fed. 45-1902.

"On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience." Such imprisonment operates solely as punishment for the completed act of disobedience.

The court then summarizes as follows: "The distinction between refusing to do an act commanded—remedial by imprisonment until the party performs the required act (civil contempt); and doing an act forbidden—punished by imprisonment for a definite term (criminal contempt); affords a test by which to determine the character of the punishment."

In this case, Gompers' contempt did not consist in refusing to do an affirmative act required, but rather in doing that which had been prohibited by the injunction. Accordingly, here was a plain necessity for an action for criminal contempt. Justice Lamar conclusively shows that the entire action in the lower court was on the contrary a proceeding for civil contempt. The Buck's Stove and Range Co. were the complainants; whereas, in a proceeding for criminal contempt, the government should have been the prosecutor, so that the case would have been entitled *U. S. v. Gompers*. Further indication of the nature of the proceedings as civil rather than criminal is discovered in the fact that the Buck's Co. attorneys placed Gompers and his associates upon the stand and made them witnesses for the company. If the suit had been considered criminal in nature, this would most likely not have been considered, since the constitution guarantees that "no person shall be compelled in any criminal case to be a witness against himself."

The Buck's people, finally, asked in substance for the imposition of a fine payable to them as additional punishment for the contempt. Here was another evidence of the civil nature of the proceedings. Reviewing the whole situation, it was evident that the court below imposed the penalty of imprisonment for a definite term upon Gompers for criminal contempt, since as pointed out above, he was guilty of violating the court's order. This action was taken in answer to a prayer for remedial relief in the equity cause which amounted to a proceeding for civil contempt. Thus there was an improper variation between the procedure adopted (civil) and the punishment imposed (criminal), and the court declared the result was fundamentally erroneous. In other words, Gompers was tried for civil contempt and punished as for criminal contempt.

Since the main cause was settled²⁸ by the agreement of the parties, this civil contempt proceeding which was necessarily a part of it, was thereby also settled, and Gompers was adjudged not guilty. I have followed this somewhat intricate reasoning in order to bring clearly to the reader's mind one statement of the distinction between criminal and civil contempt. As an illustration of the extreme contrariety on the part of the courts, and of the inherent difficulty of collating the decisions, it is only necessary to point to the case of *Rothschild v. Steger and Sons Piano Company*.²⁹ Here, one year later the Supreme Court of Illinois declared that the Supreme Court decision was not binding upon it; and held in substance that there was no difference between civil and criminal contempt. It practically stated that in its opinion the United States Supreme Court was wrong, when it maintained that in a civil contempt imprisonment for a definite term may be imposed. But on the whole, the majority of court decisions tend toward some kind of recognition of the principle affirmed in the *Buck's* case reviewed above.

This decision, however, did not end the controversy between Gompers and the Anti-Boycott organization. Justice Lamar had, while dismissing the contempt proceedings wrongly brought, avowedly left open the possibility of the District of Columbia court punishing for contempt by proper method. Justice Wright, upon a recommendation of a biased committee consisting of the attorneys who had prosecuted the case for the National Manufacturers' Association, in 1912, again pronounced the defendants guilty.³⁰ Upon appeal, the sentence was reduced and confirmed as thus modified.³¹

The case of *Gompers v. United States*,³² in the Supreme Court, finally settled the whole matter. Justice Holmes decided that inasmuch as contempt proceedings were not properly instituted until more than three years after the commission of the acts charged, and that since the contempt in question amounted to a crime, Gompers could not be punished because the law virtually sets a three-year limit on the power of a court to punish thus for any crime.

NOTICE OR ACTUAL KNOWLEDGE OF INJUNCTION. In general, it may be said that before any individual may be attached for contempt of court, he must have notice of the injunction or some actual knowledge of it. Thus, as was held in both *Consolidated Steel* and

²⁸ See Above.

²⁹ 256 Ill. 196-1912.

³⁰ In *Re Gompers*, 40 Wash. Law Rep., 417-1912.

³¹ In *Re Gompers*, 40 Wash. Law Rep., 290-1913.

³² 233 U. S. 604-1914.

Wire Co. v. Murray,³³ and in United States v. Coal Dealers' Association,³⁴ an injunction may properly go against a trade union by name and will operate to restrain all of its members who have knowledge of it.

Instances have arisen where a person *not a party* to the injunction has violated it. Here, the rule may be briefly stated; if the person can be shown to have had actual notice of the injunction, he may be adjudged guilty of contempt for its violation. More general knowledge will not serve to convict.

EFFECT OF APPEAL FROM ENJOINING ORDER. At times, during an appeal from an injunction, the unionists violate the order and as a result are committed for contempt. In Barnes v. Typographical Union,³⁵ the issue was raised as to the validity of the lower court's contempt proceedings during an appeal of the original enjoining order. The opinion held that the trial court had the clear right to punish for contempt any act which violated the injunction during the appeal. To the contention that the lower court might not punish for contempt until after the case had been passed upon by the higher tribunal, the decision said, "The adoption of a rule that the court, granting an injunction must stand idly by and see it violated while an appeal is pending and after the case is reinstated in that court, may then proceed to punish, would be attended with evil consequences. All that it would be necessary for a defendant to do to secure immunity until the case should be re-instated in the court would be to pray an appeal and file a bond. . . . If the court should be denied the right to compel obedience to the prohibition of the decree until the original case has completed its rounds through the courts, the appellees might lose all the benefits of their litigation and have their business ruined, although the decree should finally be affirmed."

If the injunction had been mandatory in character, requiring something to be done, and the violator of the order had refused to obey it during appeal, then he might not be summoned for contempt since such a summons would constitute an execution to enforce the command. In this case, however, the injunction in its nature as a prohibitory decree may be termed self-executing. An appeal from such an order could not stay the power of the court to compel obedience. Thus, the right to maintain the court's authority, was held in no way to depend upon the final outcome of the suit.

³³ 80 Fed. 811-1897.

³⁴ 85 Fed. 252-1898.

³⁵ 232 Ill. 402-1908.

It seems to me that a more reasonable rule would be to prevent the lower court from attaching for contempt pending the appeal and to permit the defendant to disobey the injunction at his own risk. If the judgment be reversed the defendant should not suffer since his acts were in no way illegal.

RIGHT OF TRIAL BY JURY. One of the oldest and at the same time most famous cases which voices an authoritative opinion as to the violation of the constitutional right of trial by jury, by a summary punishment for contempt, may be found in the United States Supreme Court records. entitled, *In Re Debs*.²⁶ When the petitioner, Debs, applied for a writ of habeas corpus, one of the contentions was based on the fact that his constitutional right of trial by jury had been invaded by his imprisonment at the hands of the judge of the circuit court. By way of reply, Justice Brewer, quoting many rulings to uphold his decision, declared that a court must have the right to inquire itself whether there has been any disobedience of its orders so that it may properly enforce them. "To submit, he added, "the question of disobedience to another tribunal, be it jury or another court, would operate to deprive the proceeding of half its efficiency." The ruling agreed with the quoted cases that when a court enforces its orders by proceedings for contempt, it is not executing the criminal laws of the land, but is only securing to suitors the right to which it has adjudged them entitled. Moreover, when some interference with property rights appears, the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by, or are themselves violation of the criminal law. Thus, if the acts in the Debs case were violations of criminal law such matter would be still open to criminal prosecution even after the defendants had been punished for the same acts as constituting violation of the equity injunction.

District Judge Rogers, in *United States v. Sweeney*, a labor case,²⁷ refers the claim, that persons who violate injunctions are entitled under the constitution to a trial by jury, to the decision in the Debs case as follows: "That case was argued by as great lawyers as are in this country, and was decided by the greatest court in the world. Until it is overturned it must be held to be the law of the land."

The fact that criminal prosecutions with trial by jury are wholly ineffective for the protection of the "scab" employee and his em-

²⁶ 158 U. S. 599-1894.

²⁷ 95 Fed. 434-1899.

ployer constitutes the justification which the opinion in *Southern Railway Co. v. Machinists' Local Union No. 14*,³⁸ finds for the use of the equitable remedy. In passing, it might be well to note that Judge Hammond, in delivering himself of a rabidly anti-union decision, uses as his controlling authority an equally rabid article in the *North American Review* (volume 173, p. 445), by the Most Reverend Archbishop Ireland. Having the church to fight is apparently not the least of the laboring-man's worries. Judge McPherson, in *Union Pacific Railway Co. v. Reuf*,³⁹ declared that when the constitution of the United States provides that "in all criminal prosecutions the accused shall enjoy the rights to a speedy and public trial by an impartial jury," it does not say that in *all* cases the right of trial by jury shall exist, merely in all criminal cases. It is assumed that since equity proceedings existed at the time of the adoption of the constitution, the right of trial by jury in equity would have been granted if the fathers had so willed.

In 1893, the legislature of Illinois passed an act providing for a trial by jury in all cases where a judgment was to be satisfied by imprisonment. *O'Brien v. The People*,⁴⁰ held that this act did not apply to contempt proceedings brought against the strikers for the violation of an enjoining order. Likewise, the territorial legislature of Oklahoma, in 1895, enacted a statute which provided that any person charged with an indirect (constructive) contempt, might have, upon demand, a change of judge or venue, and a trial by jury. The case of *Smith v. Speed*,⁴¹ held such enactment unconstitutional, since it made equitable jurisdiction inadequate to protect the citizen in his rights, including that of trial by jury. Thus, the court could not see with equanimity the writ of injunction bereft of its power by an act which made contempt proceedings dependent upon the whim of a jury or some other judge.

It will be of interest to note in this connection, Ex-President Taft's view of the matter as expressed in his "Present Day Problems."⁴² Because of the popular doubt as to the judges' impartial attitude in contempt proceedings, Mr. Taft believes he would give the defendant the right to ask for another judge to hear the issue. "I do not think," he states, "that it would seriously delay the hearing of the cause, and it would give more confidence in the impartiality of

³⁸ 111 Fed. 49-1901.

³⁹ 120 Fed. 112-1902.

⁴⁰ 216 Ill. 354-1905.

⁴¹ 11 Okl. 95-1901.

⁴² Page 272.

the decision. It is almost as important that there should be the appearance of justice as that there should be an actual administration of it." But when it comes to the question of the trial of contempt by jury, the learned professor declares that "to introduce another contest before the writ shall be enforced with all the uncertainties and digressions and prejudices that are injected into a jury trial, would be to make the order of the court go for nothing."

I have reserved for the last the only judicial utterance which upholds the right of trial by jury in contempt proceedings. Judge Caldwell, in a dissenting opinion in *Hopkins v. Oxley Stove Co.*, vigorously justifies the right, and ruthlessly condemns those who attempt to rule by injunction. This "voice from the wilderness," protesting against all recorded authority, deserves in my opinion a warm place in the affections of those who sympathize with the worker. The opinion forcefully objects to equity jurisdiction and the injunction when used as a "short-cut" in dealing with those who violate the law. It concedes that the enjoining order avoids the delay and uncertainty incident to a jury trial, occasions less expense, and insures a speedier punishment. "But," it continues, in telling fashion, "the logical difficulty with this reasoning is that it confers jurisdiction on the mob equally with the chancellor. Those who justify or excuse mob law do it upon the ground that the administration of criminal justice in the courts is slow and expensive, and the results sometimes unsatisfactory. It can make little difference to the victims of short-cut and unconstitutional methods whether it is the mob or the chancellor that deprives them of their constitutional rights. It is vain to disguise the fact that this desire for a short-cut originates in the feeling of hostility to trial by jury—a mode of trial which has never been popular with the aristocracy of wealth, or the corporations and trusts. A distrust of the jury is a distrust of the people, and a distrust of the people means the overthrow of the government our fathers founded."

After asserting that the provisions in the constitution on the subject of trial by jury are plain and unambiguous, he adds: "These mandatory provisions of the constitutions are not obsolete, and are not to be nullified by mustering against them a little horde of equity maxims and obsolete precedents originating in a monarchical government having no written constitution. . . . These constitutional guarantees are not to be swept aside by an equitable invention which would turn crime into a contempt, and enable a judge to declare innocent acts crimes, and punish them at his discretion. But notwith-

standing the constitution expressly enumerates the only exceptions to the right of trial by jury, and positively limits those exceptions to the cases mentioned, those who favor government by injunction propose to ingraft upon that instrument numerous other exceptions which would deprive the great body of citizens of the republic of their constitutional right of trial by jury. With the interpolations essential to support government by injunction, the constitution would contain the following further exceptions to the right of trial by jury: 'And except when many persons are associated together for a common purpose, and except in the case of members of trades unions, and other labor organizations, and except in cases of all persons of small means.'

To abolish thus the right of trial by jury, Judge Caldwell holds to be the right of the people. Encroachments by the judiciary for such a purpose are never to be tolerated. Instances of English cases where juries were necessary to protect individuals from the oppression of the judiciary, and the conclusion that we in this country learned the lesson from history, leads the court to remark in summing up: "Our fathers invested the prerogative of maintaining and defending the people's rights and liberties in the people themselves—in a jury."

Mr. Henry R. Seager, the noted economist, in an editorial,⁴³ expresses himself as follows on the subject: "To grant to persons charged with contempt of court outside the courtroom the right to trial by jury would be merely to extend to such offenders the same protection from judicial oppression that our ancestors secured, long years ago, from executive oppression. Judges who oppose this change have an appreciation of their importance which seems out of harmony with the democratic age in which they are condemned to live. "I'll be judge, I'll be jury," the proposal of "cunning old fury," in the familiar rhyme, is an arrangement more calculated to expedite convictions than to secure even-handed justice."

In all probability, however, many years are likely to pass before the judiciary will be willing to submit their decisions in contempt proceedings to a jury for trial. Little faith can be placed in legislative action on the subject, since as shown above, the courts declare unconstitutional any provisions which lessen their power to punish summarily for contempt.

⁴³ Survey, 31: 594-1914.

CONCLUSION.

Generalization presents at all times a difficult problem if one wishes to proceed with genuine honesty. Any statement of conclusions drawn from judicial decisions must go hand in hand with a realization that there may be more cases which oppose than uphold the rule affirmed. The weight of the opinion, however, may be generally measured by the importance of the court delivering it. A perusal of the cases cited above will show, I think, that: (1) at present the strike *per se* is legal. (2) A clearly discernible tendency is arising to make peaceful boycotting come within the protection of the law. Opposed to these advances, it is clear that (3) actual picketing is rarely allowed and (4) that the courts, on the whole, are not likely to give up, of their own volition the right to punish for contempt. Finally, it is probable that (5) the courts will continue to issue the writ of injunction in labor disputes, and as an inevitable concomitant, abuse their power when no restrictions are placed upon it.

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