

THE USE OF INJUNCTIONS IN LABOR DISPUTES.

Our present system of jurisprudence contains two distinct divisions—law and equity. Equity exists, just as in the past, to afford relief which the law by reason of its so-called “universality” is unable to grant. Inasmuch as the primary tribunal is the law court, an action in equity must first of all allege that there is no plain, adequate and complete remedy at law. To render equity proceedings effective, the enjoining writ or injunction issues as the order of the court which must be obeyed. The injunction assumes two forms, one mandatory, the other prohibitory. The former commands the performance of specific acts; the latter seeks to prevent acts which threaten irreparable injury to civil and property rights.

Within the scope of this latter category falls the use of the injunction with which labor is particularly concerned. Equity courts have so defined “property” as to make it include “business”; the protection afforded property rights is similarly granted to business rights. This principle once established spread with much rapidity. When, in 1868, an English court of equity issued an injunction to restrain the issuance of certain placards during a strike, the courts in America quickly followed suit.

All the previously developed machinery of the injunction with its temporary issuance and permanent forms was utilized to meet the troubled situation arising from the labor disputes which became numerous during the last quarter of the nineteenth century.

It follows that the worker will often plead that the courts have absolutely no precedent for their use of the injunction in the above indicated manner. To this contention the jurists will reply, “Every just order or rule known to equity courts was born of some emergency to meet some new conditions, and was therefore, in its time, without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and not unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief.”¹

A review of the various uses of the injunction in labor disputes will furnish a proper basis for a discerning attitude in the entire matter. I shall therefore indicate the relation of the enjoining order to the strike, the boycott, the picket, and finally to contempt proceedings—as all are established by judicial decisions. Some of the

¹ Judge Taft in *Toledo Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730-1893.

fundamental, specific problems which are therein discussed may resolve themselves into the following significant questions: Do the rights of the employer which equity protects genuinely belong to equity jurisdictions? Should acts, perfectly innocent otherwise, be forbidden because of a wrongful underlying motive? When the action of an individual is lawful, is the same action by a combination of individuals unlawful? Does not summary punishment for contempt violate certain constitutional provisions as to the right of trial by jury?

PART I—INJUNCTION IN RELATION TO STRIKES

STRIKE DEFINED. It is a long-established axiom that any genuine study of a subject requires a definition of terms as the first step in an intelligent consideration of it. About the meaning of an apparently simple and plain phrase may revolve a bitter controversy. Vary the definition of strike and the judicial interpretation will vary with it.

Thus, Judge Jenkins in the case of *Farmers' Loan and Trust Co. v. Northern Pacific Ry. Co.*,² after summing up the various definitions obtainable declared, "There are running through all of them two controlling ideas: First, by compulsion to extort from the employer the concession demanded; second, a cessation of labor, but not the abandonment of employment." This decision, therefore, maintains that a "Strike is essentially a conspiracy to extort by violence." A later ruling by a higher court reversing it states that orderly withdrawal and simultaneous cessation of work properly define the term.

INJUNCTION AGAINST ACT OF CEASING WORK. The general rule may at once be formulated. Although a strike may be illegal or criminal it cannot be enjoined. In the *Farmers' Loan* case an injunction actually issued against a strike. The receivers of the company obtained the injunction forbidding the employees of the railroad to quit their service. When the union officers objected, Judge Jenkins did not deny the right of the men to stop work. He insists "But it does not follow that one has the absolute right to abandon that which he has undertaken without regard to time and conditions. . . . His right of abandonment is limited by the assumption of that service, and the conditions and exigencies attaching thereto. It would be monstrous if a surgeon, upon demand and refusal of larger compensation could lawfully abandon an operation partially performed, leaving his knife in the bleeding body of the patient."

In conclusion, it is declared that the men could only strike after they had given reasonable notice. The case was appealed, and under

² 60 Fed. 803-1894.

the title of *Arthur V. Oakes*,³ the decision as stated was reversed. Here Justice Harlan asserted that to tell a man he must not strike was equivalent to "a condition of involuntary servitude which the Supreme Court of the land declares shall not exist within the United States."

Even in the case of the operation of railroads where the public is primarily concerned, it was held that there was no justification for a "departure from the general rule that equity will not compel the actual affirmative performance of merely personal services." This decision has firmly established the principle that no injunction can ever issue against the act of ceasing employment.

LEGALITY OF ACTS OF UNION OFFICERS. Mr. Bryan has summarized well the specific things which the courts have permitted the unions to do.⁴ "Unions are permitted to organize, elect officers, adopt reasonable by-laws to which all shall be subject, and govern themselves by the rules of the majority. They may adopt scales of wages, below which their members may be forbidden to work; and apportion apprentices among employers according to the number of workmen each employs. Penalties may be imposed upon members for violation of the by-laws, for which the Union may sue. The officers may be clothed with the authority to call upon members to quit work, on penalty of expulsion, and the union may pay the expenses of those who are out on strike. In general, so long as the combination pursues legitimate objects with lawful means, it is subject to no interference by any part of law or equity."

A most interesting opinion as to the limitations upon the acts of strikers was enunciated by Justice Brewer⁵ in 1885. It aptly states the law and although lengthy it deserves for its concise statement of the principles at issue to be quoted in large part. "I think a few preliminary considerations, in reference to the common rights which we all have as free men in this country, may not be amiss. Every man has a right to work for whom he pleases and to go where he pleases, and to do what he pleases, providing, in so doing, he does not trespass on the rights of others. And every man who seeks another to work for him has a right to contract with that man, to make such an agreement with him as will be mutually satisfactory; and unless he has made a contract binding him to a stipulated time, he may rightfully say to such employee at any time, "I have no further need for your services."

³ 63 Fed. 310-1894.

⁴ *American Law Review* 42.

⁵ *United States v. Kane*, 23 Fed. 748-1885.

Now it is well to come down to simple things. Supposing Mr. Wheeler has a little farm of 20 acres. He comes to Mr. Orr and says to him, "Here, work for me, will you?" and Mr. Orr goes to work for him under some contract. Now, every one of us realizes the fact that if Mr. Orr is tired of working there, if he does not think the pay is satisfactory, or if it is a mere whim of his, he has a right to say, "Mr. Wheeler, I won't work for you any more," and Mr. Wheeler would have no right to do anything. Mr. Orr is a free man, and can work for whom he pleases, and as long as he pleases and quit when he pleases; and that right which Mr. Orr has Mr. Wheeler has also. The fact that Mr. Wheeler happens to be an employer does not abridge his freedom. If he is tired of Mr. Orr's work, or if he dislikes the man, or if he does not want any more of his assistance on his place, he can say to Mr. Orr, and say very properly, "I have paid you for all the time you have worked; now you can leave, and seek work elsewhere." Those are common, every-day, simple rules of right and wrong we all recognize. Nobody doubts that. Nobody would think for a moment, in a simple case of that kind, of questioning the right, either of Mr. Orr to quit or of Mr. Wheeler to say, "You may leave." And that which is true in these simple matters where there is a little piece of property, and a single owner, is just as true when there is a large property and a large number of employees. Rules of right and wrong, obligations of employer and obligations of employee do not change because the property is in the one instance a little bit of real estate, and in the other a large railroad property; and if we apply these simple, commonplace rules of right and wrong we avoid, oftentimes, a great many of the troubles into which we come.

Let us move on a little further to another matter. Suppose Mr. Wheeler had two men employed, and that he finds that in the management of his little farm he is not making enough so that he can afford to employ two laborers, and he says to one of them: "I will have to get along without your services, and I will do with the services of the other," and the one leaves. That is all right. Supposing the one that leaves goes to the one who has not left and says to him: "Now, look here; leave with me," giving whatever reasons he sees fit, whatever reasons he can adduce, and the other one says: "Well, I will leave," and he leaves because his co-laborer has persuaded him to leave—has urged him to leave; that is all right. Mr. Wheeler has nothing to say; he may think that the reasons which the one that is leaving has given to the one that he would like to have stay are

frivolous, not such as ought to induce him to leave, but that is those gentlemen's business. If the one whom he would like to have stay is inclined to go because his friend has urged him, has persuaded him, has induced him to leave, Mr. Wheeler cannot say anything. That is the right of both these men—the one to make suggestions, give reasons, and the other to listen to them, and act upon them.

But suppose that one is discharged and the other wants to stay, is satisfied with the employment; and the one that leaves goes around to a number of friends and gathers them, and they come around, a large party of them—a party with revolvers and muskets—and the one that leaves comes to the one that wants to stay and says to him: "Now, my friends are here; you had better leave, I request you to leave;" the man looks at the party that is standing there; there is nothing but a simple request—that is, so far as the language which is used; there is no threat; but it is a request backed by a demonstration intended to intimidate, calculated to intimidate, and the man says: "Well, I would like to stay, I am willing to work here, yet there are too many men here, there is too much of a demonstration; I am afraid to say." Now, the common sense of every man tells him that that is not a mere request—tells him that while the language used may be very polite and be merely in the form of a request, yet it is accompanied with that backing of force intended as a demonstration and calculated to make an impression and that the man leaves, really because he is intimidated.

If I take another illustration I will make it even more plain. Suppose half a dozen men stop a coach, with revolvers in their hands, and one man asks the passengers politely to step out and pass over their valuables, and suppose those men should be put on trial before any court for robbery, would not you laugh at that one who would say, "Why, there was no violence; there were no threats; there was simply a request to those passengers to hand over their valuables and they handed them over; it was simply a request and a loan of their valuables." Would not the common sense of every man say that that request, no matter how politely it was expressed, was a request backed by a demonstration of force that was really intimidation, and made the offense robbery? Would not you expect any judge to say that? Would not you ridicule any one that would say otherwise? . . .

Then there is another proposition that comes in—a familiar rule of law—that where a party of men combine, with the intent to do an unlawful thing, and in the prosecution of that unlawful intent

one of the party goes a step beyond the balance of the party, and does acts which the balance do not themselves perform, all are responsible for what the one does. In order to make that rule of law applicable, there must be a concert of action; an agreement to do some unlawful thing. If there is no such agreement, no such preconcert of action, then each individual is responsible simply for what he does. Thus, for instance, if there should happen to gather here on the street 50 or 100 or 200 men, with no preconcert of purpose, accidentally meeting here, and a street fight should develop in their midst, all of that crowd are not responsible for it; that would be unjust; that would be unfair; because they did not go there, they did not meet together, with a preconcerted purpose to do anything unlawful, and, although something unlawful may be done in that crowd, yet only they are at fault who do the unlawful thing. But if they all met, as I said, for the purpose of doing some unlawful act, having formed beforehand the purpose to do it, and are present there to carry that purpose into effect, then every man, by virtue of uniting in that pre-conceived purpose to do the unlawful thing, makes himself responsible for what any one does.

A familiar illustration which often comes before a court is this: Supposing three or four men form a purpose to commit burglary, and break into a house for the purpose of committing that burglary; that is all they had intended to do; that is the unlawful act, and the single unlawful act, which they had set out to accomplish; they get into the house and somebody wakes up, and one of the party shoots and kills. Now, the three or four persons who went into that house never formed beforehand the intent to kill anybody; they simply went in there to commit burglary; but, combining to do that unlawful thing, in the prosecution of the burglary, and to make it successful, one of the party shoots and kills, and the law comes in and says: "All of you are guilty of murder; we do not discriminate between you; you broke into that house to commit burglary; in prosecution of that burglarious entrance one of your party committed murder; all are guilty."

Now that is a reasonable rule, when you stop to think of it; it is not a mere harsh, arbitrary, technical rule which the courts have laid down, and the statutes have established; it is a rule intended to prevent combinations or conspiracies to do an unlawful thing, and where there are many together it is often difficult to distinguish the one who does any particular act."

In the recent case of *Tri-City Trades v. American Steel Foun-*

dries,⁶ the court held that where the strike was for the legitimate purpose of obtaining higher wages, the commission of some unlawful acts by the strikers would not taint the entire purpose itself with unlawfulness, so as to entitle the employer to an injunction against lawful acts in furtherance of such legitimate purpose.

It was contended in this case, moreover, that the strikers had no right to interfere with other employes, because as strikers they could have no interest in the company for which they no longer worked. To this it was answered that a strike does not fully terminate its relationship of the parties so as to make the strikers mere intermeddles, since the strike creates a new and anomalous relationship that is neither that of a general employer and employee or that of employer and employee seeking work from them as strangers.

The case of *Stephens v. Ohio Telephone Co.*,⁷ provided for an injunction in favor of telephone subscribers against strikers' interference with their service on the grounds that the union admittedly was seeking to interfere with the business of the company.

The court declared that such an avowed intention would almost make the action of the unionists an unlawful conspiracy. Their primary purpose should have been to improve their own conditions. Any damage which the employer might suffer in that contingency would be merely incidental and would not be "illegal interference."

INJUNCTION AGAINST LEGAL ACTS WITH WRONGFUL MOTIVE. Passing to a consideration of the materiality of motive in acts which are *per se* lawful, two conflicting views are found. One holds that a legal act cannot be made illegal by the motive which underlies it. The other maintains that when the motive is malicious and is based upon a desire to injure the rights of others, the strike is wrong, and even innocent acts in pursuance of it are illegal.

The first view was propounded by Judge Parker in the case of *National Protective Association v. Cummings*.⁸ An injunction had been requested for the purpose of restraining the union from striking to procure the discharge of members of a rival organization. In his decision, Judge Parker refused to admit that the motive behind the act of striking could make the act unlawful. He asserts, "It seems to me illogical and little short of absurd to say that the every-day acts of the business world, apparently within the domain of competition, may be either lawful or unlawful according to the motives of the actor."

⁶ 238 Fed. 728, 1917.

⁷ 240 Fed. 760, 1917.

⁸ 63 N. E. 369-1902.

When the right to form organizations for purposes of improving working conditions is conceded, it follows that combinations may be formed to do what an individual may do. In other words, the privileges that one man has with reference to choice of conditions of labor, many in combination have. If one stops working because he chooses to, many working under the same conditions or organized for mutual advantage, may do the same because they choose, even if it is through the organization that they have learned of the advantage, and because of it that they have made their choice. The advantage of acting together is an advantage that belongs to all combination; combination of capital, of employers, and of all others as well as of laborers.

The opposite view of the question of motive emphasizes first, the common law rule which holds that any combination to affect wages is an injury to trade and therefore an unlawful conspiracy. Those acts, by *agreement* which are oppressive, immoral or wrongfully prejudicial to the rights of others can be punished as conspiracy. Thus the motive is the sole consideration. The argument continues,⁹ "But as one man cannot commonly do much harm by ceasing to work even with an evil motive, the matter yields to the personal right of such a man to cease work anyway. When many unite to cease at the same time, the chance of accomplishing the unlawful motive becomes greater. This becomes a basis for holding that the motive makes the strike wrong. Or again, the acts of many in combination increase the chances for success, and therefore undue pressure is brought to bear upon the employer. This may be coercion and the wrong lies in combination of many to do what one alone might do."

The courts have gradually advanced from this position to a more liberal interpretation of personal rights. However, they have not all gone as far as Judge Parker when he declared that laborers may strike for any reason that seems sufficient to them.

INJUNCTION APPLIED TO OFFICERS OF UNION. When it is considered that a strike may be effectually hindered by injunction against the officers of a union, it is well to state just what acts will be permitted and what acts of officers will be enjoined.

Where officers order a strike in good faith and for the advancement of lawful interests, their act is legal, and no injunction will lie against them. (*Wabash Ry. Co. v. Hannahan.*)¹⁰ Further, any injury that may be caused by the strike is *damnum absque injuria*, meaning

⁹ Groat: "Attitude of American Courts in Labor Cases." p. 76.

¹⁰ 121 Fed. 563-1903.

a loss without any real injury, and for which no damages may be recovered.

"The officers may order strikes for increased wages, to obtain the reinstatement of a wrongfully discharged member" (*National Protective Association v. Cumming*),¹¹ to compel an employer to observe a legal by-law of the union, to better the conditions of service—in short, to secure any legal benefit to the union which may fairly repel any presumption of malice arising from the intentional infliction of injury upon the employer.

The late case of *Bossert v. Dhuy*¹² followed the rule as established in *National Protective Association v. Cumming*. An injunction was denied to the New York employers as against the officers of the Carpenters' Union. The defendants had forbade their union men to work on any non-union product. Such action was here held to constitute a direct benefit to the laborers, and accordingly no malice was imputed to them. The court declares that the officers induced no employes to break their contracts of employment, that the employers were not singled out for a strike against them alone, that there was no intent to injure the good will or business of the plaintiffs, and hence that no injunction would issue.

Again, the officers may be enjoined from calling a strike, to prevent an employer from making a just discrimination against inferior labor, to drive him into an association of master workmen recognized by the union (*Coons v. Chrystie*)¹³; to enforce a boycott against a third person (*Beattie v. Callahan*)¹⁴; where the strike would amount to undue interference with interstate commerce (*Toledo Ry. Co. v. Pennsylvania Co.*)¹⁵; or, where the officers are merely wielding their powers for personal advancement and to gratify their own malicious feelings. In general, where the benefit to the union is not sufficient justification and where the strike is merely to injure the employer, the courts will restrain the acts of officers in calling it.

Justice Braley in *Snow v. Chadwick*¹⁶ enjoined the officers of an iron workers' union from calling a strike which would interfere with a *contract* entered into by the employer to install certain outside iron work upon a building. The court declared after citing authorities, "The right of the plaintiff to the benefit of its contract and to remain undisturbed by the union during perform-

¹¹ Cited Above.

¹² 221 N. Y. 342, 1917.

¹³ 24 Misc. 296-1898.

¹⁴ 81 N. Y. Supp. 413.

¹⁵ 54 Fed. 730-1893.

¹⁶ 227 Mass., 382, 1917.

ance, as well as to hire and retain such employees as it might select unhampered by the interference of the union is a primary right. An intentional interference with such right without lawful justification, is malicious in law, even if it is from good motives and without express malice."

In the case of *Hitchman Coal Co. v. Mitchell*,¹⁷ the plaintiff was operating a non-union mine under a mutual agreement, assented to by every employe, that it would not recognize the union, and that if any man wanted to become a member of the union, he might do so, but could not be a member and remain in its employ. Defendant, with full notice of this working agreement and without any agency for the employes, but as representatives of an organization of mine workers in other states, sent their agent to the mine who proceeded by persuasion accompanied by deceptive statements, to induce the employees to join the union, and at the same time to break their agreement with plaintiff by remaining in its employ after joining, and this was done, not for the purpose of enlarging the membership of the union, but of coercing plaintiff through a strike, or the threat of one, into recognition of the union. *Held*, that the purpose and methods were unlawful and not justified and that plaintiff was entitled to an injunction against such acts.

The matter for decision in *Eagle Glass Co. v. Rowe*¹⁸ was very similar to that in the *Hitchman* case. Here, also, the plaintiff was operating a non-union plant with contracts with employes that they would withdraw from their employment if they desired to become members of a union. The court held that the right of employees to quit their employment gave third persons (business agents of union) no right to instigate a strike.

Justice Brandeis dissented in this case and in the *Hitchman* case on virtually the same reasoning in each. He declared that the contract created an employment at will, that it did not bind the employe not to join the union, and he was free to join it at any time. To violate this contract, he held, an employe must have both joined the union and failed to withdraw from the plaintiff's employ. Since there was no evidence that this had been done the contract was not violated and no injunction might issue.

When the courts do restrain them from committing certain acts, they do not enjoin the workmen from striking. They simply bar the use of union machinery as a weapon in the conflict.

INJUNCTION IN DISPUTE BETWEEN UNION AND NON-UNION MEN.

¹⁷ 245 U. S. 229-1917.

¹⁸ 245 U. S. 275-1917.

In this field, the decisions are extremely contradictory, and it is accordingly difficult to lay down general principles. Formerly any strike to compel the discharge of certain employees was illegal, as being a restraint upon the business of the employer and upon the workman's right to labor as he desired.

Now, however, a union may demand dismissal of non-members, if thereby they intend only to advance their own legitimate and material interests. If, however, the union undertakes to deprive a workman of his place, out of malice then its acts may be enjoined. This proposition is not so completely approved, as here again we have entering the question of motive.

The whole matter revolves about the question: What is justifiable cause in procuring the dismissal of one employee for others? When some substantial immediate benefit can be obtained for the union, they might strike for the dismissal of an employee. This would be the situation in a demand for the removal of men who are personally obnoxious to their fellows (*Clemitt v. Watson*)¹⁹. Similarly— incompetent, careless men, whose awkwardness and neglect threaten injury about them, furnish proper grounds for a lawful strike. Again, the union may attempt to obtain positions for its members by causing the employer to discharge non-members; since "anyone . . . may procure the discharge by lawful means of another person, in order that he may obtain employment for himself or another." We have here merely a phase in the competition of labor.

When a union strikes to make non-members join it, and when as a result it becomes impossible for the non-members to get work— such action is not held to constitute justifiable cause. (*Plant v. Woods*)²⁰.

In *Bogni v. Perotti*,²¹ the court held that the right to work was a property right, that any statute declaring the opposite was unconstitutional, and that one labor union might have an injunction against another which conspired to deprive plaintiffs of their employment if they did not join defendant's union.

Any endeavor maliciously to deprive non-union men of work is unlawful and actionable. The mere fact that a contract between a union and an employers' association was entered into to avoid disputes would not be held to be a justification for depriving non-union men of work. (*Curran v. Galen*)²².

¹⁹ 14 Ind. App., 38-1895.

²⁰ 57 N. E. 1011-1900.

²¹ 224 Mass., 152-1916.

²² 152 N. Y. 33-1897.

It is always difficult to determine just what is the motive that leads a union to demand the discharge of certain non-members. One ruling (that of Judge Parker) holds that unless facts can be adduced to show that workmen refused to work with non-members solely to gratify malice, the courts will not hold that a malicious motive exists.

Kemp v. Division No. 241,²³ is authority for the proposition that non-union employees cannot enjoin the officers of a union from calling a strike of members not bound by any contract, who are co-employees of the complainants, even though the purpose of the strike is to compel complainants to join the union or be discharged from their employment.

In Lucke v. Clothing Cutters,²⁴ no real malice was shown, and still the court held that plaintiff had a good cause of action for damages, when the union refused to admit him on application because they wanted his discharge.

PART II—INJUNCTION TO RESTRAIN BOYCOTTING.

BOYCOTT DEFINED. Any inclusive definition of a boycott requires a comprehensive survey of a long and varying line of decisions, which so far as we are concerned *make* the legal definitions of the term. In precisely the same way in which the status of the strike has been improved, so also is there a clearly discernible improvement in the courts' attitude toward the boycott. This trend must be given due consideration in any worth-while attempt at definition.

The origin of the term "boycott" is narrated in McCarthy's "England under Gladstone" (State v. Glidden²⁵). The author declares: "This strike was supported by a form of action or rather inaction, which soon became historical. Captain Boycott was an Englishman, an agent of Lord Earne, and a farmer of Lough Mark. In his capacity as agent he had served notices upon Lord Earne's tenants to vacate, and the tenantry suddenly retaliated in a most unexpected way by, in the language of schools and society, sending Captain Boycott to Coventry in a very thorough manner. The population of the region for miles round resolved not to have anything to do with him, *and as far as they could prevent it*, not to allow any one else to have anything to do with him. His life appeared in danger, and he had to claim police protection. His servants fled from him as servants flee from their masters in some plague-stricken Italian city. The awful sentence of ex-communication could hardly have rendered him more helplessly

²³ 225 Ill., 213-1913.

²⁴ 77 Md. 396-1893.

²⁵ 55 Conn. 76-1887.

alone for a time. No one would work for him—no one would supply him with food. He and his wife had to work in their own fields themselves, in most unpleasant imitation of Theocritan shepherds, and play out their grim eclogue in their deserted fields with the shadows of the armed constabulary ever at their heels. The Orangemen of the north heard of Captain Boycott and his sufferings, and they organized assistance and sent him down armed laborers from Ulster. To prevent civil war the authorities had to send a force of soldiers and police to Lough Mark, and Captain Boycott's harvests were brought in by the armed Ulster laborers, guarded always by the little army." The term "boycott" was suggested by an Irish priest and given to the Irish public by an American journalist, Redpath.²⁶

Judge Carpenter, who expounded the decision in this case remarked, "If this is a correct picture, the thing we call a boycott originally signified violence, if not murder."

As opposed to this extreme position, the following definition may be found in a decision by Judge Halloway in Montana in the case of Lindsay and Co. v. Montana Federation of Labor.²⁷ "I think that the verb 'to boycott' does not necessarily mean that the doers employ violence, intimidation, or other unlawful coercive means; but that it may be correctly used in the sense of the act of a combination, in refusing to have business dealings with another until he removes or ameliorates conditions which are deemed inimical to the welfare of the members of the combination, or grants concessions which are deemed to make for that purpose."

Again, in Barr v. Essex Trades Council,²⁸ when the unionists declare that the term boycott has a technical meaning for the members of the union, and that it simply expresses that members of the union should merely refrain from trading with those persons who are opposed to the union—it is then answered that the boycott notices were scattered promiscuously and that the public gives the word its generally accepted meaning. This commonly accepted view contains the ideas of intimidation, threats, coercive acts which tend to violence, and other unlawful means which are used to do malicious injury.

Judge Taft in Toledo Ry. Co. v. Pennsylvania Co.²⁹ takes a more middle ground as follows: "As usually understood, a boycott is a combination of many to cause a loss to one by coercing others, against their will to withdraw from him their beneficial business inter-

²⁶ Laidler "Boycotts and the Labor Struggle," p. 24.

²⁷ 96 Pac. 127-1908.

²⁸ 63 Fed. 310-1894.

²⁹ 54 Fed. 730-1893.

course, through threats that, unless others do so, the many will cause similar loss to them. Ordinarily, when such a combination of persons does not use violence, actual or threatened to accomplish their purpose, it is difficult to point out with clearness the illegal means or end which makes the combination an unlawful conspiracy; for it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person, and to announce their intention of doing so, and it is equally lawful for the others, of their *own* motion, to do that which the combiners seek to compel them to do. Such combinations are said to be unlawful conspiracies when the acts are done with malice (i. e. with the intention to injure another without lawful excuse), even though the acts in themselves and considered singly are innocent."

This emphasizes the old as well as new question of motive as it enters into the whole question.

T. S. Adams in his Volume on "Labor Problems" gives the following workable definition²⁰: "The boycott may be defined as a combination to suspend dealings with another party, and to persuade and coerce others to suspend dealings, in order to force this party to comply with some demand, or to punish him for non-compliance in the past." The author then makes the following classification which will serve to distinguish between the various types of boycotting: "(1) The primary boycott; a simple combination of persons to suspend dealings with a party obnoxious to them, involving no attempt to coerce third persons to suspend dealings also. (2) The compound boycott, in which such an effort to coerce third parties is made. This is the ordinary form of the boycott. (3) The fair list or union label, placed, respectively, in establishment, or upon goods manufactured by union labor and designed to confine the patronage of trade unionists to employers who accept the union scale and conditions of labor. This is often spoken of as the *legal or negative boycott*. (4) The unfair list, published in most trade union journals and containing the names of firms and employers who have offended the unions, and with whom trade unionists are exhorted to have no business dealings, whether of purchase or sale, direct or indirect."

A secondary boycott may be defined as an attempt on the part of the workmen to persuade others not to deal with the boycotted concern. It differs from the compound boycott in that it uses none of the coercive or intimidating measures of the compound boycott.

ILLEGALITY OF BOYCOTT AT COMMON LAW. We find that

²⁰ Page 196.

throughout those cases which have held the boycott illegal there runs somewhat of the same reasoning. Generally speaking, it is lawful for any one to enter into such business relations as are found mutually agreeable and which will lead to mutual benefit. Freedom to enter into them implies likewise freedom to refrain. "Refraining is assumed to be primarily for the benefit of the one who refuses the relations, and the fact that another may be deprived of an advantage that would result from such relations cannot be regarded as a loss to him. But when many combine and by a concerted action refuse business relations, the case is not parallel with individual action. *Combination colors the act.* The outcome is that the superior right of the combination forces an agreement that would not otherwise have been made. This is coercion and therefore unlawful. The lawful act entered into by many and sought to be accomplished by unlawful means brings it within the meaning of conspiracy."²¹ Add to this the idea of malicious intent or motive which makes legal acts, unlawful, and the bases for all injunctions against boycott are established. It must be remembered, of course, that whenever violence of any kind accompanies the boycott, the injunction will always issue against it.

Intimidation also makes it probable that an injunction will issue against the boycott. Intimidation, moreover, means more than threats of violence to person or property. There are other effective methods used in boycotts. One of them is a threat by a union to order strikes among the employees of those who will not shun the boycotted person. While the act of striking can no longer be prevented by equity, union officers may be enjoined from ordering such a strike, and the boycott thus be made less effective.

In *Barr v. Essex Trade Council*,²² Vice-Chancellor Green declares, "the test is, has the injury been inflicted intentionally and without legal excuse? . . . If the injury which has been sustained, or which is threatened, is not only the natural, but the inevitable consequence of the acts of those who injure, it is without effect for them to disclaim the intention to injure. It is folly for a man who deliberately thrusts a firebrand into a rick of hay to declare after it has been destroyed that he did not intend to burn it. If a person deliberately discharges a loaded pistol at point-blank range, directly at the person of another, it is useless for him to say he did not intend to maim his victim. The law, as a rule, presumes that a person intends the natural result of his act."

²¹ Groat: "American Courts in Labor Cases," p. 112.

²² Cited above.

In a decision by Judge Taft, *Thomas v. Cincinnati Ry. Co.*,³³ malicious motive was held to make otherwise lawful acts unlawful. Says Judge Taft, "The normal operation of competition in trade is the keeping away or getting away patronage from rivals by inducements offered to the trading public. The normal operation of the right to labor is the securing of better terms by refusing to contract to labor except on such terms. If the workmen of an employer refuse to work for him except on better terms, at a time when their withdrawal will cause great loss to him, and they intentionally inflict such loss to coerce him to come to their terms, they are bona fide exercising their lawful rights to dispose of their labor for the purpose of lawful gain." The decision goes on to state that where the employees have no direct interest in improving their conditions of employment, and where the boycott exists merely maliciously to injure the trade of another party with whom they have no dispute, the employees are not acting within the law and can therefore be enjoined. Judge Taft declares that in this case the *immediate* motive of employees was to show what punishment and disaster necessarily follow a defiance of their demands. He holds that the remote motive of wishing to better their condition by the power so acquired will not make any justification for the employee's act.

ILLEGALITY UNDER FEDERAL 'ANTI-TRUST ACT OF 1890. The application of the Sherman anti-trust law to the boycott in particular and to labor questions in general has been developed by a long and complicated line of decisions extending from 1903 to 1915—all of which have come to be included under the title, "The Danbury Hatters' Case." To follow in detail the course of these decisions with the numerous appeals, reversals and affirmations would be to undertake a task of doubtful value. It will be sufficient to set forth the important principles and rules of law which have been developed in the course of this twelve year legal controversy.

In 1902, when Loewe refused to unionize his factory, an effective boycott was carried out against him which damaged his plant to about the sum of \$80,000.00 during a period of about two years.

In 1908, upon request of a lower court, the United States Supreme Court handed down a decision which interpreted this section of the Sherman act (*Loewe v. Lawlor*)³⁴. It was held here that the Act has a broader application than the prohibition of restraints of trade, unlawful at common law. It prohibits any combination which essen-

³³ U. S. Circ. Ct., 62 Fed. 803-1894.

³⁴ 208 U. S., 274-1908.

tially obstructs the free flow of commerce between the States, or restricts the liberty of a trader to engage in business; and thus includes restraints of trade aimed at compelling third parties and strangers in voluntarily not to engage in the business of interstate trade except on conditions that the combination imposes. Even if some of the acts of the combination are within the state, and the persons in combination are not engaged in interstate commerce, the Act of 1890 will hold if it can be shown that the deeds of the combination tend to prevent interstate trade. On the basis of this decision, a jury brought in a verdict against the union for an amount which was trebled under the triple damage provision of the Anti-Trust Act.

When the case came to trial again, and in the final Supreme Court decision of 1915 (*Lawlor v. Loewe*)²⁵ it was established that the broadcast circulation of boycott notices among an important group of customers or possible customers which restrains interstate commerce constitutes a combination and conspiracy forbidden by the Sherman Act. The court held that it was not necessary to demonstrate that compulsion was used to make out a case under the act.

Further, it was decided that members of the unions who paid dues and who thus delegated authority to their officers to interfere unlawfully with the interstate commerce of Mr. Loewe were jointly liable with such officers for the damages sustained by their acts. In other words, we have here a decision of the Supreme Court of the land which fixes the liability of members of unions for acts of their organization which are in violation of the law. To the contention of the unionists that they did not authorize the acts of their officers, Justice Holmes replied: "It is a tax on credulity to ask anyone to believe that members of labor unions at that time did not know that the primary and secondary boycott and the use of the 'We Don't Patronize' or 'Unfair' list were means expected to be employed in the effort to unionize shops . . . The jury could not but find that by the usage of the unions the acts complained of were authorized and authorized without regard to their interference with commerce among the States."

This case although decided in 1915 was not tried under the Clayton Act, because that statute was passed long after the commencement of this suit. Whether the Clayton amendment will permit the courts similarly to reach the funds of the unionists is a question which, at present, is open to dispute.

RECENT DECISIONS VIEWING BOYCOTT AS LEGAL. We next pro-

²⁵ 235 U. S., 522-1915.

ceed to a review of those cases which have shown a favorable legal view of the boycott.

FREEDOM OF SPEECH AND INSOLVENCY OF EMPLOYEES. Relating to this subject, the case of Marx and Haas Jeans Clothing Co. v. Watson³⁶ is most important. The employees of the company after numerous attempts to reach reasonable and agreeable terms with their employers finally came to the conclusion that it was impossible. They decided, therefore, to boycott Marx and Haas, and the two affiliated unions sent out notices of this boycott to the laboring world and to other concerns who dealt with the company. The notice was a calm, reasonable statement of the facts as the employees saw them. It contained no intimidation nor threats, nor did the officers and committees of the union resort to threats or violence of any kind.

Marx and Haas asked for an injunction against the publishing of the boycott because irreparable damage would be done their business by impecunious persons who could not answer in damages. The injunction was refused on the grounds that to restrain the publishing of these notices would be to violate the constitutional provisions which permit absolute freedom of speech. Section 14 of the Bill of Rights of Missouri declares that "no law shall be passed impairing the freedom of speech, that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty." It is shown that the vital idea of that section is penalty or punishment for such abuse and *not prevention*. This is clearly evident, for if prevention exists, then no opportunity can possibly arise for one becoming responsible by saying or writing whatever he will. The idea of preventing free speech or publication cannot possibly be included within a broad general constitutional provision which grants complete freedom to one "to say, write, or publish whatever he will on any subject."

The Constitution explicitly recognizes these rights as now existing, and gives a perpetual guaranty that they will continue to exist. Section 30 of the Constitution contains a guaranty of the right of free speech, although it is here expressed only implicitly: "that no person shall be deprived of life, liberty, or property without due process of law." The court proceeds to say concerning this section that free speech is inevitably a permanent part and parcel of "*liberty*." "These terms 'life', 'liberty', and 'property' are representative terms and cover every right to which a member of the body politic is en-

³⁶ 168 Mo., 133-1902.

titled under the law. Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may—all our liberties—personal, civil and political; in short, all that makes life worth living and of none of these can anyone be deprived, except by due process of law.”

Section 14 of the Constitution makes no difference between a proceeding set on foot to enjoin the publication of any other sort or nature however injurious it may be. Since this is true, it therefore follows that wherever the authority of the injunction begins, there the right of free speech ends.

For the establishment of this view the laboring men and their representatives through the American Federation of Labor have striven with varying success. In the contempt cases, which grew in part out of the Buck Stove Co. Case to which reference is made in Part IV, unions have failed to win the courts over to their view.

The employer next made the contention that the damage which was to result from the boycott was irreparable because of the insolvency of the employees. The court held, however, that such a contention would mean that equity relief would issue only against the poor, impecunious man, while no injunction could be granted against a man who was financially able to stand a suit for damages. Thus only the latter would have the right to freedom of speech, while the former, the man without property, the oppressed and exploited laborer must hold his tongue even if he be worked beyond endurance. The Constitution of the State clearly denies that such a malicious difference should be made. Such a distinction certainly takes away the basis of the guarantee of equal rights to all citizens. The constitution makes no difference between persons. The poor man “who hath not where to lay his head,” has as good a right to free speech as does the wealthiest man in the community. In short, in the language of Judge Sherwood, “the exercise of free speech, etc., is as *free from outside interference or restriction as if no civil recovery could be had or punishment inflicted because of its unwarranted exercise.* . . . The authority to enjoin finds no better harbor in the empty pocket of the poor man than in the full pocket of the rich man. . . . If those defendants are not permitted to tell this story of their wrongs, or, if you please, their supposed wrongs, by word of mouth, or with pen or print, and to endeavor to persuade others to aid them by all peaceable means in securing redress of such wrongs, what becomes of free speech, and what of personal liberty? The fact that in exercising

that "freedom they thereby do plaintiff an actionable injury does not go a hair toward a diminution of their right of free speech, for the exercise of which, if resulting in such injury, the constitution makes them expressly responsible. But such responsibility is utterly incompatible with authority in a court of equity to prevent such responsibility from occurring."

The trade unionists, I think, have here a strong plea for successful resistance. Irreparable damages are not now a necessary concomitant with insolvency on the part of the employees, and the employer is then robbed of one of the most effective claims in a suit for injunction. It will be increasingly difficult to show the irreparable damage which is to result from the acts of the employees.

COMBINATION NOT UNLAWFUL PER SE.—The case of *Lindsay and Co. v. Montana Federation of Labor*³⁷ is the second important case which takes a favorable legal view of the boycott. In this case it was held that a combination of employees to stop dealing with a wholesale fruit dealer and any who dealt with him was not unlawful; that the act is valid when done by one person is not made illegal when accomplished by a combination. In precisely the same fashion as in the *Marx and Haas* case,³⁸ an injunction was refused against the publication of a boycotting circular on the grounds that the issuance of the injunction would violate the constitutional provisions that every person shall be free to write or publish whatever he will on any subject, being responsible for all abuse of that liberty. Likewise the insolvency of the employees and of those publishing the circular was held not to constitute sufficient grounds for an injunction.

The question was further raised in this case as to what constituted unlawful intimidation and as to what protection a person may have in his business interests. The following principle has been clearly established from this decision according to a note in 18 L. R. A., 707: "While a man is entitled to protection in his business against unlawful acts or interference, yet he is not entitled to protection as against injuries which fairly flow from his own conduct. The rights of the public, constitutional guarantees of freedom of speech and a right of fair competition are superior to the right of the individual to be protected in his business. In other words, the mere fact that a person dependent on the public for patronage is having a controversy with labor which will injure him in that patronage if generally known does not entitle him to be protected from that injury

³⁷ *F. of L., Montana*, 96 Pac. 127-1908.

³⁸ Cited *Supra*.

by restraining the dissemination of the fact among his patrons that he is engaged in such a controversy. If the publication of the fact of the controversy hurts the man's business he should have thought of that possibility when he entered the controversy. If, further, the publication keeps others from patronizing him because of a fear of offending labor, he is not entitled thereby to protection. There must be some intimidation, either direct or indirect. This is the crux of the whole matter. Mere fear of loss which is not caused by any direct or indirect threat other than moral suasion does not constitute intimidation."

Finally, it must be again emphasized that the right of the individual to publish such circulars in pursuance of his constitutional privilege is *not* lost in the combination. As Judge Hollaway concludes, "If any one of these individuals could publish this circular they may with equal security all join in its publication."

MATERIALITY OF MOTIVE AND OTHER IMPORTANT ISSUES. In the case of *J. F. Parkinson Co. v. Building Trades Council*,³⁹ many issues vital to unionism were decided. In my estimation the question of the materiality of the motive is the most important of these; and I have accordingly placed this case under the above heading, although other points will be discussed as they bear cogently upon the boycott.

Here it was held that the mere enforcement by a building trades' council of a rule which stated that members will not work with non-union men or handle the product of their labor, by calling out its own members from a plant which employs non-union men, and by notifying the public that the plant is unfair—does not constitute a conspiracy to subject the plant to the union's control. Against such a conspiracy an injunction would clearly not issue. Under these circumstances the motive by which the unionists were moved was shown to be immaterial. The court followed the reasoning of the New York Court of Appeals in the *National Protective Association* case.⁴⁰ In the words of Chief Justice Beatty, "The general objects of the union and the trades' council being lawful, if they used no unlawful means for their attainment, the motives which inspired their action in this case are irrelevant to the question of conspiracy and immaterial as affecting the cause of action. . . . Any injury to a lawful business, whether the result of a conspiracy or not, is *prima facie* actionable, but may be defended on the ground that it was merely the result of a lawful effort of the defendants to promote their own welfare (as in

³⁹ 98 Pac., 1027-1908.

⁴⁰ Cited in Part I, above.

this case). To defeat this plea of justification, the plaintiff may offer evidence that the acts of the defendants were inspired by express malice and were done for the purpose of injuring plaintiff, and not to benefit themselves."

The evidence in this case was held to constitute proof that the unionists committed the acts for their own benefits. Further, the Parkinson Co. based its claim for an injunction partly on the fact that a business agent of a labor union had come upon their property for the purpose of notifying the employees to strike. Since there had been no threatened repetition of this act the court held that this could be no ground for an injunction.

Again, it was shown that all the notices of the boycott had been sent out by the unionists before the Parkinson Co. started its action for the injunction. There was no valid evidence which showed that there were threats to continue such sending of notices; and even if the sending of notices for the purpose of breaking contracts was wrongful, no injunction could issue unless there was some evidence that the wrongful action was to be continued. In the words of the court: "*An injunction lies only to prevent threatened injury, and has no application to wrongs which have been completed and for which the injured party may obtain redress by an action at law.*"

With regard to these notices, the court held that the unionists acted clearly within their rights when they notified contractors not to buy from the Parkinson Co. because the union men would not work their material for them—even if as a result of the notice contractors cancelled contracts with Parkinson Co. Such notice was justifiable, if on no other grounds, for the reason that the contractors were entitled to know the conditions concerning the refusal of the union men to work the Parkinson material. The effect of these notices was to enable the contractors and the Parkinson people to conduct their future dealings on equal terms, and hence there was nothing wrongful about them.

Finally, it was held that when representatives of the union present to their former employees a plan by which they will return, such action is not unlawful and no injunction can issue against it.

In *Door Co. v. Fuelle*,⁴¹ a boycott carried on by a carpenters' union having for its purpose the intimidation of contractors and builders from using building material manufactured in plaintiff's planing mill, by prohibiting the union carpenters from working on any buildings in which plaintiff's materials are used, is a con-

⁴¹ 215 Mo., 421-1908.

spiracy and an unlawful combination to injure plaintiff, the purpose of the boycott being to compel plaintiff to discharge all its non-union laborers.

Here, the court views the acts of the combination as having such injurious consequences upon the employers' business that in spite of possible benefit to the union, the acts must be enjoined as distinct violation of property rights.

ARGUMENTS FOR LEGALITY OF BOYCOTT. In attempting to demonstrate the legality of the boycott, various lines of reasoning have been utilized. One radical group declares that the boycott is legal because it is merely an exercise of the personal liberties guaranteed by the constitution. Again, it has been maintained that the mere fact that men combine to refrain from business dealings with one does not make their acts in pursuance of such combination any more unlawful than the acts of individuals. If it be to the legal advantage of an individual to enter into or refrain from certain business relations, any number of persons may act similarly together and certainly be within their rights. The right of one to refrain includes the right of ten thousand to refrain.

When by means of a boycott, many refrain from business dealings in order to improve their condition, or from any other worthy motive, then the person against whom the boycott is directed cannot be said to suffer any real or legal loss (that is loss for which damages can be recovered). This may be clearly understood when it is remembered that a person cannot lose something if he has never had it. In a boycotted industry, it is true that an opportunity for gain is denied the entrepreneur, but that is not strictly a loss.

When it is proposed to enjoin the boycott because it is an unwarrantable attack upon property rights which leads to irreparable damage, it is answered that the mutual relationship of buying and selling is in no proper sense of the word a property right.

The right of property has been defined⁴² as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." Sound judgment prevents anyone from declaring that buying and selling, if it be a voluntary relationship, can be a property right in this sense. Who will maintain that A has "sole and despotic dominion" over the selling of his product? Who will be so blind as to fail to grasp the significance and importance of competition, in so far as it alters the control of a man over his product?

⁴² Black's Law Dictionary.

If plain business competition can take away a concern's trade, why cannot some other method, if it is fairly within the law? The man who goes into business assumes the risk of failure together with the chances of success. If failure comes, it is his risk, so long as it comes from the refusal of others to buy whether they refuse because they prefer the article manufactured by his competitor or because they are attempting to improve their own welfare and livelihood. It is the producer's loss, but it is not a loss for which those who refuse to be purchasers can be held legally responsible.

The question of combination, as demonstrated by the Parkinson case, is now no longer the determining issue. Recent thought, as evidenced both from the court decisions and from the opinion of most intelligent men, holds to the view that combination should be regulated and controlled rather than dissolved and abolished. The trend of modern industry moves toward combination with as much justice and right as in that of capital. To grasp this fundamental principle is but to commence the solution of a difficult problem. What acts particular combinations may perform must be left to the decisions of courts in cases referring and relating to specific issues.

THE BLACKLIST. Briefly stated, the law is that blacklisting is illegal. However, in *Adair v. United States*⁴³ that part of the Erdman Act which made it illegal to discharge a workman, because of his affiliations with a labor organization was declared unconstitutional. In general, moreover, it is extremely difficult to prove the existence of the blacklist, since in its most effective form it is secret.

IRL B. ROSENBLUM.

(To be concluded in next number.)

⁴³ 208 U. S., 161-1908.