LEGISLATION AFFECTING LABOR INJUNCTIONS*

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On May 27, 1895, the Supreme Court of the United States for the first time in its history passed on the scope and validity of an injunction in a labor controversy. Yet the very next year this modern application of an ancient procedure was made a party issue, and since then has maintained itself as a lively political problem. "Government by injunction" was the slogan by which the Democratic platform of 1896 inveighed against the practice of issuing labor injunctions. Since 1908, also the Republican Party has proposed the correction of abuses due to judicial intervention in labor conflicts. In response to this agitation, important federal legislation was enacted in 1914. But the hopes in which it was conceived soon foundered. Protest revived and grew. And so, in the campaign of 1928 both parties committed themselves to the need of further legislation. What is true of the nation is true of the states. In 1896 the Chief Justice of Massachusetts remarked that "The practice of issuing injunctions in cases of this kind is of very recent origin." [1] Since then the practice has had rich growth, giving rise to vigorous counter-agitation. State legislatures have followed Congress in corrective legislation, but proposals for curbing resort to labor injunctions continue to be urged alike by Democratic and Republican governors.

A full understanding of the history of a legal institution under scrutiny is necessary to wise reform. How labor injunctions came to be and how they operate in practice, the uses which they serve and the abuses to which they have given rise, must be known if we are to determine whether the practice of issuing injunctions serves our present needs, and if so, how they may be realized. Elsewhere we have attempted to tell this story. This article is confined to a history of the legislation to which the labor injunction has given rise, and, more particularly, of federal legislation in this field.

The issuance of an injunction in labor disputes is conditioned by the substantive law that determines legitimacy of challenged behavior as well as by the principles and procedure of equity controlling the exercise of injunctive powers. In responding to demands for the correction of alleged evils in this domain of

* This in substance will be a chapter in a forthcoming book entitled "The Labor Injunction."

[1] Field, C. J., in Vegelahn v. Guntner, 167 Mass. 92, 100, 44 N. E. 1077, 1078 (1896).

law, legislatures must consider the policy of society towards industrial strife, and also the forms of legal remedy and the methods of their employment appropriate to proscribed conduct. Reform of abuses revealed by the use of labor injunctions therefore presents a variety of problems for legislative solution. Legislation might immunize activities of organized labor from all tort liability—pecuniary responsibility as well as restraint of conduct—or merely define the conduct that is to be deemed a wrong. Again, legislation might withdraw from the scope of injunctive relief activities normally prevalent in labor controversies, or merely fashion a procedure especially suitable to injunctions in such cases. Legislation has entered all these fields.

LEGISLATION AFFECTING SUBSTANTIVE LAW

Outright exception of trade union activity from liability for tortious acts, such as the English Trade Disputes Act of 1906 [2] introduced, has not been made by any American legislature. In an advisory opinion to the Massachusetts Senate, the Justices of the Massachusetts Supreme Judicial Court in 1912 considered such a proposal and dealt it an effective quietus.[3] In the opinion

[2] 6 EDW. VII, c. 47 (1906): "4.—(1) An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court." "The Act was passed in direct opposition to the dogmatic principles prevailing at the time as to liability for torts and the responsibility of principals for tortious acts of their agents. The dialectical side of the problem had been fully considered and settled by the judgment of the Court of Appeals of the *Taff-Vale Case*. Parliament, however, passed the Trades Disputes Act as a measure necessary to allow organized labour to exert its action as a counter-poise to the power of capital wielded by the employers." 2 VINOGRADOFF, COLLECTED PAPERS (1928) 323. See Geldart, *The Present Law of Trade Disputes and Trade Unions* (1914) POLITICAL QUARTERLY No. 2, 16-71; WEBB, HISTORY OF TRADE UNIONISM (1920) 604-08; DICEY, LAW AND OPINION IN ENGLAND (2d ed. 1919) p. xliv *et seq;* TILLYARD, INDUSTRIAL LAW (2d ed. 1928). The general strike of 1926 also had its reflex in English legislation, resulting in the Trade Disputes and Trade Unions Act, 17 & 18 GEO. V, c. 22 (1927). See the debates upon this measure in the House of Lords, 68 HANS. DEB. 2 *et. seq.*, particularly the speech of the Marquis of Reading, at 67.

[3] Opinion of the Justices, 211 Mass. 618, 98 N. E. 337 (1912). For a defense of advisory opinions generally, see Hudson, *Advisory Opinions of National and International Courts* (1924) 37 HARV. L. REV. 970, and for a criticism, *semble*, see Frankfurter, *A Note on Advisory Opinions* (1924) 37 HARV. L. REV. 1002, 1006: ". . . advisory opinions are bound to move in an unreal atmosphere. The impact of actuality and the intensities of immediacy are wanting. In the attitude of court and counsel, in the vigor of adequate representation of the facts behind legislation (lamentably inadequate even in contested litigation) there is thus a wide gulf of difference, partly rooted in psychologic factors, between opinions in advance of legislation and decisions in litigation after such proposals are embodied into law. Advisory opinions are rendered upon sterilized and mutilated issues."

of the Justices, such legislation would violate the "underlying principles and fundamental provisions" both of the Massachusetts and the United States Constitutions—guarantees against deprivation of life, liberty and property without due process of law, guarantees of the equal protection of the laws and of absolute equality before the law.

Measures granting a more restricted freedom to the promotion of labor's claims have prevailed. In essence, they constitute attempts to curb the two judicial conceptions which have played the most prolific rôles in the evolution of the labor injunction—the doctrines of "conspiracy" and of "restraint of trade." [4]

In the decade from 1880 to 1890, at least eight states [5] passed laws permitting "coöperation of persons employed in any calling, trade or handicraft for the purpose of obtaining an advance in the rate of wages or compensation or of maintaining such rate." [6] But courts stuck close in the bark of this language. A strike in furtherance of trade union existence, though not immediately in pursuit of the purposes of the statute, was held outside its pale; [7] since immunity only against criminal proceed-

[4] See Frankfurter and Greene, *Injunction in American Labor Controversies* (1928) 44 L. Q. REV. 164, 165-66.

[5] Ill. Laws 1873, 76; ME. REV. STAT. (1883) c. 126, § 18; Md. Acts 1884, c. 226; MINN. PEN. CODE (1886) § 138; N. J. LAWS 1883, 36; N. Y. Laws 1870, c. 18; N. Y. PEN. CODE (1881) § 170; N. Y. Laws 1882, c. 384; Pa. Acts May 8, 1869; Pa. Acts June 14, 1872; Pa. Acts April 20, 1876; Pa. Acts June 19, 1891. Early legislation that a strike is not a conspiracy: MD. CODE OF PUB. GEN. LAWS (1888) art. 27, § 31; N. J. REV. STAT. (1877) 1296; BRIGHTLEY'S PA. DIG. (1885) 1172. A compilation of the statutes up to 1892 was prepared under the direction of C. D. Wright, Commissioner of Labor: A COMPILATION OF THE LABOR LAWS OF THE UNITED STATES AND TERRITORIES AND THE DISTRICT OF COLUMBIA, REPORT NO. 1960. See also TENTH SPECIAL REPORT OF COMMISSIONER OF LABOR (1904) and TWENTY-SECOND ANNUAL REPORT OF COMMISSIONER OF LABOR (1907), the latter being cumulative.

[6] N. Y. PEN. LAW (1926) § 582.

[7] Auburn Draying Co. v. Wardell, 89 Misc. 501, 152 N. Y. Supp. 475 (Sup. Ct. 1915), *aff'd*, 227 N. Y. 1, 124 N. E. 97 (1919); Davis Machine Co. v. Robinson, 41 Misc. 329, 84 N. Y. Supp. 837 (Sup. Ct. 1903); Grassi Contracting Co. v. Bennett, 174 App. Div. 244, 160 N. Y. Supp. 279 (1st Dep't 1916); People v. Epstean, 102 Misc. 476, 170 N. Y. Supp. 68 (Gen. Sess. 1918), appeal dismissed, 190 App. Div. 899 (1919). It will be recalled that a similar fate was visited upon the Massachusetts statute authorizing peaceful persuasion. See Frankfurter and Greene, *op. cit. supra* note 4, at 187, nn. 45-46. In the 1929 session of the Massachusetts legislature, a bill (House No. 887) was introduced to legalize strikes "or other concerted action" when the purposes sought to be attained thereby were, *inter alia*, the closed shop and collective bargaining.

Some states have provided that workers might combine to carry out "their legitimate purposes as freely as they could do if acting singly." MINN. STAT. (Mason, 1927) § 4255; ORE. LAWS (Olson, 1920) § 6817. But obviously the question as to what are "legitimate purposes" remains very large.

ings was explicitly given, civil remedies remained unaffected whether through an action for damages or a suit for an injunction.[8] In Congress numerous bills were proposed for more effective sterilization of the conspiracy doctrine.[9] They were never enacted. The Wilson bill of 1911 provided that no agreement concerning "any act or thing to be done . . . with reference to . . . a labor dispute . . . should constitute a conspiracy unless the act agreed upon would be unlawful if done by a single individual." [10] This would have drawn the sting of legal significance from the fact of combination. The Clayton Act, in which the Wilson proposals finally culminated, rejected such a provision and left undisturbed existing judicial views of conspiracy. As late as 1926 [11] another effort failed to secure enactment of the policy embodied in the proposal of 1911. On the whole, legislation has done little to restrict the courts in applying common law notions of conspiracy to labor disputes. We owe to the judicial process such liberalization as there has been of the conspiracy concept.[12] Legislation has merely registered judicial modifications; it has not been creative.

Statutory innovation has been bolder in creating exceptions to the anti-trust laws. Many states have saved organizations of labor from the operation of statutes subjecting combinations in "restraint of trade" to liability both criminal and civil. The Nebraska Anti-Trust Act of 1897 [13] was perhaps the earliest to exempt "any assemblies or associations of laboring men" for the purpose of raising wages. This was deemed unconstitutional favoritism when the law first came before a federal court sitting in Nebraska:

"Dozens of statutes have been held invalid by appellate courts which sought to make it invalid for one class of men to do one thing and lawful for other men practically under the same circumstances, to do another, but like, thing." [14]

[8] See, *e.g.*, Rogers v. Evarts, 17 N. Y. Supp. 264 (Sup. Ct. 1891); Frank & Dugan v. Herold, 63 N. J. Eq. 443, 52 Atl. 152 (1902); Jonas Glass Co. v. Glass Bottle Blowers' Ass'n, 77 N. J. Eq. 219, 79 Atl. 262 (1908). But see Reynolds v. Everett, 67 Hun 294, 22 N. Y. Supp. 306 (Sup. Ct. 1893), *aff'd*, 144 N. Y. 189, 39 N. E. 72 (1894).

[9] S. 4233, H. R. 8917, 56th Cong., 1st Sess.; H. R. 89, H. R. 1234, H. R. 4063, 58th Cong., 1st Sess.; H. R. 6782, H. R. 8136, 58th Cong., 2d Sess.; H. R. 4445, 59th Cong., 1st Sess.; H. R. 17137, 60th Cong., 1st Sess.; H. R. 3058, 61st Cong., 1st Sess. Other early bills are referred to in Frankfurter and Greene, *op. cit. supra* note 4, at 167, n. 21.

[10] H. R. 11032, 62d Cong., 1st Sess. See HEARINGS BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY, INJUNCTIONS (62d Cong., 2d Sess. 1912).

[11] S. 972, H. R. 3920, 69th Cong., 1st Sess. This bill is reprinted in (1924) 6 LAW AND LABOR 85.

[12] See Brandeis, J. in Truax v. Corrigan, 257 U. S. 312, 361-62, 42 Sup. Ct. 124, 140 (1921).

[13] Laws of Neb. 1897, c. 79.

[14] Niagara Fire Ins. Co. v. Cornell, 110 Fed. 816, 825 (C. C. D. Neb. 1901).

A year later the Nebraska Supreme Court reached a contrary conclusion, holding that the legislature had made a reasonable classification:

"The distinction between goods and merchandise produced by skill and labor and the skill and labor which produced them is manifest and reasonable." [15]

So wrote Roscoe Pound, then a member of the Nebraska court. In 1914 the Supreme Court of the United States sustained this viewpoint in passing upon a similar Missouri statute. The Court found nothing in the federal Constitution against a state's freedom to decide for itself "whether a combination of wage earners . . . called for repression by law." [16]

The attempt to withdraw labor unions from the scope of federal anti-trust legislation forms a long and spirited chapter of congressional history. Following the early decisions by the federal courts holding that the Sherman Law covered combinations of labor as well as of capital,[17] the effort began in Congress

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[15] Cleland v. Anderson, 66 Neb. 252, 260, 92 N. W. 306, 308 (1902).

[16] International Harvester Co. v. Missouri, 234 U. S. 199, 34 Sup. Ct. 859 (1914). But *cf.* Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431 (1902) and comment thereon by Mr. Taft in 1914: "Attempts are being made in Congress to exclude from the operation of the antitrust act trades-unions and farmers. I hope this will never be done. . . . A law with a similar exemption was passed by the legislature of Illinois. It was held by the United States Supreme Court to be invalid because it denied to all the people of Illinois the equal protection of laws. While that case was under the Fourteenth Amendment, which prevents a State from denying equal protection of the laws to any persons within its jurisdiction, it would be a question whether the Supreme Court might not find in the first eight amendments of the Constitution a prohibition upon Congressional legislation having similar unjust operation." TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT (1914) 98-99.

[17] See Frankfurter and Greene, *op. cit. supra* note 4, at 170, 171. The congressional debates on the Sherman Act are to be found in volume 21 of the Record, especially as of March 27, 1890. On March 25, 1890, Senator Sherman opposed a proviso excluding labor and farm organizations from the terms of the Act. This proviso, agreed to in Committee of the Whole, was out when the bill was again reported out of Committee to the floor of the Senate on April 2, 1890. Whether the reason for the deletion of the proviso was opposition to it or a belief that the Act itself so clearly excluded labor that the proviso was unnecessary—the Record does not settle. For weighty contemporaneous opinion that the amendment was unnecessary, see the speeches of Senator Hoar, 21 CONG. REC. 2729 (1890), of Senator Stewart, *ibid.* 2606, and of Senator Teller, *ibid.* 2562. The speech of Senator Hoar is all the more significant as it was he who, as a member of the Judiciary Committee, recast the bill. See 2 HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS (1903) 264 *et seq.*; *cf.* MASON, ORGANIZED LABOR AND THE LAW (1925) c. vii; and see Edmunds, *Interstate Trust and Commerce Act of 1890* (1911) 194 N. AM. REV. 801; WASHBURN, THE HISTORY OF A STATUTE (1927).

to express a contrary intent. The Littlefield Anti-Trust Bill of 1900[18] was amended in the House by inserting the following clause recommended by the minority[19] of the House Judiciary Committee:

"Nothing in this act shall be so construed as to apply to trade unions or other labor organizations organized for the purpose of regulating wages, hours of labor, or other conditions under which labor is to be performed."

The bill so amended passed the House[20] but was buried in the Senate Judiciary Committee.[21] The proposal met the same fate in the Fifty-seventh Congress,[22] in the Sixtieth Congress,[23] in the Sixty-second Congress.[24] Failure by direct attack provoked a more successful flank movement. Friends of the reform saw their opportunity to restrict appropriations for enforcement of the anti-trust laws by writing into the sundry appropriations bills a proviso against using any funds for prosecutions of labor organizations. Such a provision passed the House in 1910, but

[18] Introduced by Mr. Littlefield April 7, 1900, and referred to the Committee on the Judiciary. The bill was reported May 16, 1900, with amendments (H. Rep. 1506 to accompany H. R. 10539, 56th Cong., 1st Sess.). An even earlier bill was introduced in the 52d Congress (1st Sess.), H. R. 6640.

[19] H. Rep. 1506, pt. 2, p. 4, 56th Cong., 1st Sess. to accompany H. R. 10539. This bill, the amendments and reports are reprinted in a volume prepared by the direction of the Attorney General, BILLS AND DEBATES IN CONGRESS RELATING TO TRUSTS (1903). The minority report referred to said concerning this proposed amendment that it ". . . explains itself, but we observe that it is rather a curious fact, so far as we have been able to learn, that the only criminal convictions ever obtained under the Sherman antitrust law have been in cases of laboring men on a strike for higher wages, and no trust magnate, officer, or agent has ever been put behind the bars. . . ."

[20] The bill in this form is reprinted in full in 34 CONG. REC. 2728 (1901).

[21] 33 CONG. REC. 6669-70 (1900); 34 CONG. REC. 3438-39 (1901).

[22] H. R. 11988; H. R. 14947; S. 649 (1st Sess.).

[23] S. 6440; S. 6900; S. 6331; S. 6913 (1st Sess.). Hearings were had that session on S. 6331 and S. 6440. See HEARINGS BEFORE THE SUBCOMMITTEE OF THE SENATE COMMITTEE ON THE JUDICIARY ON AMENDMENT OF SHERMAN ANTITRUST LAW (1908).

[24] H. R. 40; H. R. 5606 (1st Sess.) referred to Committee on Judiciary. See volumes prepared for the use of the Committee on the Judiciary, House of Representatives, 3 BILLS AND DEBATES IN CONGRESS RELATING TO TRUSTS 2466 where the above-mentioned bills are reprinted.

These repeated failures were used by counsel as an argument before the Supreme Court in Loewe v. Lawler, 208 U. S. 274, 280 (1908) to prove congressional intent in the Sherman Law: "Congress, therefore, has refused to exempt labor unions from the comprehensive provisions of the Sherman law against combinations in restraint of trade, and this refusal is the more significant, as it followed the recognition by the courts [inferior federal courts] that the Sherman Anti-Trust law applied to labor organizations."

did not come out of the Senate.[25] It passed both Houses in 1913 but led to President Taft's veto.[26] It again passed both Houses later in 1913 and, though the item was strongly disapproved, the bill was signed by President Wilson.[27] Every similar appropriation since then has carried the restriction that no money be

". . . spent in the prosecution of any organization or individual for entering into any combination or agreement having in view the increasing of wages, shortening of hours, or bettering the conditions of labor, or for any act done in furtherance thereof not in itself unlawful." [28]

Bills containing such a provision became law through the signatures of President Harding and President Coolidge.

But greater promises were made to labor in the presidential campaign of 1912. By its platform the Democratic Party was committed to the withdrawal of labor and farm organizations from condemnation by the Sherman Law.[29] The election of Woodrow Wilson made some action inevitable. Relief for labor was an aim too deeply associated with Wilson's gospel of "the new freedom" [30] not to survive campaign speeches. A campaign promise is one thing; legislative performance quite another. To trace the course of legislation by which performance was attempted in this instance, is to gain insight into the physiology of lawmaking when powerful social forces contend for mastery.

As originally introduced in the House, the bill for the correction of abuses in issuing labor injunctions carried no exemption of labor organizations from the scope of the anti-trust laws. Upon the plea of Samuel Gompers,[31] speaking for organized labor,

[25] See the Senate debate thereon, 45 CONG. REC. 8849-52 (1910) and American Federation of Labor letters insisting upon the proviso, *ibid.* A short summary of the congressional history of this legislation is given in 51 CONG. REC. 9540-41 (1914).

[26] The veto message appears in 49 CONG. REC. 4838 (1913). He said in part: "This provision is class legislation of the most vicious sort."

[27] 38 STAT. 53 (1913). The Senate debates are reported in 50 CONG. REC. 1096, 1102-14, 1189-97, 1269-86 (1913). President Wilson's statement issued in connection with the signing of this bill said that if the proviso could have been separated from the bill, he "would have vetoed that item, because it places upon the expenditure a limitation which is, in my opinion, unjustifiable in character and principle." He added: "I can assure the country that this item will neither limit nor in any way embarrass the actions of the Department of Justice. Other appropriations supply the department with abundant funds to enforce the law." See 51 CONG. REC. 14604 (1914).

[28] See, *e.g.*, 44 STAT. 1194 (1927); see LAIDLER, BOYCOTTS AND THE LABOR STRUGGLE (1914) 260.

[29] PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION (1912) 372; 51 CONG. REC. 9165 (1914).

[30] WOODROW WILSON, THE NEW FREEDOM (1913).

[31] 51 CONG. REC. 9165-66 (1914).

a provision to this end was reported by the House committee, and passed by the House. In the course of the Senate debate upon the bill an amendment was proposed and adopted [32] in the form of the famous sentence, "the labor of a human being is not a commodity or article of commerce." [33] By President Wilson's signature, these provisions, as Section 6 of the Clayton Act, became law on October 14, 1914. The exact text of this section is important:

"Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." [34]

This measure brought labor, so it was thought, into the promised land. "Those words, the labor of a human being is not a commodity or article of commerce," [35] Samuel Gompers informed the trade union movement, "are sledge hammer blows to the wrongs and injustices so long inflicted upon the workers. This declaration is the industrial magna charta upon which the working people will rear their construction of industrial freedom." [36]

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[32] *Ibid.* 14610.

[33] *Ibid.* 14590. Senator Cummins of Iowa: "It is high time that we recognize the difference between the power of a man to produce something and the thing which he produces. . . . The thing in which he is dealing is not a commodity, and if we do not recognize the difference between the labor of a human being and the commodities that are produced by labor and capital . . . we have lost the main distinction that warrants, justifies, and demands that labor organizations coming together for the purpose of bettering the conditions under which they work . . . shall not be reckoned to be within a statute which is intended to prevent restraints of trade and monopoly." *Ibid.* 14585.

[34] 38 STAT. 731 (1914), 15 U. S. C. § 17 (1926).

[35] The identical clause or a paraphrase thereof appears in state statutes, both antedating and following the Clayton Act. Such statutes are: Cal. Stat. 1909, 594; CAL. GEN. LAWS (Henning, 1920) act 5264, § 13; MINN. STAT. (Mason, 1927) § 4258; ORE. LAWS (Olson, 1920) § 6817; WASH. COMP. STAT. (Remington, 1922) § 7613; WIS. STAT. (1927) § 133.05.

[36] (1914) 21 AMERICAN FEDERATIONIST 971. In February of 1917, a federal judge (Killits, D. J.) said: "We may as well call it an 'Employer's Bill of Rights'. . . ." Stephens v. Ohio State Tel. Co., 240 Fed. 759, 770 (N. D. Ohio, 1917).

President Wilson's own characterization of the signficance of this legislation may be recalled: "The workingmen of America have been given a veritable emancipation, by the legal recognition of a man's labour as part of his life, and not a mere marketable commodity; by exempting labour organizations from processes of the courts which treated their members like

Descending to particulars, Mr. Gompers added, "This declaration removes all possibility of interpreting trust legislation to apply to organizations of the workers, and their legitimate associated activities." [37] Whether this expectation coincided with congressional intent is meat for endless dialectic; the debates in Congress looked both ways. When the bill was first reported out of the House Judiciary Committee, one of its members, referring specifically to the clause—"Nor shall such organizations . . . be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws"—said that this "would clearly exempt labor organizations . . . from the provisions of the anti-trust laws"; that it "would give these organizations what they have desired so long and all they have been struggling for since the original enactment of the Sherman antitrust law." [38] Another member of the same committee told the House "We are taking them [labor organizations] out from the ban of the present law to the extent that in future they cannot be dissolved as unlawful combinations. Their existence is made lawful and they are given a legal status." [39] These expressions may serve as a cross-section of congressional opinion. Did the section merely legalize what was already legal, *i.e.*, the mere existence of labor unions, or did it completely immunize labor organizations from prosecution or suit under the Sherman Law? [40] The majority report of the House Committee adopted the innocuous view of the measure.[41] A minority of the same committee suggested that the act would merely prevent suits for the dissolution of labor organizations, but would continue to permit the issue of injunctions under the Sherman Law to restrain them from carrying out their puposes.[42] No less equivocal is the evidence furnished

fractional parts of mobs and not like accessible and responsible individuals. . . ." Woodrow Wilson's address accepting his renomination Sept. 2, 1916, 1 MESSAGES AND PAPERS OF WOODROW WILSON (1924) 302, 307.

[37] See (1914) 21 AMERICAN FEDERATIONIST, an editorial entitled, *Anti-Trust Law Enmeshes Labor.* This material is reprinted in 51 CONG. REC. 16340 (1914).

[38] Representative Henry of Texas, 51 CONG. REC. 9540 (1914). He also said, in part: "We are now about to correct that error, and make it plain and specific, by clear-cut and direct language, that the antitrust laws against conspiracies in trade shall not be applied to labor organizations and farmers' unions." *Ibid.* 9541.

[39] Representative Floyd of Arkansas, 51 CONG. REC. 9166 (1914).

[40] Mr. MacDonald of Michigan lucidly exposed the verbal deception: "If you mean to exempt these associations from this bill, exempt them and say in so many words that this legislation is not intended to apply to these organizations. Do not attempt to leave any loophole for the claim that while the existence of these organizations is not prohibited yet the courts may still hold the exercise of their vital functions unlawful." 51 CONG. REC. 9249 (1914).

[41] H. Rep. 627, 63d Cong., 2d Sess. to accompany H. R. 15657.

[42] H. Rep. 627, pt. 3, 63d Cong., 2d Sess. to accompany H. R. 15657.

by the debate in the Senate. Senator Pittman was confident that as a result of the new measure the anti-trust laws have "nothing to do with organized labor . . . that any unlawful acts committed in the pursuit of the objects of their organizations shall be tried and determined by other existing laws." [43] To which Senator Cummins replied that "in my view he [Senator Pittman] has stated just what section 7 [Section 6 of this bill as passed] does not do." [44] A rather large group of Congressmen attacked the legislation as futile if it aimed only at legislation of what was already legal, and vicious if it accomplished the immunization of labor from the anti-trust laws.[45]

This brief history illustrates how fictitious can become the search of courts for "the intent of the legislature" in construing ambiguous enactments. With a legislative history like that which surrounds the Clayton Act, talk about the legislative intent as a means of construing legislation is simply repeating an empty formula. The Supreme Court had to find meaning where Congress had done its best to conceal it.[46] In June 1917, in denying, for the majority of the Court, *equitable* relief in a labor case [47] on the ground that the Sherman Law only authorized the government, and not private suitors, to obtain injunctions and that the Clayton Act, which did grant such authority,[48] came too late to apply to this case, Mr. Justice Holmes expressed the view that even if the Clayton Act were applicable it "establishes a policy inconsistent with the granting of one [an injunction] here." [49] But, Mr. Justice Holmes added prophetically, "I do not go into the reasoning that satisfies me because upon this point I am in the minority." [50] Before very long another case

[43] 51 CONG. REC. 14588 (1914). His further remarks are of interest: "There are ample laws to punish men who commit crime. . . . There is no fear that there will be lack of punishment. It is simply a question as to whether or not labor . . . should be subjected to this particular act. Labor has always contended that it should not be subjected to this particular act, because it is an act that depends largely upon the equity discretion of a single judge or a court. . . ."

[44] 51 CONG. REC. 14588 (1914).

[45] 51 CONG. REC. 9249 (MacDonald); 9082, 16283 (Volstead); 9544, 14021 (Thomas); 13918 (Borah); 14013 (Jones) (1914).

[46] See *Labor is not a Commodity* (1916) 9 NEW REPUBLIC 112; *ibid.* 243.

[47] Paine Lumber Co. v. Neal, 244 U. S. 459, 37 Sup. Ct. 718 (1917).

[48] 38 STAT. 737, § 16 (1914), 15 U. S. C. § 26 (1926). Prior to the enactment of this section, the rule was established that private parties were not entitled to sue under the anti-trust laws to prevent or restrain a violation of such laws.

[49] Paine Lumber Co. v. Neal, *supra* note 47, at 471, 37 Sup. Ct. at 720.

[50] *Ibid.* Pitney, J. wrote the dissent, concurred in by McKenna and Van Devanter, JJ. He said: "Neither in the language of the section, nor in the committee reports, is there any indication of a purpose to render lawful or legitimate anything that before the act was unlawful, whether in the objects

compelled decision on the issue, and the majority of the Court concluded that "there is nothing in the section [6] to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate object and engage in an actual combination or conspiracy in restraint of trade." [51] The long drawn-out battle on the national stage, to withdraw labor tactics from the risks of judicial notions concerning "restraint of trade," was fought and lost.

The attempted modification of one other judicial doctrine of substantive law remains to be noted. The courts had ruled that it is illegal to persuade employees to join a union when such workers are under contract to their employers not to become union members while in their employ. This doctrine plays a leading part in the industrial conflict. Recognizing that such agreements, certainly in large measure, represent the superior economic position of the employer by virtue of which the theoretical freedom of an employee to refuse assent was illusory and that such agreements therefore emptied of meaning the "right of collective bargaining," legislatures, particularly in the industrialized states, passed laws prohibiting the discharge of an employee merely because of his membership in a labor union, and forbidding employers to require workers to agree not to become or remain union members. Such statutes were passed in quick succession in many states, including Connecticut, Illinois, Kansas, Massachusetts, Missouri, New York, Ohio, Oklahoma, Oregon, Pennsylvania, and Wisconsin.[52] A like measure, sponsored by Richard Olney, Cleveland's Attorney General, was also passed by Congress as a result of the abuses of discrimination against

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of such an organization or its members or in the measures adopted for accomplishing them." *Ibid.* 484, 37 Sup. Ct. at 725.

[51] Duplex Co. v. Deering, 254 U. S. 443, 469, 41 Sup. Ct. 172, 177 (1921). Pitney, J., now writing the majority opinion, said: "As to § 6, it seems to us its principal importance in this discussion is for what it does *not* authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from *lawfully* carrying out their *legitimate* objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade."

[52] N. Y. PEN. CODE (1887) § 171a; Mo. Laws 1893, 187; OHIO REV. STAT. (Bates, 1903) §§ 4364-4366; Pa. Act of June 4, 1897; Wis. Laws 1899, c. 332; ILL. REV. STAT. (Hurd, 1899) 844; KAN. GEN. STAT. (1901) §§ 2425, 2426; MASS. GEN. LAWS (1912) c. 149, § 20; ORE. LAWS (Olson, 1920) § 2181; Okla. Acts 1907-1908, 513; OKLA. COMP. LAWS (1909) § 4041; CONN. GEN. STAT. (1918) § 6359. See BULLETIN OF THE BUREAU OF LABOR STATISTICS, No. 148, Vols. I and II.

union men reported to Congress by the weighty commission that inquired into the causes of the Pullman strike.[53]

But state courts, and later the Supreme Court of the United States, denied the power of states [54] and nation [55] to pass such legislation. It ran counter to judicial conceptions of "liberty of contract" which the Supreme Court discovered within the "vague contours" [56] of the due process clause. Though actually intervening in the push and tussle of the industrial conflict and the forces of contending social classes, the Court seemed not to move out-

[53] JAMES, RICHARD OLNEY (1923) c. 5; 2 MCELROY, GROVER CLEVELAND (1923) c. 5; Olney, *Discrimination Against Union Labor—Legal?* (1908) 42 AM. L. REV. 161.

[54] People v. Marcus, 185 N. Y. 257, 77 N. E. 1073 (1906); State v. Julow, 129 Mo. 163, 31 S. W. 781 (1895); Gillespie v. The People, 188 Ill. 176, 58 N. E. 1007 (1900); State v. Bateman, 7 Ohio N. P. 487 (1900); State v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098 (1902); Brick Co. v. Perry, 69 Kan. 297, 76 Pac. 848 (1904); Goldfield Consol. Mines v. Goldfield M. U. No. 220, 159 Fed. 500 (C. C. D. Nev. 1908); People v. Western Union Co., 70 Colo. 90, 198 Pac. 146 (1921); Montgomery v. Pacific Electric Ry., 293 Fed. 680 (C. C. A. 9th, 1923). These rulings were, in effect, sustained by the Supreme Court in Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240 (1915), considered in (1915) 15 COL. L. REV. 272; (1915) 28 HARV. L. REV. 496, 518; (1915) 13 MICH. L. REV. 497; (1915) 24 YALE L. J. 677. And see Powell, *Collective Bargaining Before the Supreme Court* (1918) 33 POL. SCI. Q. 396.

[55] Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277 (1908) invalidating § 10 of the Erdman Act. By this legislation, Congress carried out the recommendation of the commission that investigated the causes of the Pullman strike. See UNITED STATES STRIKE COMMISSION, REPORT ON THE CHICAGO STRIKE OF JUNE-JULY 1894 (1895). The specific section in question made it criminal for an interstate carrier to discharge an employee because of his membership in a labor union. This provision was invalidated not only on the ground that it was an invasion of the guarantees of liberty and property of the Fifth Amendment, but also on the ground that such legislation was not within the power of Congress to enact. Reminding that the power to regulate commerce authorizes only such legislation as has "some real or substantial relation to or connection with the commerce regulated," the Court asked "what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce?" Adair v. United States, *supra* at 178, 28 Sup. Ct. at 282. For a criticism of the case and an answer to the Court's question, see Olney, *loc. cit. supra* note 53, and Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454.

[56] "In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. . . . If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins. Whether in the long run it is wise for the workingmen to enact legislation of this sort is not my concern, but I am strongly of opinion that there is nothing in the Constitution of the United States to prevent it, and that *Adair v. United States*, 208 U. S. 161, and *Lochner v. New York*, 198 U. S. 45 should be overruled." Mr. Justice Holmes dissenting in Coppage v. Kansas, *supra* note 54, at 26-27, 35 Sup. Ct. at 248.

side the logical frame-work of an abstract syllogism. Freedom of contract and the right of private property are protected by the Constitution; "wherever the right of private property exists, there must and will be inequalities of fortune";[57] it is "impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate the inequalities of fortune that are the necessary result of the exercise of those rights."[58] Such reasoning presupposes a perfectly balanced symmetry of rights: the employer and employee are on an equality, and legislation which disturbs that equality is an arbitrary interference "with the liberty of contract which no government can legally justify in a free land."[59] In vain did Mr. Justice Holmes oppose such pernicious abstractions with insistence on the justification of such legislation whereby law seeks to further that true "equality of position between the parties in which liberty of contract begins."[60] Against such efforts the majority invoked the Constitution.

Employers heavily capitalized the failure of this legislation, particularly after the *Hitchman Case*.[61] Building upon the disability of legislatures to prohibit "yellow dog contracts," employers used these agreements to create barriers against unionization.[62] In the *Hitchman Case*, it will be recalled, the Supreme Court gave equitable protection to these agreements by enjoining employees who had subscribed to such agreements, even when

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[57] *Ibid.* 17, 35 Sup. Ct. at 244.

[58] *Ibid.* 17, 35 Sup. Ct. at 245.

[59] Harlan, J. in Adair v. United States, *supra* note 55, at 175, 28 Sup. Ct. at 280. The lively persistence in the United States of an abstract conception concerning "liberty of contract" long after it was rejected by conservative English statesmen and English legislation to modern conditions, is illustrated by this statement of Lord Randolph Churchill to Mr. Moore Bayley in 1884: "In answer to your question as to my views on the rights of contract I beg to inform you that where it can be clearly shown that genuine freedom of contract exists I am quite averse to State interference, so long as the contract in question may be either moral or legal. I will never, however, be a party to wrong and injustice, however much the banner of freedom of contract may be waved for the purpose of scaring those who may wish to bring relief. The good of the State, in my opinion, stands far above freedom of contract; and when these two forces clash, the latter will have to submit. If you will study the course of legislation during the last fifty years, you will find that the Tory party have interfered with and restricted quite as largely freedom of contract as the Liberals have done." 2 CHURCHILL, LORD RANDOLPH CHURCHILL (1906) 505.

[60] Holmes, J. in Coppage v. Kansas, *supra* note 54, at 27, 35 Sup. Ct. at 248.

[61] Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65 (1917); see Powell, *loc. cit. supra* note 54.

[62] See Note (1928) 41 HARV. L. REV. 770; Carpenter, *Interference with Contract Relations* (1928) 41 HARV. L. REV. 728.

employed merely from day to day and not for a definite term. This decision brought realization to employers that "yellow dog contracts" had more than psychologic potency.[63] The use of these arrangements and their variants in the form of company unions has spread widely and rapidly.[64] Referred to as the "American plan," the system covers nearly all the unorganized coal fields in Ohio, Pennsylvania, West Virginia and elsewhere.[65] Recent hearings before the Senate Judiciary Committee furnish ample testimony that this movement is today among the most active forces in large-scale industry.[66]

Such a challenge to organized labor was bound to arouse appeal for legislative help. The first and thus far the only statutes do not directly outlaw "yellow dog contracts," but deny equitable relief "in all cases involving the violation of a contract of employment . . . where no irreparable damage is about to be committed upon the property or property rights." [67] In 1925 a bill

[63] See Cochrane, *Why Organized Labor is Fighting "Yellow Dog" Contracts* (1925) 15 AM. LAB. LEG. REV. 227-28, where it is said: "There is, however, undoubtedly, a psychological effect upon some employees, particularly the ignorant or illiterate worker, when he affixes his signature and his mark to a written agreement. He doesn't know what may not happen if he even incurs the displeasure of his employer. To him it might involve not only his being fired, but he might also be punished—perhaps fined and imprisoned; and when there is included in the individual contract a clause whereby the employee promises to have no dealings or talks with any one in regard to union matters, the employer, playing upon the fears and apprehensions of the ignorant man, finds that such contracts assist, perhaps to a very marked degree, in not only keeping the union out, but keeping the union at a distance. . . . There is, also, an effect upon intelligent trade-union officials, for when they are notified by a firm's attorney that an effort is being made to organize employees who have signed individual contracts, the trade-union official cannot escape having in mind the possibility of involved and costly court costs."

[64] The President of the American Federation of Labor (Mr. Green) testified: "Ever since the Hitchman injunction case . . . employers of labor have been making what they term individual agreements with their employees. Those agreements usually provide that the employee will not join a labor union while in the employ of the corporation . . . . along with the individual contract there has developed the company union. . . . Usually these company unions are organized and formed by some officer of the corporation. These company unions in the General Electric, or the Pennsylvania Railroad, upon transportation concerns, the Standard Oil, the steel companies, and others have been inspired and developed by the companies themselves." HEARINGS ON S. 1482, pp. 2, 87. See testimony as to specific cases, *ibid.* 89-93, 662-69; (1920) 2 LAW AND LABOR 184, 188, 206. *Cf.* Stern, *A New Legal Problem in the Relations of Capital and Labor* (1926) 74 U. OF PA. L. REV. 523, which poses the question: Will the law uphold a contract between a workman and his labor-union whereby he agrees for a period of two years not to work in a non-union shop?

[65] See HEARINGS ON CONDITIONS IN COAL FIELDS, 70th Cong., 1st Sess.

[66] HEARINGS ON S. 1482, p. 628.

[67] See N. D. COMP. LAWS ANN. (Supp. 1925) § 7214a3; WASH. COMP.

sponsored by the Ohio State Federation of Labor, which provided that such contracts are against public policy and void, did not get beyond the lower House; within the next two years similar bills presented in California, Illinois, and Massachusetts failed of passage.[68] In the 1928 session of the New York legislature,[69] such a bill was pressed by the New York State Federation of Labor but died in committee. We may be sure that this is only the beginning of the agitation. Abatement of the present trend of prosperity is likely to invigorate the demand for legislation.

LEGISLATION AFFECTING EQUITY JURISDICTION

Legislative revision of judicial doctrines of substantive law proved, on the whole, futile. The influences that for a generation stimulated legislative easing of the sensitized contacts between law and labor therefore began to promote more concrete measures of relief. They sought to meet specific complaints concerning the equity process. The measures that were proposed from time to time and frequently enacted had two main objectives: to compress the scope of equitable jurisdiction in labor controversies, and to correct procedural evils both in the manner of granting the injunction and in the mode of its enforcement.

Proposals within the first category have the more spirited legislative and judicial history.[70] The three earlier statutes on this phase of our problem and their judicial fate sufficiently tell the tale. In 1903 a California statute not only eliminated as a criminal offence a combination to do any act in furtherance of a trade dispute, if such act would not be a crime when done by one person alone, and excluded such a combination from the law against restraint of trade, but went on to provide, "nor shall any restraining order or injunction be issued with relation there-

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STAT. (Remington, 1922) § 7613; ORE. LAWS (Olson, 1920) § 6815. The latter two statutes are even more cautious than indicated, as they permit equitable relief not only in case of "irreparable damage" to "property rights" but also to "personal rights."

[68] See (1925) 15 AM. LAB. LEG. REV. 227; (1927) 17 AM. LAB. LEG. REV. 142. The Ohio bill was deemed constitutional by the Attorney General of that state, *ibid.* 143-44.

[69] Assembly Bill 562.

[70] Legislative measures to curb labor injunctions in Canadian provinces are not within our immediate concern. As to them, see STEWART, CANADIAN LABOR LAWS AND THE TREATY (1926) 161. But the recent testimony of Mr. Frey before the Senate Committee on the Judiciary is suggestive of the reflex influence of the American experience upon labor disputes in Canada: "There are some $3,500,000,000 of American capital invested in Canadian industry. The attorneys for these American investors . . . acquaint . . . [their Canadian attorneys] with the methods that they are able to apply in American courts of equity. . . ." See, further, HEARINGS ON S. 1482, pp. 656-57.

to." [71] Claiming that defendants paraded in front of his place of business with "unfair" and "don't patronize" placards to intimidate employees and patrons from entering his place of business, a San Francisco employer applied to the state court for an injunction. The defendants relied upon the terms of the statute, "nor shall any restraining order or injunction be issued." The trial court issued an injunction which, with slight modifications, the Supreme Court of California sustained.[72] Yet the statute was not overlooked by the court nor was it found repugnant to any constitutional provision. The statute was "construed":

"Appellants make the bare statement, without argument, that 'an injunction in this case is one also specifically forbidden by Penal Code, page 581 . . .' but, in the first place, it cannot, in our opinion, be construed as undertaking to prohibit a court from enjoining the main wrongful acts, charged in the complaint in this action; and, in the second place, if it could be so construed, it would to that extent be void because violation of plaintiff's constitutional right to acquire, possess, enjoy and protect property." [73]

In 1913 and 1914 two other states undertook more comprehensively to contract the jurisdiction of their equity courts. An Arizona statute was the more elaborate.[74] It prohibited, first, its courts from issuing injunctions "in any case between an employer and employees or between employers and employees . . . involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property . . . for which injury there is no adequate remedy at law." Secondly, it enumerated particular acts that no labor injunction might prescribe: ceasing work or inducing others by peaceful means so to do; peaceful patrolling; ceasing to patronize any party to a labor dispute or inducing others by peaceful means so to do; payment of strike benefits; peaceable assembly; the doing of any act "which might lawfully be done in the absence of such dispute by any party thereto."

Massachusetts followed the phrasing of the first part of the Arizona statute *verbatim,* but added a stiffening provision in order to eliminate the possibility of opening too wide the door which by the permissive clause—"unless necessary to prevent irreparable injury to property"—the Arizona statute left ajar. It defined as follows what was not to be deemed property for purposes of the statute:

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[71] CAL. STAT. AND AMEND. TO CODES (1903) 289; CAL. GEN. LAWS (Deering, 1923) act 1605.

[72] Goldberg etc. Co. v. Stablemen's Union, 149 Cal. 429, 86 Pac. 806 (1906).

[73] *Ibid.* 434, 86 Pac. at 808. *Accord:* Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909).

[74] ARIZ. CIV. CODE (1913) par. 1464.

"In construing this act the right to enter into the relation of employer and employee, to change that relation, and to assume and create a new relation for employer and employee, and to perform and carry on business in such relation with any person in any place, or to do work and labor as an employee, shall be held and construed to be a personal and not a property right." [75]

"Recognizing every presumption in favor of the validity of statutes enacted by the legislature," the Supreme Judicial Court of Massachusetts found the enactment repugnant to the due process clause of the federal Constitution and equivalent provisions in the state constitution.[76] In withdrawing the protection of equitable remedies from the economic advantages of the employer-employee relationship, the legislation was held to have annihilated the right to carry on business and to have deprived those who possessed such rights from equal protection of the laws.[77]

The Arizona statute had a longer life. In the picturesque mining town of Bisbee, Arizona, one Truax operated a restaurant. When he reduced the pay and increased the hours of his employees, they struck, and, according to the findings of the trial court, used these means to succeed:

". . . advertising the existence of the strike by the display of banners, by pickets and the distribution of circulars and loud talking on the streets. The facts advertised . . . are that a strike against the English Kitchen existed; that the said strike was declared and maintained by the defendant union; that the English Kitchen proprietors are 'unfair' to organized labor, because said proprietors have refused to grant union employees fair wages and fair working hours. . ." [78]

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[75] Mass. Acts 1914, c. 778, § 2, reprinted in Bogni v. Perotti, 224 Mass. 152, 153, 112 N. E. 853, 855 (1916). See the comment of former President Taft in (1914) 39 A. B. A. REP. 359, 372, speaking of the Massachusetts Act (subsequently held invalid): "One feels in respect to such an enactment by the conservative, law-abiding Old Bay State, which loves equality and properly prides itself as a government of laws and not men, as the author of the Biglow Papers did with reference to her attitude in the Mexican War, when he said: "Massachusetts, God forgive her, is a-kneelin' with the rest.' "

[76] Bogni v. Perotti, *supra* note 75. The case is discussed in (1920) 20 COL. L. REV. 696; (1916) 30 HARV. L. REV. 75. In SENATE HEARINGS ON S. 1482, p. 294, W. G. Merritt testified concerning this decision: "That decision naturally stirred up a great deal of excitement, because it was contrary to what organized labor believed the law to be, and editorials were written by the Federationist, such as: 'Americans, wake up! What shall be done with judges who violate the constitutional rights of labor? Massachusetts court filches labor's rights.' "

[77] A statute almost identical with that of Massachusetts was enacted in Minnesota in 1917, MINN. STAT. (Mason, 1927) § 4258. It has not yet apparently been subjected to review by an appellate court. So also, ORE. LAWS (Olson, 1920) § 6817.

[78] Truax v. Bisbee Local No. 380, 19 Ariz. 379, 389, 171 Pac. 121, 125 (1918).

The Supreme Court of Arizona affirmed dismissal of injunction proceedings against the union and based its decision largely upon the Arizona statute. Peaceful picketing, according to the court, was thereby legalized. Whether picketing is peaceful or not was a question of fact, and when the trial court had determined that picketing in a particular strike was peaceful, no injunction could issue to restrain it. Truax forthwith began a new suit, this time including as defendants some of the strikers individually as well as their union. The complaint repeated the allegations of the prior action and was again dismissed. On appeal only one question was presented—"the constitutionality of Paragraph 1464 of the Civil Code of Arizona of 1913"—and that was decided in favor of the validity of the statute.[79] The court bluntly admitted that the strike tactics were hurting the plaintiff's business, but concluded that the very purpose of the statute was to prevent enjoining such tactics and "to recognize the right of workmen or strikers to use peaceable means to accomplish the lawful ends for which the strike was called." [80] The Supreme Court of Arizona was the only court in 1918 that at once respected the aim of this type of legislation and found in its application no infringement of constitutional guarantees. The subsequent fate of the Arizona statute is entwined with the history of kindred national legislation. The explanation of Mr. Truax's final triumph in the Supreme Court of the United States will seem clearer after a recital of the history of this federal legislation.

Congressional efforts to cut down the equity jurisdiction of federal courts in labor controversies followed the Debs case. At the turn of the present century, a bill before the House to limit the meaning of the word "conspiracy" and partially withdrawing trade disputes from the scope of the Sherman Law contained the clause "nor shall any restraining order or injunction be issued in relation thereto." [81] The next year a bill with the identical clause passed the House.[82] In the next two Congresses like measures were proposed but without effect.[83] In 1906, the American Federation of Labor addressed to the President, the President of the Senate and the Speaker of the House what was called a " Bill of Grievances," setting forth in part the following:

[79] Truax v. Corrigan, 20 Ariz. 7, 176 Pac. 570 (1918).

[80] *Ibid.* 11, 176 Pac. at 572.

[81] H. R. 8917, S. 4233, 56th Cong., 1st Sess. The bill will be found in 34 CONG. REC. 2589-90 (1901). A provision, added by the Committee, read: "*Provided*, That the provisions of this act shall not apply to threats to injure the person or the property, business, or occupation of any person . . . to intimidation or coercion, or to any acts causing or intended to cause an illegal interference, by overt acts, with the rights of others." The bill thereupon was defeated upon the insistence of labor leaders themselves.

[82] H. R. 11060, 35 CONG. REC. 4995 (1902).

[83] H. R. 4445, 58th Cong., 1st Sess.; H. R. 6782, H. R. 8136, 58th Cong., 2d Sess.

"The beneficent writ of injunction intended to protect property rights has, as used in labor disputes, been perverted so as to attack and destroy personal freedom, and in a manner to hold that the employer has some property rights in the labor of the workmen. Instead of obtaining the relief which labor has sought it is seriously threatened with statutory authority for existing judicial usurpation." [84]

Not less than nineteen bills were introduced in the House and Senate of the Sixtieth Congress. The most significant of these, in view of later developments, was a bill introduced by Mr. Pearre, a Republican Congressman from Maryland.[85] He proposed a complete departure from earlier attempts at reform. Assuming that equity jurisdiction was coterminous with the protection of "property," the Pearre Bill proposed to circumscribe equity by so defining the concept "property" as to exclude the interests that are involved in a labor dispute. After forbidding any federal judge to issue an injunction in any labor dispute, except to prevent irreparable injury to property, the Pearre Bill provided that

". . . for the purposes of this Act, no right to continue the relation of employer and employee or to assume or create such relation with any particular person or persons, or at all, or to carry on business of any particular kind, or at any particular place, or at all, shall be construed, held, considered or treated as property or as constituting a property right." [86]

This bill had scarcely been referred to the House Judiciary Committee when President Roosevelt sent a special message to Congress "again" calling its attention "to the need of some action in connection with the abuse of injunctions in labor cases":

"It is all wrong to use the injunction to prevent the entirely proper and legitimate actions of labor oganizations in their struggle for industrial betterment, or under the guise of protecting property rights unwarrantably to invade the fundamental rights of the individual. It is futile to concede, as we all do, the right and necessity of organized effort on the part of wage earn-

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[84] Reprinted *in toto* in 51 CONG. REC. 16337 (1914). See McMahon, *Review of Platforms Put Forth by the American Federation of Labor* (1920) 65 OHIO L. BULL. 67; FREY, LABOR INJUNCTION 91.

[85] H. R. 94, 42 CONG. REC. 13 (1907).

[86] At a hearing before the House Committee on Judiciary, the counsel for the American Federation of Labor on Feb. 5, 1908, stated: "The bill was considered by at least two sessions of the executive council of that organization and unanimously approved. It was considered by two of its national conventions—the two latest—and by these unanimously indorsed . . . . the organization has stood by and is to-day standing by this bill without amendments." Mr. Gompers before the same Committee, on Feb. 28, 1908, said: "Events have demonstrated clearly to my mind that there is only one bill before the committee that can at all be effective to deal with this abuse, with this invasion of human rights, and that is the Pearre bill."

ers and yet by injunctive process to forbid peaceable action to accomplish the lawful objects for which they are organized and upon which their success depends." [87]

Despite this message and the many bills, the Sixtieth Congress closed without action. That year, 1908, the national conventions were meeting. The Republican platform [88] recognized defects in the procedure leading to injunctions. A broader, if vaguer, paragraph in the Democratic platform [89] was interpreted by Mr. Gompers as an endorsement of the Pearre Bill.[90] In a characteristic public letter, two weeks before the election President Roosevelt assailed the Pearre Bill:

"I denounce as wicked the proposition to secure a law which, according to the explicit statement of Mr. Gompers, is to prevent the courts from effectively interfering with riotous violence where the object is to destroy a business, and which will legalize a blacklist and the secondary boycott, both of them the apt instruments of unmanly persecution." [91]

In the first Congress of President Taft's administration twelve bills were introduced seeking modifications of the existing procedure governing labor injunctions. Not one was reported out of committee. Two years later, however, politics were in the lively current of the "Progressive movement" and in the Sixty-second Congress began the steady drive that three years later eventuated in the Clayton Act. The House Judiciary Committee, in January 1912, opened hearings on injunctive legislation, considering eleven specific bills then pending.[92] The most active measure was the Wilson Bill,[93] identical with the Pearre Bill of the Sixtieth Congress in purpose, scheme and, for the greater part, in language. Like the Pearre Bill, it forbade the issuance of injunctions in labor disputes, except to prevent irreparable injury to property, defining "property" thus:

"And for the purpose of this Act no right to continue the relation of employer and employee, or to assume or create such

[87] 42 CONG. REC. 1347-48 (1908).

[88] PROCEEDINGS OF THE FOURTEENTH REPUBLICAN NATIONAL CONVENTION (1908).

[89] "Questions of judicial practice have arisen especially in connection with industrial disputes. We deem that the parties to all judicial proceedings should be treated with rigid impartiality, and that injunctions should not be issued in any cases in which injunctions would not issue if no industrial dispute were involved." PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION (1908) 168.

[90] HEARINGS BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY, INJUNCTIONS (1912) 62d Cong., 2d Sess. pp. 269-70.

[91] This letter is reprinted, *ibid.* 264. Mr. Gompers' reply appears *ibid.* pp. 272-75.

[92] *Supra* note 90.

[93] H. R. 11032, 62d Cong., 1st Sess.

relation with any particular person or persons, or at all, or patronage or good-will in business, or buying or selling commodities of any particular kind or at any particular place, or at all, shall be construed, held, considered, or treated as property or as constituting a property right." [94]

The American Federation of Labor urged this bill on President and Congress.[95] But after extended hearings, the House Committee wholly recast the Wilson Bill, and reported out a new series of proposals [96] which were destined to become the bases of the labor provisions in the Clayton Act. The course of the debates on these proposals and their vicissitudes, covering a period of over two years from first presentation to the House until final passage by both chambers, is more than historic curio. It is essential to an understanding of the decisions that applied the Clayton Act.

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[94] See Mr. Andrew Furuseth's testimony at the House Hearings, *supra* note 90 at 110: "What labor is now seeking is the assistance of all liberty-loving men in restoring the common-law definition of property and in restricting the jurisdiction of the equity courts in that connection to what it was at the time of the adoption of the Constitution."

Daniel Davenport, general counsel of the American Antiboycott Association, in testifying before the committee: "To say that Congress can declare by statute that not to be property which the uniform decisions of innumerable courts have declared to be property, which the Supreme Court itself has so declared, and which the common sense of mankind instinctively recognized as property, and by so declaring it not to be property to withdraw it from the protection of the processes of law which this bill itself preserves for the protection of all other property is simple nonsense. I say it is useless to spend time in discussing it." *Ibid.* 294-95.

[95] See HOUSE HEARINGS, *supra* note 90, at 11. The American Federation Convention of 1911 adopted by unanimous vote the following recommendations: "We recommend that this convention authorize and direct the executive council to urge the President of the United States to recommend in his forthcoming message to Congress the amendment of the Sherman antitrust law upon the lines as contained in the Wilson bill; and further, that the executive council be and it is hereby, directed, either as a body or by the selection of a committee thereof, to interview and confer with the President in furtherance of the purpose of this report; and the executive council is hereby further authorized and directed to take such further action as its judgment may warrant to secure the enactment of such legislation at the following session of Congress as shall secure the legal status of the organized movement of the wage workers and its freedom from unjust discrimination in the exercise of their necessary, normal, and constitutional rights through their voluntary associations; and the executive council is further authorized and directed, that, in the event of failure on the part of Congress to enact the legislation which we herein seek at the hands of Congress and the President, to take such action as in its judgment the situation may warrant in the presidential and congressional election of 1912." Reprinted *ibid.* 94.

[96] H. R. 23635, 62d Cong., 2d Sess., reported out April 27, 1912 (48 CONG. REC. 5514) accompanied by H. Rep. No. 612 and a minority report, H. Rep. 612, pt. 2. The majority report will be found reprinted in 48 CONG. REC. 6458 (1912); the minority report, *ibid.* 6443.

The first three sections of the new bill were regulatory of procedure governing the injunction and the *ex parte* restraining order; these we treat later. Our immediate concern is with the fourth and last section, made up of two paragraphs. The first forbade federal judges from granting an injunction

". . . in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right. . . ."

The bill carried no definition of "property." The second paragraph took a new tack. It catalogued specific acts for which no injunction could issue: terminating employment or persuading others by lawful means so to do; peacefully obtaining or communicating information; ceasing to patronize or to employ any party to such dispute or persuading others by peaceful means so to do; paying strike benefits; peaceable assembly in a lawful manner for lawful purposes; "doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto." [97]

The purpose of the bill was set forth in the majority report of the House Judiciary Committee:

"The second paragraph of section 266c is concerned with specific acts which the best opinion of the courts holds to be within the right of parties involved upon one side or the other of a

[97] This paragraph read as follows: "And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful means so to do; or from paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto." Reprinted in 48 CONG. REC. 6415 (1912) as H. R. 23635.

The second clause was taken from the British Trade Disputes Act of 1906, the second section of which provided: "It shall be lawful for one or more persons . . . in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working."

trades dispute. The necessity for legislation concerning them arises out of the divergent views which the courts have expressed on the subject and the difference between courts in the application of recognized rules." [98]

Contrariwise, the minority report contended that the second paragraph was "the most vicious proposal of the whole bill," [99] because it authorized the specified conduct regardless of actuating motives. The debate on the floor of the House followed the lines of these reports. The opposition was summarized by Mr. Moon of Pennsylvania:

"The obvious purpose of this paragraph, Mr. Speaker, is to legalize the modern strike and secondary boycott as instruments of industrial warfare, and to place the destructive machinery of these dangerous and cunningly devised weapons beyond the preventive power of our courts of justice." [100]

The ablest speech was by John W. Davis, then a member for West Virginia, who supported the bill as an "effort to crystallize into law the best opinions of the best courts." [101] On May 14, 1912, the bill passed the House as reported.[102] It duly came before the Senate Judiciary Committee which began hearings the month following, continuing intermittently until February of the next year.[103] Despite much prodding on the floor of the Senate,[104] the bill never emerged from the legislative "morgue." [105]

The next Congress ushered in the Wilson era on Capitol Hill as well as at the White House. In the spring of 1914, the chairman of its Judiciary Committee, Mr. Clayton, reported to the House [106] a bill (H. R. 15657)—"To supplement existing laws against unlawful restraints and monopolies, and for other purposes"—Section 18 [107] of which was the exact replica of the bill

[98] H. Rep. No. 612, 62d Cong., 2d Sess.; 48 CONG. REC. 6458 (1912).

[99] H. Rep. No. 612, pt. 2, 62d Cong., 2d Sess.; 48 CONG. REC. 6443 (1912).

[100] 48 CONG. REC. 6421 (1912).

[101] *Ibid.* 6438.

[102] 48 CONG. REC. 6470-71 (1912); referred to Senate Committee on Judiciary, *ibid.* 6477.

[103] HEARINGS BEFORE A SUBCOMMITTEE OF THE SENATE COMMITTEE ON THE JUDICIARY, 62d Cong., 2d Sess. on H. R. 23635 (1912).

[104] Motions to discharge the committee from further consideration of the bill were made repeatedly, 48 CONG. REC. 7986, 7987, 8118, 8224, 8246 (1912); 49 CONG. REC. 2685, 2686 (1913). The Senate at this time was Republican, the House was Democratic. See 51 CONG. REC. 9272 (1914).

[105] 51 CONG. REC. 9272 (1914).

[106] H. Rep. No. 627, 63d Cong., 2d Sess., to accompany H. R. 15657; 51 CONG. REC. 8200 (1914).

[107] Reprinted in 51 CONG. REC. 9611 (1914).

passed in the previous House. One amendment only was proposed by the committee: following the catalogue of specific acts that were not to be enjoined, these words were added—"nor shall any of the acts specified in this paragraph be considered or held unlawful." [108]

The section produced a cross-fire of opposition—"nothing whatsoever for labor's benefit" would be accomplished because it was operative only between an employer and employees, a relationship that terminated in case of strike or lockout; [109] too much was accomplished because prohibition of injunctions against "ceasing to patronize . . . or persuading others by peaceful means so to do" legalized the secondary boycott.[110] The argument in support of the section was briefly that "everything set forth in section 18 is the law to-day" [111] and that the section was not intended to legalize the secondary boycott.[112]

We have already had occasion to note the diversity of meanings which has over-laid the label "secondary boycott." [113] The

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[108] 51 CONG. REC. 9652 (1914). Mr. Webb's explanation follows: ". . . having recognized and legalized the acts set forth in section 18, so far as the conscience side of the court is concerned, the committee feels that no harm can come from making those acts legal on the law side of the court, for anything that is permitted to be done in conscience ought not be made a crime or forbidden in law." *Ibid.* 9653.

[109] Mr. Madden, 51 CONG. REC. 9082 (1914). This argument was made many times, 51 CONG. REC. 9654-55. Mr. Murdock of Kansas framed the difficulty in this way: "The gentleman . . . knows that under this paragraph there are several kinds of classes to which are granted exemption; that is, cases between employer and employees, between employers and employees, and between two sets of employees, and between persons employed and persons seeking employment; but none of these classes of cases, to my mind, include strikers. And it was the strike which caused this proposition to be offered." Mr. Floyd of Arkansas answered as follows: "I can not agree with the gentleman from Kansas that when strikers temporarily quit work, demanding better terms and conditions before they resume, that the relation of employer and employee has ceased. It may have ceased temporarily, but this broad language used in the provision would undoubtedly include them." *Ibid.* 9655. Mr. Madden of Illinois said: "And when anyone argues that the words 'employer and employees' will be held to mean those previously holding the relation, the courts will refuse to so radically change and extend the meaning." *Ibid.* 9496.

[110] 51 CONG. REC. 9652, 9658 (1914). Mr. Moon of Pennsylvania, from the House Committee on the Judiciary (H. Rep. 612, pt. 2, 62d Cong., 2d Sess.) submitted the following as the views of the minority: ". . . this section would prevent the issuance of the injunction in the Debs case (In re Debs, 158 U. S. 564); it would prevent the issuance of the injunction in Toledo & Ann Arbor v. Pennsylvania Co. (54 Fed. 730); it would prevent the issuance of any injunction to restrain either workmen or employers who were the objects of the most vicious form of boycott that has been passed upon by the courts, or can be devised by the ingenuity of boycotters."

[111] 51 CONG. REC. 9653 (1914).

[112] *Ibid.* 9652-53, 9658.

[113] Frankfurter and Greene, *op. cit. supra* note 4, at 195.

debates on this measure illustrate these accretions of ambiguity. The leaders on both sides, Mr. Webb in support, and Mr. Volstead in opposition, were in accord in their abhorrence of a "secondary boycott." But while the latter rhetorically asked "can it be questioned that . . . it [Section 18 as amended] will legalize the secondary boycott?" [114] the former was so "perfectly satisfied" that the section did not authorize the secondary boycott, that he declined to accept an amendment further to clarify the point.[115] The statute itself scrupulously avoided the words "secondary boycott" which would unavoidably have imported ambiguity. The language used was descriptive of conduct, and not a phrase that to many inevitably conveyed the significance of illegality.[116]

The bill, as amended, passed the House on June 5, 1914,[117] was promptly referred to the Senate Judiciary Committee, reported out on July 22, 1914,[118] and with some literary modifications [119]

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[114] 51 CONG. REC. 9658 (1914).

[115] *Ibid.* The same difficulties and confusion prevailed in the Senate, *ibid.* 15945. Mr. Albert H. Walker of New York, testifying before a subcommittee of the Senate Committee on the Judiciary, *supra* note 103, at 631:

"Chairman. The bill as I read it, does not exempt the so-called secondary boycott from injunctions.

Mr. Walker. I think it does.

Chairman. Where it says: No such restraining order or injunction shall prohibit any person or persons from ceasing to patronize or to employ any party to such dispute.

Mr. Walker. But to go to the last words of the sentence, 'or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto,' that covers secondary boycotting like a blanket and exempts it from injunctions."

[116] The clause "ceasing to patronize or advising others by peaceful means so to do," Mr. Webb thus interpreted: ". . . it does authorize persons to cease to patronize the party to the dispute and to recommend others to cease to patronize that same party to the dispute . . . . we confine the boycotting to the parties to the dispute, allowing parties to cease to patronize that party and to ask others to cease to patronize the party to the dispute." 51 CONG. REC. 9658 (1914).

[117] *Ibid.* 9911.

[118] *Ibid.* 12468.

[119] These changes were made: (1) To the privilege of terminating employment was added the phrase "whether singly or in concert." 51 CONG. REC. 14330 (1914). (2) The clause specifying unenjoinable conduct—"attending at or near a house or place where any person resides or works or carries on business or happens to be, for the purpose of peacefully obtaining or communicating information" was dropped, *ibid.* 14330, and later replaced by this clause: "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working." (3) "ceasing to patronize . . . or persuading others by peaceful means so to do" changed to include the words "and lawful" after "peaceful." *Ibid.* 14331. (4) "peaceably assembling at any place" changed by dropping the words "at any place." *Ibid.* 14331. (5)

was adopted by the Senate, September 2, 1914.[120] The conference of the two Houses submitted their report,[121] which was accepted by the Senate, October 5, 1914[122] and by the House three days later.[123] By President Wilson's signature on October 15, 1914, the measure known to history as the Clayton Act became law.[124]

This completes in barest outline a sketch of legislative proposals to curb equity jurisdiction which, from 1894 to 1914, engaged the attention of every congressional session but one. If such continuous effort and travail in the evolution of a single measure[125] express any responsible purpose, they must justify

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The provision that none of the specifically unenjoinable conduct shall be held "unlawful" was changed by adding after the word "unlawful," "under the laws of any State in which the act was committed." *Ibid.* 14367. This was eventually modified to read: "shall . . . be considered or held to be violations of any law of the United States."

[120] 51 CONG. REC. 14610 (1914).

[121] SEN. DOC. No. 585, reprinted *ibid.* 15637.

[122] *Ibid.* 16170.

[123] *Ibid.* 16344.

[124] Section 20 of this Act (now 29 U. S. C. § 52 (1926)) reads as follows: "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any persons engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. (Oct. 15, 1914, c. 323 § 20, 38 Stat. 738)."

[125] We take the following summary of references to congressional debates and hearings from Mr. Justice Brandeis' dissenting opinion in Truax v. Corrigan, *supra* note 12, at 369, n. 39, 42 Sup. Ct. at 143, n. 39: "53d Congress: resolutions to investigate the use of the injunction in certain cases, 26 CONG. REC. 2466; 56th Congress: debate, 34 CONG. REC. 2589; 60th Congress: hearings, SEN. DOC. 525; special message of the President.

the presumption that Congress was long conscious of abuses in issuing injunctions and that this legislation embodied a solution.[126] Five days after its enactment, however, the then President of the American Bar Association, in his annual address, gave warning of impending pitfalls:

"All these provisions have been called the charter of liberty of labor. We have seen that the changes from existing law they make are not broadly radical and that most of them are declaratory merely of what would be law without the statute. This is a useful statute in definitely regulating procedure in injunctions and in express definition of what may be done in labor disputes. But what I fear is that when the statute is construed by the courts it will keep the promise of the labor leaders to the ear and break it to the hope of the ranks of labor." [127]

This prophet was himself destined to be Chief Justice of the Court that gave final meaning to the Clayton Act and determined the limits of legislative power in prescribing remedies for injunctive abuses.

SEN. DOC. 213, 42 CONG. REC. 1347; papers relating to injunctions in labor cases, SEN. DOCS. 504 and 524; 61st Congress: debate, 45 CONG. REC. 343; 62d Congress: debate, 48 CONG. REC. 6415-6470; hearings, SEN. DOC. 944; petitions, SEN. DOC. 440; hearings before the House Committee on the Judiciary, Jan. 11, 17-19, February 8, 14, 1912; hearings before a subcommittee of Senate Committee on the Judiciary, 62d Congress, 2d Sess.; 63d Congress, see debates on H. R. 15657 (the Clayton Act)."

[126] Judge Amidon drew the following comparison between § 20 of the Clayton Act and § 2 of the English Trade Disputes Act of 1906: "The form in which they are framed differs, but their legal effect is the same. The English statute says that 'it shall be lawful' to do the specific acts mentioned in each of the statutes. This, as a necessary inference, forbade the courts to issue injunctions restraining workmen from doing those acts. The American statute reverses this order. It expressly forbids courts to issue injunctions or restraining orders forbidding workmen to do the acts specified in section 20, and then in its last clause declares as follows: 'Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.' Our statute forbids expressly the issuing of injunctions against the doing of the acts, and also declares that the doing of the same shall not be construed or held to be a violation of federal law. The English act, without expressly dealing with the subject by forbidding injunctions, does so impliedly by conferring upon employés in the case of a trade dispute the right to do the acts. The only difference in the two statutes is that our law is express on the subject of forbidding injunctions in the cases specified, while the English statute accomplishes the same result by implication." Great Northern Ry. v. Brosseau, 286 Fed. 414, 417 (D. N. D. 1923).

[127] (1914) 39 A. B. A. REP. 359, 380. Other discussions of the Act prior to any judicial construction are the following: Davenport, *An Analysis of the Labor Sections of the Clayton Anti-Trust Bill* (1915) 80 CENT. L. J. 46; Witte, *The Doctrine that Labor is a Commodity* (1917) 69 AM. ACADEMY OF POL. & SOC. SCI. ANN. 133; *The Clayton Bill and Organized Labor* (1914) 32 SURVEY 360; Note (1917) 30 HARV. L. REV. 632.

Between 1916 and 1920, in thirteen cases [128] in which opinions are reported, lower federal courts applied Section 20 of the Clayton Act. In ten of these cases, the statute was held not to stand in the way of an injunction. This surprising result was based on two independent and inconsistent constructions. First, that Section 20 did not change the pre-existing law; [129] second, that the section did create new privileges, but extremely limited in scope. Thus, the statute was held inapplicable when the purpose of the strike was other than immediate betterment of working conditions: to unionize a factory, to refuse to work upon non-union products was deemed a strike "for a whim," not sheltered by the Clayton Act and subjecting the defendants to "those settled principles respecting organized picketing." [130] Again, the Act could not be invoked when once the employer had refilled vacancies: persons who continued to strike and picket thereafter were no longer "employees" protected by the Clayton Act.[131] Finally, hostility to all picketing was too deeply ingrained in the mental habits of some of the federal judges to yield to the language of the Clayton Act. Instead, it continued to supply a canon of interpretation.[132] An attitude derived from assumptions like this—"practical people question the possibility of peaceful persuasion through the practice of picketing" [133]—found no difficulty in clothing every reasonably effective strike activity in language synonymous with illegality.[134]

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[128] Alaska S. S. Co. v. International Longshoremen's Ass'n, 236 Fed. 964 (D. Wash. 1916); Tri-City Cent. T. Council v. American Steel Foundries, 238 Fed. 728 (C. C. A. 7th, 1916); Stephens v. Ohio State Telephone Co., 240 Fed. 759 (N. D. Ohio, 1917); Kroger Grocery & B. Co. v. Retail Clerks' I. P. Ass'n, 250 Fed. 890 (D. Mo. 1918); Montgomery v. Pacific Electric Ry., 258 Fed. 382 (C. C. A. 9th, 1919); Dail-Overland Co. v. Willys-Overland, 263 Fed. 171 (N. D. Ohio, 1920); Vonnegut Machinery Co. v. Toledo Machine & Tool Co., 263 Fed. 192 (D. Ohio, 1920); Langenberg Hat Co. v. United Cloth Hat and Cap Makers, 266 Fed. 127 (D. Mo. 1920); King v. Weiss & Lesh Mfg. Co., 266 Fed. 257 (C. C. A. 6th, 1920); Herkert & Meisel T. Co. v. United Leatherworkers' I. U., 268 Fed. 662 (E. D. Mo. 1920). The cases in which the injunction was denied: Puget Sound Traction Light & Power Co. v. Whitley, 243 Fed. 945 (W. D. Wash. 1917); Duplex Printing Press Co. v. Deering, 247 Fed. 192 (S. D. N. Y. 1917); Kinloch Telephone Co. v. Local Union No. 2, 265 Fed. 312 (E. D. Mo. 1920).

[129] Stephens v. Ohio State Telephone Co., *supra* note 128.

[130] Vonnegut Machinery Co. v. Toledo Machine & Tool Co., *supra* note 128, at 201-03.

[131] Dail-Overland Co. v. Willys-Overland, *supra* note 128.

[132] As to the attitude of courts generally towards legislation, see Pound, *Common Law and Legislation* (1908) 21 HARV. L. REV. 383.

[133] Vonnegut Machinery Co. v. Toledo Machine & Tool Co., *supra* note 128.

[134] See Montgomery v. Pacific Electric Ry.; Vonnegut Machinery Co. v. Toledo Machine & Tool Co.; Langenberg Hat Co. v. United Cloth Hat and Cap Makers, all *supra* note 128.

Not until 1921 [135] did litigation reach the Supreme Court calling for its pronouncement upon the Clayton Act. But in June of 1917, the intimation of Mr. Justice Holmes in *Paine Lumber Company v. Neal,*[136] and a dissenting opinion in that case, foreshadowed the Court's construction of the Act. Because the material manufactured by plaintiffs was not made by union labor, defendant unions (whose members, however, were not in plaintiff's employ) refused to work upon it. To restrain their conduct, plaintiffs sought an action against them. Disagreeing with the majority of the Court that the Clayton Act was inapplicable because the litigation antedated it, the dissenting Justices argued that an injunction should issue because they did not find "in § 20 of the Clayton Act anything interfering with the right of the complainants to an injunction." [137] This opinion yielded to the reasoning we have just summarized from the opinions in the lower federal courts: the section did not apply because there was no relation of employer and employee between the parties in the case, and because there was no dispute between them as to conditions of employment; the section only sanctioned "lawful" measures—"that is, of course, measures that were lawful before the Act." [138] These views were transmuted into decisions in two cases which fixed the meaning of Section 20.[139]

In *Duplex Printing Co. v. Deering,* an injunction was sought to restrain the Machinists' and affiliated unions from interfering with plaintiff's business by inducing their members not to work for the Duplex Company, or its customers, in connection with the hauling, installation and repair of printing presses made by the Company.[140] There was a strike pending against the Company to secure the closed shop, an eight-hour day, and a union scale of wages. The late Judge Hough's decision dismissing the bill [141] was affirmed by a majority of the Circuit Court of Appeals for the Second Circuit.[142] Judge Hough was clear that Section

[135] Duplex Co. v. Deering, *supra* note 51.

[136] Paine Lumber Co. v. Neal, *supra* note 47.

[137] *Ibid.* 484, 37 Sup. Ct. at 725.

[138] *Ibid.* 485, 37 Sup. Ct. at 725.

[139] The Hitchman Coal Company Case, *supra* note 61, decided Dec. 10, 1917, did not consider at all the applicability of the Clayton Act since the final decree had issued Jan. 18, 1913 (202 Fed. 512 (N. D. W. Va.)). See Kroger Grocery & B. Co. v. Retail Clerks' Ass'n; Kinloch Telephone Co. v. Local Union No. 2, both *supra* note 128. But *cf.* Montgomery v. Pacific Electric Ry. Co., *supra* note 128, at 388-89.

[140] The conduct of the union is detailed fully in the opinion of the trial court, 247 Fed. 192 (D. N. Y. 1917), and in the opinion of Judge Rogers, on appeal, 252 Fed. 722 (C. C. A. 2d, 1918). It must be remembered that counsel for the plaintiff requested the court not to consider any evidence of violence or threats of violence in deciding upon the legality of the defendants' conduct. *Ibid.* 746.

[141] Duplex Printing Press Co. v. Deering, 247 Fed. 192 (D. N. Y. 1917).

[142] Duplex Printing Press Co. v. Deering, 252 Fed. 722 (C. C. A. 2d, 1918).

20, if applicable to the litigation, forbade the issue of an injunction. His only doubt was as to the applicability of the section: "Is the present litigation one between employers and employés or *an* employer and employés, growing out of a dispute concerning terms *or* conditions of employment?" [143] He so held. There was a dispute; it concerned conditions of labor; it was a dispute between employer and employees, although only "a dozen or so" of the plaintiff's own employees were on strike. "In strict truth," wrote Judge Hough,

". . . this is a dispute between two masters, the union, or social master, and the paymaster; but, unless the words 'employers and employees', as ordinarily used, and used in this statute, are to be given a strained and unusual meaning, they must refer to the business class or clan to which the parties litigant respectively belong." [144]

Meaning that to Judge Hough was "strained and unusual" a majority of the Supreme Court found easy and obvious, and all his conclusions were rejected.[145] Their reasoning took this course: irreparable injury "to property or to a property right" includes injury to an employer's business; the privileges of Section 20 did not extend to defendants who had never been in the relationship of employee to the plaintiff or sought employment with him, because it did not apply "beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of the dispute"; [146] furthermore, analyzing the specific exemption invoked [147]—"ceasing to patronize. . . or persuading others by peaceful and lawful means so to do"—the Court concluded that the instigation of a strike against an employer who was at peace with his own employees, solely to compel such employer to withdraw his patronage from the plaintiff with whom there was a dispute "cannot be deemed peaceful and lawful persuasion." [148] The dissenting opinion of

[143] *Ibid.* 747.

[144] *Ibid.* 748. The majority opinion of the Supreme Court answered the point as follows: "We deem this construction altogether inadmissible. . . . Congress had in mind particular industrial controversies, not a general class war." Duplex Co. v. Deering, *supra* note 51, at 471-72, 41 Sup. Ct. at 178.

[145] *Ibid.* Pitney, J. wrote the majority opinion, which was concurred in by White, C. J., McKenna, Day, Van Devanter, McReynolds, JJ. Brandeis, J. wrote the dissenting opinion, which was concurred in by Holmes and Clark, JJ. The case is considered in (1921) 34 HARV. L. REV. 880; MASON, ORGANIZED LABOR AND THE LAW (1925) 203 *et seq.*; Sayre, *The Clayton Act Construed* (1921) 45 SURVEY 597.

[146] Duplex Co. v. Deering, *supra* note 51, at 472, 41 Sup. Ct. at 178.

[147] See Powell, *The Supreme Court's Control over the Issue of Injunctions in Labor Disputes* (1928) 13 ACADEMY OF POL. SCI. PROC. 37, 51.

[148] It is of significance that Mr. Justice Pitney misquoted the pertinent

Mr. Justice Brandeis (in which Holmes and Clarke, JJ. concurred) refused to confine the scope of the exemptions of Section 20 merely within the area of a legal relationship between a specific employer and his employees, both by reason of the wording of the statute and by virtue of the fact that "the very acts to which it applies severed the continuity of the legal relationship." [149] Finding that the economic relation of the parties brought them within Section 20, the dissenting Justices concluded that it did exempt from injunctive process instigation to strike in aid of persons with whom there is a unity of economic interest. Such unity was disclosed by the actual circumstances of the case. After a detailed analysis of the facts, the minority of the Court thus summarized the economic justification for conduct which the majority held subject to an injunction: ". . . in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself." [150]

Thus ended the litigation which gave the pitch to all future readings of the Clayton Act. How much of the life of a statute dealing with contentious social issues is determined by the general outlook of judges upon society lies on the very surface of the *Duplex* case. Thirteen federal judges were called upon to apply the Clayton Act to the particular facts of this case. Six found that the law called for a hands-off policy in the conflict between the Printing Press Company and the Machinists; seven found that the law called for interference against the Machinists. The decision of the majority of the Supreme Court is, of course, the authoritative ruling. But informed professional opinion would find it difficult to attribute greater intrinsic sanction for the views of the seven judges, White, McKenna, Day, Van Devanter, Pitney, McReynolds and Rogers than for the opposing interpretation of the six judges, Holmes, Brandeis, Clarke, Hough, Learned Hand and Manton.

Statutory construction in doubtful cases is a choice among competing policies as starting points for reasoning. This is the real explanation of the conflict of opinion in the

provision of the Clayton Act by adding the words "and *lawful*" after the word "peaceful." Duplex Co. v. Deering, *supra* note 51, at 474, 41 Sup. Ct. at 179.

[149] "But Congress did not restrict the provision to employers and workingmen *in their employ*. By including 'employers and employees' and 'persons employed and persons seeking employment' it showed that it was not aiming merely at a legal relationship between a specific employer and his employees. Furthermore, the plaintiff's contention proves too much. If the words are to receive a strict technical construction, the statute will have no application to disputes between employers of labor and workingmen, since the very acts to which it applies sever the continuity of the legal relationship." Brandeis, J., *ibid.* 487-88, 41 Sup. Ct. at 184. *Cf.* the congressional debates on this very question, *supra* p. 902.

[150] *Supra* note 51, at 482, 41 Sup. Ct. at 182.

Duplex case. But even without a critique of the policy which the majority adopted, two general observations may be made. A difference of judgment upon the facts of the controversy between the Duplex Company and the Machinists might readily have brought the situation within the Court's own requirement that, to enjoy immunity, defendants must be "affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of the dispute." [151] Secondly, by using the "secondary boycott" as the concept governing the decision, the Court imported the term of multiple meaning which Congress had kept out of its legislation. The crux of the *Duplex* case was interference by New York unionists with work in New York on Duplex printing machines in the course of a controversy against the Duplex Company in Battle Creek, Michigan. This is the familiar case of refusal to work upon non-union made goods within the same industry. Whether, as part of an industrial conflict between the Duplex Company and the Machinists' Union, unionists in New York should be allowed to exercise their power of economic coercion by seeking to interfere with the installation of Duplex presses is an issue about which men will naturally differ. On this issue, judges might give different answers, but they will be talking about the same thing. To attempt, however, to decide the propriety of a "secondary boycott" is to leave definiteness of fact for ambiguity of phrasing. For to talk about "secondary boycott" is to become involved in a confusion of terms and, therefore, in a confusion of thought.[152]

At the time of the *Duplex* decision, there was pending before

[151] Compare the facts as summarized by Mr. Justice Brandeis: "There are in the United States only four manufacturers of such presses; and they are in active competition. Between 1909 and 1913 the machinists' union induced three of them to recognize and deal with the union, to grant the eight-hour day, to establish a minimum wage scale and to comply with other union requirements. The fourth, the Duplex Company, refused to recognize the union; insisted upon conducting its factory on the open shop principle; refused to introduce the eight-hour day and operated for the most part, ten hours a day; refused to establish a minimum wage scale; and disregarded other union standards. Thereupon two of the three manufacturers who had assented to union conditions notified the union that they should be obliged to terminate their agreements with it unless their competitor, the Duplex Company, also entered into the agreement with the union, which, in giving more favorable terms to labor, imposed correspondingly greater burdens upon the employer." *Ibid.* 479-80, 41 Sup. Ct. at 181.

[152] Professor T. R. Powell observes that since the Clayton Act granted for the first time the right of injunction under the Sherman Law to private parties, Pitney, J. was in error in viewing § 20 as a restriction on old equity powers, rather than as a limitation on a new addition to equity powers. (1928) 13 ACADEMY OF POL. SCI. PROC. 54. Of course, this point cannot be made where federal jurisdiction obtains for any reason other than the Sherman Act.

the Supreme Court *American Steel Foundries v. Tri-City Central Trades Council.*[153] This case presented for review an injunction that issued from a district court as a restraint upon "persuasion" and "picketing," which was modified by the Circuit Court of Appeals to permit "persuasion" and to restrain only "picketing in a threatening or unlawful manner." [154] The Supreme Court, it will be recalled,[155] affirmed the first modification but reversed the second. The Court was of opinion that "the name 'picket' indicated a militant purpose inconsistent with peaceable persuasion," and that "the presence of groups of pickets" [156] resulted "in inevitable intimidation." While professing "every regard to the congressional intention manifested in the act," the Court, following the *Duplex* case, held that Section 20 "introduces no new principle into the equity jurisprudence of those [federal] courts," and "is merely declaratory of what was the best practice always." It, therefore, concluded that picketing as the case revealed it, "is unlawful and cannot be peaceable and may be properly enjoined by the specific term because its meaning is clearly understood in the sphere of the controversy by those who are parties to it."

The Court ruled that Section 20 was intended merely as "declaratory of what was the best practice always." In condemning "picketing," the Court relies on "many well reasoned authorities," while conceding "there has been contrariety of view." But it does not articulate the criteria by which it determined what, in the intention of Congress, "was the best practice." Again, the opinion repeats the technique in the *Duplex* decision, in that it characterizes conduct with a word that to the Court carries evil connotation, inhibits the conduct because of the label and supports the result by the observation that "Congress carefully refrained from using" "the sinister name of 'picketing'" in Section 20.

While protecting "the right of the employer incident to his business and property to free access" of his employees, the Court also recognized the right of strikers to persuade those working for an employer "to join the ranks of his opponents in a lawful economic struggle." How are such conflicting rights to be reconciled? The Court gave this answer:

"Each case must turn on its own circumstances. It is a case for the flexible remedial power of a court of equity which may try one mode of restraint, and if it fails or proves to be too

[153] 257 U. S. 184, 42 Sup. Ct. 72 (1921).

[154] Tri-City Cent. T. Council v. American Steel Foundries, *supra* note 128.

[155] *Supra* note 153.

[156] "'Singly or in concert,' says the Clayton Act. 'Not together, but singly,' says the Chief Justice in interpreting it." T. R. Powell, *op. cit. supra* note 152.

drastic, may change it. We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant, that such representatives should have the right of observation, communication and persuasion but with special admonition that their communication, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence and which may be varied in other cases." [157]

Thus, the Court derived from the Clayton Act privileges of persuasion not only for the actual strikers, who were former employees of the complainant, but also for members of the defendant unions who were neither former nor prospective employees of the complainant. The concession was drawn from broad considerations:

"Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood." [158]

[157] American Steel Foundries v. Tri-City Trades Council, *supra* note 153, at 206, 42 Sup. Ct. at 77.

[158] *Ibid.* 209, 42 Sup. Ct. at 78.

This enlightened analysis by Chief Justice Taft of the social justification of trade unions writes its own commentary upon the ruling in the *Duplex* case. Is the interest of members of a national union who threaten a strike in New York in aid of a strike by fellow-members in Michigan against an employer there, whose continued resistance to the union was "threatening the standing of a whole organization and the standards of all its members" merely interest in a "sentimental or sympathetic, sense?" The justification of a substantial common concern so clearly expounded by the Chief Justice was present in the *Duplex* as well as in the *Tri-City* case, unless the Court rested the differences in result between the two cases upon the fact that in the *Tri-City* case the stage of the controversy was confined to a smaller geographic area.

Following the *Tri-City* case, we find seventeen decisions [159] in the lower federal courts, counting only reported cases, that sanction the issuance of an injunction notwithstanding Section 20 of the Clayton Act. The opinions add little to the doctrines we have canvassed. According to them, such immunities as the Clayton Act formulated do not apply to union organizers who operate in non-union territories, for they are neither employees nor ex-employees, but rank "outsiders." [160] The immunities do not operate when "persuasion" would hinder some industry engaged in interstate commerce or is incidental to an "unlawful

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[159] Buyer v. Guillan, 271 Fed. 65 (C. C. A. 2d, 1921); Quinlivan v. Dail-Overland Co., 274 Fed. 56 (C. C. A. 6th, 1921); Charleston Dry Dock & Machine Co. v. O'Rourke, 274 Fed. 811 (D. S. C. 1921); Gasaway v. Borderland Coal Corporation, 278 Fed. 56 (C. C. A. 7th, 1921); Lyons v. United States Shipping Board E. F. Corp., 278 Fed. 144 (C. C. A. 5th, 1922); Central Metal Products Corporation v. O'Brien, 278 Fed. 827 (N. D. Ohio, 1922); United States v. Vannatta, 278 Fed. 559 (E. D. N. Y. 1922); Portland Terminal Co. v. Foss, 283 Fed. 204 (D. Me. 1922), *rev'd*, 287 Fed. 33 (C. C. A. 1st, 1923); United States v. Railway Employees' Dept. A. F. L., 283 Fed. 479, 286 Fed. 228 (N. D. Ill. 1922); Great Northern Ry. v. Local G. F. L. of I. A. of M., 283 Fed. 557 (D. Mont. 1922); Great Northern Ry. v. Brosseau, 286 Fed. 414 (D. N. D. 1923); New York etc. R. R. v. Ry. Employees' Dept., 288 Fed. 588 (D. Conn. 1923); United States v. Taliaferro, 290 Fed. 214 (W. D. Va. 1922), *aff'd*, 290 Fed. 906 (C. C. A. 4th, 1923); Montgomery v. Pacific Electric Ry., 293 Fed. 680 (C. C. A. 9th, 1923); Western Union Tel. Co. v. International B. of E. Workers, 2 F. (2d) 993 (N. D. Ill. 1924); Waitresses' Union, Local No. 249 v. Benish Restaurant Co. Inc., 6 F. (2d) 568 (C. C. A. 8th, 1925); International Organization v. Red Jacket C. C. & C. Co., 18 F. (2d) 839 (C. C. A. 4th, 1927), *cert.* denied, 275 U. S. 536, 48 Sup. Ct. 31 (1928).

[160] Montgomery v. Pacific Electric Ry.; Waitresses' Union, Local No. 249 v. Benish Restaurant Co., Inc.; International Organization v. Red Jacket C. C. & C. Co., all *supra* note 159; Ferguson v. Peake, 18 F. (2d) 166 (Ct. of App. D. C. 1927); see Note (1927) 40 HARV. L. REV. 896.

conspiracy."[161] They do not operate when the strike is practically over and the plant is operating on a normal basis.[162] Nor do they sanction persuasion to break a contract of employment or a contract not to join a union.[163] One district court actually held that the immunities of Section 20 do not extend to striking employees because the very act of striking terminates the relationship of employer and employee.[164] When available, the scope of the exemptions has been held not broad enough to sanction the use of the word "scab," to permit utterance of bad language.[165] Unreported decrees, so far as available, are more than cumulative; they emphasize the tendencies here traced.

If after this judicial experience anything survived of the roseate hopes aroused by the Clayton Act, it evaporated on April 11, 1927. On that day in the *Bedford Cut Stone* case,[166] the Supreme Court ordered an injunction against the Journeymen Stone Cutters Association to restrain simple refusal to work upon stone which had been partly cut at the quarries by men working in opposition to the Association. The application which the courts made of the Sherman Law and the Clayton Act in labor controversies is, indeed, a study in irony, upon which the dissenting opinion in the *Bedford* case made these reflections:

"If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraint upon labor which reminds of involuntary servitude. The Sherman Law was held in *United States v. United States Steel Corporation,* 251 U. S. 417, to permit capitalists to combine in a single corporation

[161] United States v. Railway Employees' Dept. A. F. L.; United States v. Railway Employees' Dept. A. F. L.; Western Union Tel. Co. v. International B. of E. Workers, all *supra* note 159.

[162] Quinlivan v. Dail-Overland Co., *supra* note 159. It is of interest here to note the Wisconsin statute which defined "when a strike is in progress": "A strike or lockout shall be deemed to exist as long as the usual concomitants of a strike or lockout exist; or unemployment on the part of the workers affected continues; or any payments of strike benefits is being made; or any picketing is maintained; or publication is being made of the existence of such strike or lockout." WIS. STAT. (1927) § 103.43 (1a).

[163] Charleston Dry Dock & Machine Co. v. O'Rourke; International Organization v. Red Jacket C. C. & C. Co., both *supra* note 159.

[164] Canoe Creek Coal Co. v. Christinson, 281 Fed. 559 (D. Ky. 1922). This case was reversed on another ground, *sub. nom.* Sandefur v. Canoe Creek Coal Co., 293 Fed. 379 (C. C. A. 6th, 1923), 266 U. S. 42, 45 Sup. Ct. 18 (1924).

[165] United States v. Taliaferro, *supra* note 159.

[166] Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n, 274 U. S. 37, 47 Sup. Ct. 522 (1927). The majority opinion written by Mr. Justice Sutherland was concurred in by Taft, C. J., Van Devanter, McReynolds, Butler, JJ. Special concurring opinions were written by Sandford and Stone, JJ. Mr. Justice Brandeis wrote a dissenting opinion in which Holmes, J., concurred.

50 per cent. of the steel industry of the United States dominating the trade through its vast resources. The Sherman Law was held in *United States v. United Shoe Machinery Co.*, 247 U. S. 32, to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe-manufacturing in America. It would, indeed, be strange if Congress had by the same Act willed to deny to members of a small craft of workingmen the right to cooperate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so." [167]

And the process by which this ironic effect was achieved, Mr. Justice Stone elucidated in his separate opinion:

"As an original proposition, I should have doubted whether the Sherman Act prohibited a labor union from peaceably refusing to work upon material produced by non-union labor or by a rival union, even though interstate commerce were affected. In the light of the policy adopted by Congress in the Clayton Act, with respect to organized labor, and in the light of *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 106, 178-180, I should not have thought that such action as is now complained of was to be regarded as an unreasonable and therefore prohibited restraint of trade. But in *Duplex Printing Press Co., v. Deering*, 254 U. S. 443, these views were rejected by a majority of the court and a decree was authorized restraining in precise terms any agreement not to work or refusal to work, such as is involved here. Whatever additional facts there may have been in that case, the decree enjoined the defendants from using 'even persuasion with the object or having the effect of causing any person or persons to decline employment, cease employment, or not seek employment, or to refrain from work or cease working under any person, firm, or corporation being a purchaser or prospective purchaser of any printing press or presses from complainant, . . .' (p. 478). These views, which I should not have hesitated to apply here, have now been rejected again largely on the authority of the *Duplex* case. For that reason alone, I concur with the majority." [168]

The Clayton Act was the product of twenty years of voluminous agitation. It came as clay into the hands of the federal courts, and we have attempted a portrayal of what they made of it. The result justifies an application of a familiar bit of French cynicism: the more things are legislatively changed, the more they remain the same judicially.[169]

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[167] Brandeis, J., dissenting, *ibid.* 65, 47 Sup. Ct. at 531. See Frey, *The Double Standard in Applying the Sherman Act* (1928) 18 AM. LAB. LEG. REV. 302.

[168] *Supra* note 166, at 55, 47 Sup. Ct. at 528.

[169] Since this conviction has gathered, efforts in Congress have been renewed. Beginning with the Sixty-sixth Congress, the following bills to

But the Supreme Court of the United States does not control only the law of injunctions in the federal courts. The Fourteenth Amendment—the protection of due process and the guaranty of the equal protection of the laws—does not give to the Supreme Court the last word merely over new policies of substantive law affecting industrial relations. Through the Amendment, the Supreme Court also scrutinizes legislation regulating the scope of equitable relief afforded by states in local labor disputes. We have already examined the decisions by the respective state courts upon legislation dealing with this subject in California, Massachusetts and Arizona.[170] The California statute, we saw, was so interpreted as to create no substantial contraction of equitable jurisdiction; the Massachusetts statute was invalidated; the Arizona law was construed to permit peaceful picketing and, so construed, was sustained. Only the Arizona decision reached the Supreme Court, and on the ground that it contravened the protections of the Fourteenth Amendment. While, in language, the Arizona statute was practically identical with Section 20 of the Clayton Act,[171] the meaning which the Arizona Court had placed upon it led to its invalidation by the Supreme Court.[172]

The policy of Arizona, formulated by its legislature and sustained by its court, refused relief[173] for the following conduct by strikers: verbal castigation of employers, their business, their

affect equity jurisdiction in labor disputes have been proposed: H. R. 7783, H. R. 7784, 66th Cong., 1st Sess.; H. R. 12622, 67th Cong., 2d Sess.; H. R. 3208, H. R. 8663, 68th Cong., 1st Sess.; S. 972, H. R. 3920, 69th Cong., 1st Sess.; S. 1482, H. R. 10082, 70th Cong., 1st Sess. During the Seventieth Congress, 1st Session, extensive hearings were held by the Senate Judiciary Committee. See HEARINGS ON S. 1482, LIMITING SCOPE OF INJUNCTIONS IN LABOR DISPUTES (1928). See (1928) 10 LAW AND LABOR 3 for comment against the latest bills; *ibid.* 169, an article entitled *Labor and the Political Conventions,* which contrasts the platforms of the Republicans and Democrats in the 1928 national election.

[170] *Supra* 893 *et seq.*

[171] The Arizona statute is identical with the Clayton Bill as first reported to Congress and prior to its amendment on the floor and in conference committee.

[172] Truax v. Corrigan, *supra* note 12. This decision is criticized adversely in Comment (1922) 10 CALIF. L. REV. 237; Note (1922) 22 COL. L. REV. 252; Comment (1922) 31 YALE L. J. 408.

[173] Of course, no conduct was legalized by this statute; it merely withdrew the right of injunction against certain specified acts. Thus, Pitney, J. in his dissenting opinion was compelled to observe: "Paragraph 1464 does not modify any substantive rule of law, but only restricts the processes of the courts of equity. Ordinary legal remedies remain; and I cannot believe that the use of the injunction in such cases—however important—is so essential to the right of acquiring, possessing and enjoying property that its restriction or elimination amounts to a deprivation of liberty or property without due process of law, within the meaning of the Fourteenth Amendment." Truax v. Corrigan, *supra* note 12, at 349, 42 Sup. Ct. at 136,

employees and their customers; use of epithets; patrolling in front of plaintiffs' business continuously during business hours with banners announcing plaintiffs' unfairness by insulting and loud appeals.[174] All this, the Supreme Court ruled, was "moral coercion by illegal annoyance and obstruction . . . plainly a conspiracy "[175] and as such a deprivation of plaintiffs' property without due process of law. But, in reply to the contention that the Arizona statute did not withhold from the plaintiffs all remedies but only the relief of injunction, the Court found a denial of the equal protection of the laws.[176] It was held discriminatory to withdraw the right to resort to equity in this class of cases and to continue that right in other cases. The statute drew a distinction between former employees and other tortfeasors and this, the Court held, an unreasonable classification. In the language of the Chief Justice:

"The necessary effect of these provisions and of Paragraph 1464 is that the plaintiffs in error would have had the right to an injunction against such a campaign as that conducted by the defendants in error, if it had been directed against the plaintiffs' business and property in any kind of a controversy which was not a dispute between employer and former employees." [177]

But the plaintiffs had open to them the same protection that was available to all other persons similarly circumstanced. There was equality as between these plaintiffs and all potential plaintiffs. There was inequality only between these plaintiffs in a suit against their former employees and the same plaintiffs

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[174] As this case was submitted on complaint and demurrer, Chief Justice Taft felt free to "analyze the facts as averred and draw its [the Court's] own inferences as to their ultimate effect. . . ." *Ibid.* 325, 42 Sup. Ct. at 127.

[175] *Ibid.* 328, 42 Sup. Ct. at 128. For early views of Chief Justice Taft upon this general subject, see his opinion as judge of the Superior Court of Cincinnati in Moores v. Bricklayers Union, 23 WEEKLY L. BULL. 48 (1890).

[176] *Supra* note 12, at 330 *et seq.*, 42 Sup. Ct. at 129 *et seq.* As to the relationship between the "due process" clause and the "equal protection" clause, see Taft, C. J., *ibid.* 331-33, 42 Sup. Ct. at 129. He says, in part: "It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. . . . It [the equal protection clause] sought an equality of treatment of all persons, even though all enjoyed the protection of due process." Of course, as the equal protection clause appears only in the Fourteenth Amendment and not in the Fifth, it does not apply to congressional legislation.

[177] *Ibid.* 331, 42 Sup. Ct. at 129. The views which through the decision in Truax v. Corrigan became authoritative interpretations of the Constitution were foreshadowed by the Chief Justice, before he came to the Supreme Court, in his inaugural address on March 4, 1909. 16 MESSAGES AND PAPERS OF THE PRESIDENTS (1917) 7368, 7378, and later in an address before the Cincinnati Law School on May 23, 1914, (1916) 5 KY. L. J. 3, 22-23.

against persons not formerly in their employ. The employers were found to be without equal protection because they had fewer remedies against one class of tortfeasors than against other classes. In other words, an employer was unequally protected as against himself. This was reasoning which four Justices could not accept.

The notable dissenting opinion of Mr. Justice Pitney rescued the equal protection clause from an exercise in logomachy. He allowed full scope for the practical differentiation demanded of law-making in industrialized society, and did not ask legislatures to move in a realm of abstract geometry:

"Cases arising under this clause of the Fourteenth Amendment, preeminently, call for the application of the settled rule that before one may be heard to oppose state legislation upon the ground of its repugnance to the Federal Constitution he must bring himself within the class affected by the alleged unconstitutional feature. . . .

"A disregard of the rule in the present case has resulted, as it seems to me, in treating as a discrimination what, so far as plaintiffs are concerned, is no more than failure to include in the statute a case which in consistency ought, it is said, to have been covered—an omission immaterial to plaintiffs. This is to transform the provision of the Fourteenth Amendment from a guaranty of the 'protection of equal laws' into an insistence upon laws complete, perfect, symmetrical.

"The guaranty of 'equal protection' entitled plaintiffs to treatment not less favorable than that given to others similarly circumstanced. This the present statute gives them. The provision does not entitle them, as against their present opponents under present circumstances, to protection as adequate as they might have against opponents of another class under like circumstances. I find no authority for the proposition that the guaranty was intended to secure equality of protection 'not only for all but against all similarly situated,' except as between persons who properly belong in the same class." [178]

The dissent of Mr. Justice Brandeis dealt more particularly with the due process argument. He marshalled a massive array of judicial and legislative experience to substantiate the reasons given by the Arizona court in support of the Arizona legislation. Indeed, he demonstrated that Arizona in withholding the injunction from the conduct in question was doing no more than expressing by legislation the policy enforced by many state courts without the sanction of legislation,[179] which led him to these observations:

". . . the Supreme Court of Arizona made a choice between well-established precedents laid down on either side by some of

[178] Truax v. Corrigan, *supra* note 12, at 350-51, 42 Sup. Ct. at 136.

[179] *Ibid.* 354 *et seq.*, 42 Sup. Ct. 137 *et seq.*

the strongest courts in the country. Can this court say that thereby it deprived the plaintiff of his property without due process of law?" [180]

To the majority, however, "the illegality of the means used is without doubt and fundamental" and a "law which operates to make lawful such a wrong" is beyond "the legislative power of a State." [181] The inference cannot be resisted that if a state deems interference in industrial controversies through injunctions against picketing and its concomitants unwise, such a policy must be worked out through judicial process. The same rules formulated by a legislature are, apparently, "purely arbitrary or capricious exercise" of the legislative power.

Thus the Supreme Court not only wrote decisively between the lines of federal legislation, but through its decision in *Truax v. Corrigan* it made these interlineations a necessary condition to survival of all similar state measures.[182] The states followed the example set by Congress—Kansas in 1913, Minnesota and Utah in 1917, North Dakota, Oregon, Washington and Wisconsin in 1919, Illinois in 1925, New Jersey in 1926 [183]—in measures for the greater part identical with Section 20 of the Clayton Act. Even within their narrow margin of freedom in construing these statutes, state courts largely took their cue from the Supreme Court. Such statutes do not make new law, but are merely declaratory of the old; the legislation did not transmute what was theretofore unlawful into legal innocence; injunctive relief persists against the "secondary boycott," and group picketing, even against peaceful patrolling. Still in harmony with federal precedent, state interpretation of state statutes applies the immu-

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[180] *Ibid.* 371, 42 Sup. Ct. at 144.

[181] *Ibid.* 328-330, 42 Sup. Ct. at 128.

[182] The general counsel of the Wisconsin State Federation of Labor, testifying before the recent Senate hearings, thus spoke of the Tri-City case: ". . . it went further than any of the decisions, and being a decision of the United States Supreme Court, had a very, very bad effect upon the courts so far as the administration of these cases was concerned, for the Tri-City case was followed by the State Courts. I can give my experience in Wisconsin . . . . as a result of the Tri-City case, [the judges] rather infer that they should follow the precedent established by Judge Taft and the courts have universally, in Wisconsin, . . . limited picketing to the use of one picket, no matter how large the plant, one picket to each entrance of the plant. . . . No matter how much we argue, or how much we endeavor to get them to interpret the decision in some other manner, we can not get the courts to change." SENATE HEARINGS ON S. 1482, p. 559.

[183] KAN. REV. STAT. ANN. (1923) § 60-1107; MINN. STAT. (Mason, 1927) § 4256-57; UTAH COMP. LAWS (1917) § 3652-53; N. D. COMP. LAWS ANN. (Supp. 1925) § 7214a2; ORE. LAWS (Olson, 1920) § 6315-17; WASH. COMP. STAT. (Remington, 1922) § 7612; WIS. STAT. (1927) § 133.07; ILL. REV. STAT. (Cahill, 1927) c. 22, § 58; N. J. Laws 1926, c. 207. See Chamberlain, *The Legislature and Labor Injunctions* (1925) 11 A. B. A. J. 815.

nities, such as they are, only to former employees; they do not govern where there is no strike of the plaintiff's own employees, or in a dispute for an "unlawful purpose," or in a dispute detrimental to the state.[184]

The powerful influence exerted, naturally enough, by the Supreme Court upon state adjudications is evidenced by recent decisions in Illinois [185] and New Jersey.[186] The statutes of both states are, in substance, identical and neither was held to sanction peaceful picketing. The opinion of Chief Justice Taft in the *Tri-City* case was the guiding light for both decisions. But the New Jersey case found even the federal law not sufficiently stringent:

"A single sentinel constantly parading in front of a place of employment for an extended length of time may be just as effective in striking terror to the souls of the employees bound there by their duty as was the swinging pendulum in Poe's famous story 'The Pit and the Pendulum' to victims chained in its ultimate band. In fact, silence is sometimes more striking and impressive than the loud mouthings of the mob. . . . It is admitted that back of the demonstrations is the full force and power of the American Federation of Labor." [187]

The legislation we have summarized had, as its essential impulse, the conviction that labor unions "were organized," in the

[184] Greenfield v. Central Labor Council, 104 Ore. 236, 192 Pac. 783 (1920); Heitkemper v. Central Labor Council, 99 Ore. 1, 192 Pac. 765 (1920); Bull v. International Alliance, 119 Kan. 713, 241 Pac. 459 (1925); Pacific Typesetting Co. v. I. T. U., 125 Wash. 273, 216 Pac. 358 (1923); A. J. Monday Co. v. Automobile A. & V. Workers, 171 Wis. 532, 177 N. W. 867 (1920); Pac. Coast Coal Co. v. Dist. No. 10 U. M. W. A., 122 Wash. 423, 210 Pac. 953 (1922); Crane & Co. v. Snowden, 112 Kan. 217, 210 Pac. 475 (1922); and see Schuberg v. Local Int'l. Alliance of Stage Employees (1926) (Sup. Ct. British Columbia) 8 LAW AND LABOR 239.

The Wisconsin case *supra* held that the statute was inapplicable to a strike "purely and simply for the closed shop." Let the general counsel of the Wisconsin State Federation of Labor tell the story that followed this discussion: "Well, we went back to the legislature, the labor union did, that is. . .—we simply amended that bill in Wisconsin by cutting out some of the provisions which the court held limited the application and we put in the words 'any dispute affecting labor'. . . and that is the way the matter now stands. . . . No court interpretation has been had as yet on the act as amended." SENATE HEARINGS ON S. 1482, p. 560.

[185] Ossey v. Retail Clerks' Union, 326 Ill. App. 405 (1927). Lower courts in Illinois had passed upon the constitutionality of the statute: see International Tailoring Co. v. Amalgamated Clothing Workers of America, (1925) 7 LAW AND LABOR 237; Ossey v. Retail Clerks' Union, (1926) 8 LAW AND LABOR 5. And see Comment (1928) 22 ILL. L. REV. 888; (1925) 15 AM. LAB. LEG. REV. 233.

[186] Gevas v. Greek Restaurant Workers' Club, 99 N. J. Eq. 770, 782-83, 134 Atl. 309, 315 (1926).

[187] *Ibid.*

language of the Chief Justice, "out of the necessities of the situation." That the concrete remedies by which this justification was to be realized encountered feelings of unfriendliness on the part of courts is a conclusion not easy to escape. The decisions would not have been otherwise if courts had applied as a conscious guide the belief that there may be unions, but they must not be strong.

LEGISLATION AFFECTING EQUITY PROCEDURE

There remain for consideration legislative prescriptions for procedure applicable to labor injunctions, and what courts have done with them. Procedure, it will be remembered, becomes significant at two stages in these litigations: in the process leading up to the issuance of an *ex parte* restraining order or temporary injunction, and in subsequent attempts to punish disobedience.

In our earlier description of the prevailing practice of granting restraining orders without notice to the opposing sides and of basing temporary injunctions upon affidavits, incidental mention was made of the legislative corrections that were proposed in New York and Massachusetts, and at Washington.[188] Bills formulating procedural guides and establishing limits to the discretion of federal judges in issuing *ex parte* restraining orders [189]

[188] Frankfurter and Greene, *op. cit. supra* note 4, at 376.

[189] The federal legislative history of *ex parte* orders may be noted. The 1793 revision of the Judiciary Act of 1789 provided that no injunction shall "issue in any case without reasonable previous notice to the adverse party. . . ." 1 STAT. 333, 335; see New York v. Connecticut, 4 Dall. 1 (U. S. 1799). So far as the reports disclose the facts, despite this statute restraining orders were granted without prior notice to defendants. In 1873, § 263 of the Judicial Code was enacted, authorizing the issuance of restraining orders without notice in the discretion of the court. That provision continued effective until the passage of the Clayton Act.

In his address accepting the nomination for President on July 28, 1908, Mr. Taft thus expressed his sympathy with the early federal practice in the case of a lawful strike: "In the case of a lawful strike, the sending of a formidable document restraining a number of defendants from doing a great many different things which the plaintiff avers they are threatening to do, often so discourages men always reluctant to go into a strike from continuing what is their lawful right. This has made the laboring man feel that an injustice is done in the issuing of a writ without notice. I conceive that in the treatment of this question it is the duty of the citizen and the legislator to view the subject from the standpoint of the man who believes himself to be unjustly treated, as well as from that of the community at large. I have suggested the remedy of returning in such cases to the original practice under the old statute of the United States and the rules in equity adopted by the Supreme Court, which did not permit the issuing of an injunction without notice. In this respect, the Republican Convention has adopted another remedy, that, without going so far,

were before Congress as early as 1901.[190] Thereafter such proposals were introduced in Congress session after session.[191] They did not encounter vigorous opposition. Neither, however, did they arouse the dynamic interest of labor and its friends. In the earlier phases of the movement for legislative relief, labor evinced little understanding of how much turns on rules of procedure.

We have already quoted from the message of President Taft to Congress on December 7, 1909, in which he recommended certain restrictions upon *ex parte* orders, the establishment of a time limit for them and specifications as to the form of order.[192] In that session, both the House and Senate considered such measures.[193] In the second session of the next Congress, the Sixty-second, provisions embodying such proposals passed the House as part of the Clayton Bill,[194] and the next Congress enacted them, with scarcely any opposition, as Sections 17, 18, and 19 of the Clayton Act.[195]

Section 17 [196] permits the granting of a temporary restraining

promises to be efficacious in securing proper consideration in such cases by courts, by formulating into a legislative act the best present practice." PROCEEDINGS OF THE FOURTEENTH REPUBLICAN NATIONAL CONVENTION (1908) 219.

[190] S. 4233, H. R. 8917, 56th Cong., 1st Sess. For earlier bills, see S. 1563, S. 1898, 53d Cong., 2d Sess.

[191] H. R. 18327, 58th Cong., 3d Sess.; S. 2829, H. R. 9328, H. R. 17976, H. R. 18171, H. R. 18446, H. R. 18752, 59th Cong., 1st Sess.; S. 5888, H. R. 21991, 60th Cong., 1st Sess.; H. R. 26609, 60th Cong., 2d Sess.

[192] Frankfurter and Greene, *op. cit. supra* note 4, at 367. The words of President Taft were used in support of the Clayton committee's first report of H. R. 23635, 62d Cong., 2d Sess., H. Rep. No. 612.

[193] S. 4481, H. R. 16026, 61st Cong., 2d Sess.

[194] Section 263 of H. R. 23635, 48 CONG. REC. 6463 (1912); passed the House, *ibid.* 6470.

[195] See 48 CONG. REC. 6415 (1912) and 45 CONG. REC. 343 (1910).

[196] 38 STAT. 737 (1914), 28 U. S. C. § 381 (1926). In 1912, the Supreme Court promulgated new Equity Rules, and Rule 73 thereof is practically a complete forerunner of this section. It was adopted at the suggestion of the Bar Committee of the Circuit Court of Appeals for the 9th circuit. It was subsequently held to embody principles long established in the federal courts. Cathey v. Norfolk & W. Ry., 228 Fed. 26 (C. C. A. 4th, 1915). Rule 73 (226 U. S. 670) provides: "No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall clearly appear from specific facts, shown by affidavit or by the verified bill, that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency specified, the matter shall be made returnable at the earliest possible time, and in no event later than ten days from the date of the order, and shall take precedence of all matters, except older matters of the same character. When the matter comes up for hearing the party who obtained the temporary restraining order shall proceed with his application for a pre-

order without notice to defendants only when it is made clearly to appear under oath that the applicant will otherwise suffer irreparable injury. The order must state the hour of, and reasons for, its issue; it expires within a fixed time after entry,[197] not to exceed ten days, though it may be extended for "good cause shown." Provision is further made for expeditious hearing of the motion for a temporary injunction, and the defendants are given the right to dissolve or modify the restraining order on two days' notice. Section 18 requires the giving of security as a condition to the granting of a restraining order or temporary injunction—a matter theretofore within the discretion of judges. Section 19 demands that a restraining order shall be specific and that it describe the acts restrained explicitly, not by reference to the bill of complaint or other document.[198] The same section limits the scope of the binding effect of the injunction by making it apply only to "the parties to the suit, their officers, agents, servants, employees and attorneys, or those in active concert or participating with them," who must be shown to "have received actual notice of the same." [199]

In the course of the debate upon these clauses, a member of the House denied the existence of any judicial abuse calling for correction. John W. Davis replied that reported cases

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liminary injunction, and if he does not do so the court shall dissolve his temporary restraining order. Upon two days notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require. Every temporary restraining order shall be forthwith filed in the clerk's office."

[197] Considerable opposition revolved about this provision, the minority desiring to have the order date from the time of service rather than the time of its entry. We quote from H. Rep. 612, pt. 2, 62d Cong., 2d Sess., p. 4: "We can conceive of no more certain method of depriving a suitor of essential equitable protection."

[198] Further quoting from the above minority report: "This proposal multiplies the delays, difficulties, and inconveniences of procedure indefinitely. It requires every order to be a history, to repeat in irrelevant and cumbersome detail all the preliminary pleadings, and instead of enlightening the parties against whom it was issued . . . the procedure prescribed would increase his confusion and doubt." *Ibid.* 5-6.

[199] The majority report of the committee said as to this: ". . . a safeguard against what have been heretofore known as dragnet or blanket injunctions, by which large numbers may be accused, and eventually punished, for violating injunctions in cases in which they were not made parties in the legal sense and of which they had only constructive notice, equivalent in most cases to none at all." H. Rep. 612, 62d Cong., 2d Sess., p. 4. To which the minority replied: "The majority offer in proof of the necessity of their proposal merely an implication unwarrantedly reflecting upon the judiciary and without supporting proof of any character." H. Rep. 612, pt. 2, 62d Cong., 2d Sess., p. 5.

". . . show at least five glaring abuses which have crept into the administration of this remedy. I name them:

The issuance of injunctions without notice.
The issuance of injunctions without bond.
The issuance of injunctions without detail.
The issuance of injunctions without parties.
And in trade disputes particularly the issuance of injunctions against certain well-established and indisputable rights." [200]

Sections 17, 18, and 19 of the Clayton Act were intended to correct the first four abuses enumerated by Mr. Davis. They have now been "the law of the land" for fourteen years. What have they accomplished? More restraining orders without notice have been granted by federal courts within that period of time than in any prior period of like duration.[201] Since 1914, we find among reported cases alone more than fifteen such instances.[202] And in most of them the orders remained effective without hearing of any kind for a longer period than the normal ten days allotted by Section 17.[203] The other statutory safeguards have likewise been ineffective. Disregard of the statutory requirement of setting forth the reasons for the order is merely improper, but does not invalidate the order or the preliminary injunction;[204] an injunction against "interfering in any respect" with the complainant's business is as definite a way of express-

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[200] 48 CONG. REC. 6436 (1912).

[201] Generally as to restraining orders without notice, see DOBIE, FEDERAL JURISDICTION AND PROCEDURE (1928) § 173; Lane, *Working under Federal Equity Rules* (1915) 29 HARV. L. REV. 55.

[202] Restraining orders have been granted without notice in the following labor cases, among others, since 1912 (the time of the promulgation of Federal Equity Rule 73): Aluminum Castings Co. v. Local No. 84, 197 Fed. 221 (W. D. N. Y. 1912); Puget Sound Traction Co. v. Lowrey, 202 Fed. 263 (W. D. Wash. 1913); Sona v. Aluminum Castings Co., 214 Fed. 936 (C. C. A. 6th, 1914); Oates v. United States, 223 Fed. 1013 (C. C. A. 4th, 1915); Alaska S. S. Co. v. International Longshoremen's Ass'n; Tri-City Cent. T. Council v. American Steel Foundries; Stephens v. Ohio State Telephone Co.; Dail-Overland Co. v. Willys-Overland, all *supra* note 128; Local No. 7 of Bricklayer's Union v. Bowen, 278 Fed. 271 (S. D. Tex. 1922); Forrest v. United States, 277 Fed. 873 (C. C. A. 9th, 1922); United States v. Ry. Employees' Dept.; Portland Terminal Co. v. Foss; New York, N. H. & H. R. R. v. Ry. Employees' Dept., all *supra* note 159; Herkert & Meisel Trunk Co. v. United Leatherworkers' I. U., 268 Fed. 662 (E. D. Mo. 1920); Great Northern Ry. v. Brosseau, 286 Fed. 414 (D. N. D. 1923); Staudte & Rueckoldt Mfg. Co. v. Carpenters' D. C., 12 F. (2d) 867 (C. C. A. 8th, 1926); Columbus Heating & Ventilating Co. v. Pittsburgh Building Trades Council, 17 F. (2d) 806 (W. D. Pa. 1927).

[203] A detailed tabular record of the use of the injunction in the federal courts will be included in the writers' forthcoming book.

[204] Lawrence v. St. L. S. F. Ry., 274 U. S. 588, 47 Sup. Ct. 720 (1927). Compare insistence on strict compliance with procedural requirements imposed upon administrative agencies, such as public service commissions, in Wichita R. R. v. Pub. Util. Comm., 260 U. S. 48, 43 Sup. Ct. 51 (1922).

ing the conduct restrained "as it is possible to make it";[205] a stranger to an injunction suit may still be punished for contempt of the injunction.[206] And the unreported decrees issued by the federal courts within the last three years, so far as available for examination, pay little heed to the purpose of the Clayton Act that the "defendants should never be left to guess at what they are forbidden to do."[207]

Several states have enacted some or all of the procedural features found in the Clayton Act. Kansas, Minnesota, North Dakota, Oregon, Utah and Wisconsin require that the complainant must describe the plaintiff's property with particularity and must carry the oath of the applicant or his agent.[208] The Kansas statute leaves to the court's discretion whether a hearing of both sides should precede a restraining order and whether security should be required of the plaintiff. Wisconsin makes the strictest requirement for the elimination of the *ex parte* evil by providing that

> "No such restraining order or injunction shall be granted except by the circuit court . . . and then only upon such reasonable notice of application therefor as a presiding judge of such court may direct by order to show cause, but in no case less than 48 hours. . . ."[209]

While the Massachusetts statute[210] is not nearly so sweeping in terms, the practice of its courts has substantially eliminated the issuance of restraining orders before a hearing.[211] In New York,

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[205] Stephens v. Ohio State Telephone Co., 240 Fed. 759 (N. D. Ohio, 1917). But *cf.* King v. Weiss & Lesh Mfg. Co., 266 Fed. 257, 261 (C. C. A. 6th, 1920); Great Northern Ry. v. Local G. F. L. of I. A. of M., 283 Fed. 557 (D. Mont. 1922).

[206] McCauley v. First Trust & Savings Bank, 276 Fed. 117 (C. C. A. 7th, 1921); Day v. United States, 19 F. (2d) 21 (C. C. A. 7th, 1927); United States v. Taliaferro, *supra* note 159.

[207] From REPORT OF CLAYTON COMMITTEE, H. Rep. 612, 62d Cong., 2d Sess., p. 4.

[208] See references *supra* note 183.

[209] WIS. STAT. (1927) § 133.07 (2). For a discussion by a Wisconsin lawyer as to how this statute has resulted in actual practice, see SENATE HEARINGS ON S. 1482, p. 562.

[210] MASS. GEN. LAWS (1921) c. 214, § 9. A bill (House—No. 562) introduced in the 1929 session of the Massachusetts legislature, proposed to amend this provision by adding the following new sentence: "No preliminary injunction or temporary restraining order shall be granted in industrial disputes between employers and employees, but the court shall proceed to hear evidence on such matters and determine requests for injunctive relief in such cases as expeditiously as the ends of justice may require."

[211] Frankfurter and Greene, *op. cit. supra* note 4, at 367. Governor Allen, in his first message to the Massachusetts legislature in January 1929, made the following recommendations concerning procedure affecting the labor injunction: "The furtherance of amicable relations between capital and

on the other hand, the practice of issuing *ex parte* orders is prevalent, but attempts at legislative restriction have signally failed.[212]

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labor is one of the first concerns of government, particularly in a State so predominantly industrialized as is this Commonwealth. Considerations of justice as well as those of economic welfare admonish us to remove real grievances and to avoid reasonable grounds for believing that there are grievances. The use of the injunction in trade disputes has for a number of years been a source of widespread irritation to labor throughout the country, and both Congress and the States have had to take measures against abuses. Fortunately, in this Commonwealth the practices of our courts have avoided many misuses of the injunction. Thus our courts, upon their own initiative, have generally refrained from issuing injunctions upon an *ex parte* hearing and without adequate investigation of the facts. On this and other phases pertaining to the issuance of labor injunctions, it would appear to be the part of wisdom to formulate the usual practices of judicial procedure into positive law in order that they may be defined as the accepted standards applicable to all cases, precluding departure therefrom in individual cases. I recommend the passage of legislation which will provide that no injunctive relief shall be given in labor disputes unless both parties have had an opportunity to be heard on the facts on which the petition for the injunction is based."

[212] Assembly Bill 113; Assembly Bill 949; S. Bill 213,—providing "No restraining order or injunction by either party to an industrial dispute shall be made by any court of this state otherwise than upon notice and after hearing. . . ." In the 1929 session, a bill was introduced requiring three days notice as a prerequisite to the issuance of a restraining order in an industrial dispute. Assembly Bill 51.

The exacerbated feelings of labor are revealed in the following exaggerated statement by the counsel for the State Federation of Labor, as reported in the N. Y. Times, Feb. 29, 1928, at 2: "Ninety-nine percent of the injunctions signed on papers from one party and without a hearing are vacated or modified a few days later after a hearing, but the harm then has been done. The belief is growing that the courts are being used in the interests of the employers. It is creating a communistic spirit."

Equally revealing is the statement of objections to these bills filed by a Committee of the Bar Association of the City of New York: "If the advocates of this bill intended that an illegal act should not be restrained, the bill deserves no consideration. If the bill contemplates only rightful acts it is reiterative of the present law and becomes mere surplusage." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON AMENDMENT OF THE LAW, BULL. No. 5 (1928) 153; see also N. Y. Times, March 7, 1928, at 7. Such a view is indifferent to experience in disregarding the aim of the bill to withhold equitable relief only until it could be determined with some reasonable accuracy that illegal acts were really being committed. The Committee said further: "The danger is that when damage is imminent it will be accomplished before a hearing can be had." This overlooks the fact that the grant of a labor injunction before the facts are known may lead to the same danger of irreparable damage to the defendants. The author of this report had evidently forgotten the provision under the early judiciary act which forbade issuance of any injunction "without reasonable previous notice to the adverse party." 1 Stat. 335. It will be recalled that Mr. Taft in 1908 suggested the return to this "original practice." See *supra* note 189.

Nowhere has legislative inroad been made upon the procedure of basing injunctions upon affidavits, rather than following the more reliable method of hearings in open court.[213] In New York, Governor Smith twice recommended "that before such injunctions are issued a preliminary hearing be held to establish the facts." [214] In the 1928 session of the New York legislature, two bills were presented calling for a jury trial on the facts.[215] The bills never emerged from committee. Without legislation, courts have found themselves with ample resources to assure a responsible procedure in these cases. It is a rule in some of the federal districts that the judge may call witnesses,[216] and in many cases judges have done so.[217]

The power exercised by judges in proceedings for contempt of court yields an important chapter in the political history both of England [218] and of the United States.[219] The grievances aroused by summary prosecutions for contempt and their legislative appeasement long antedate labor injunctions.[220] But the incidence of hardship has fallen heaviest, in our day, upon labor, because of the widespread threat of summary punishment conveyed by every labor injunction. Such is its essential meaning, if not indeed its purpose. The heart of the problem is the power, for all practical purposes, of a single judge to issue orders, to interpret them, to declare disobedience and to sentence. Doubtless as a reflex of the *Debs* case,[221] a bill passed the Senate, as

[213] It is worth noting that in patent litigation, questions of fact may within the court's discretion be tried by a jury of from five to twelve persons. 28 U. S. C. § 772 (1926). This statute was enacted in 1875, 18 STAT. 316.

[214] Frankfurter and Greene, *op. cit. supra* note 4, at 377. Also the Governor's message to the legislature in 1928, 37 STATE DEPT. REP. 447, 553. Governor Roosevelt's message to the legislature in 1929 repeated the recommendation in this language: "The prohibiting of the granting of temporary injunctions in individual disputes without notice of hearing; and provision for trial before a jury of any alleged violations of injunctions." N. Y. Times, Jan. 3, 1929, at 18.

[215] Assembly Bills 113, 399. For disapproving comment, see ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *op. cit. supra* note 212, at 155.

[216] 3 STREET, FEDERAL EQUITY PRACTICE (1909) § 2322, n. 81. See New York, N. H. & H. R. R. v. Railway Employees' Dept., 288 Fed. 588 (D. Conn. 1923).

[217] See Tri-City Cent. T. Council v. American Steel Foundries; Alaska S. S. Co. v. International Longshoremen's Ass'n; King v. Weiss & Lesh Mfg. Co.; Kroger Grocery & B. Co. v. Retail Clerks' Ass'n; Montgomery v. Pacific Electric Ry., all *supra* note 128.

[218] See FOX, THE HISTORY OF CONTEMPT OF COURT (1927).

[219] Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts* (1924) 37 HARV. L. REV. 1010; Nelles, *Contempt by Publication in the United States since the Federal Contempt Statute* (1928) 28 COL. L. REV. 401, 525.

[220] Frankfurter and Landis, *op. cit. supra* note 219, at 1026 *et seq.*, 1049-50.

[221] In re Debs, 158 U. S. 564, 15 Sup. Ct. 900 (1895).

early as 1896, granting trial by jury in cases of "indirect contempt"—obstructions, that is, to a court's authority not within the presence of the judge.[222] The measure was founded on modern conceptions of political liberty. Senator Bacon of Georgia put the matter bluntly:

"I think the lodgment of the power in any one man to determine whether personal liberty shall be taken is something entirely inconsistent with the genius of this age and with the spirit of our institutions. . . .

". . . he is judge and jury and prosecutor in the case in which he has this personal feeling." [223]

But this bill did not come out of the House Judiciary Committee.[224] At each succeeding Congress [225] Representative Bartlett of Georgia introduced a similar bill, until in the Sixty-second Congress the proposal was favorably reported and passed the House.[226] Finally, in the Sixty-third Congress the agitation culminated in law.[227]

Detailed regulations for contempt proceedings became part of the Clayton Act. The most significant change was based upon the report made by the House Judiciary Committee to the previous Congress:

"That complaints have been made and irritation has arisen out of the trial of persons charged with contempt in the Federal Courts is a matter of general and common knowledge. The charge most commonly made is that the courts, under the equity power, have invaded the criminal domain and under the guise of trials for contempt have really convicted persons of substantive crimes for which, if indicted, they would have had a constitutional right to be tried by jury." [228]

Summary trial by a single judge gave way to trial by jury, but only in a narrow class of cases and under strictly defined conditions. Amelioration in contempt procedure, introduced by the Clayton Act, applies only when a contempt also constitutes a

[222] S. 2984, 54th Cong., 1st Sess. See 51 CONG. REC. 14370 (1914) for a summary of the history and debates upon that measure.

[223] 28 CONG. REC. 6378 (1896).

[224] 28 CONG. REC. 6443 (1896).

[225] See 51 CONG. REC. 9664 (1914) for this history. See the Democratic platform of 1908: "Experience has proved the necessity of a modification of the present law relating to injunctions, and we reiterate the pledge of our national platforms of 1896 and 1904 in favor of the measure which passed the Senate in 1896 [which was the Hill bill], but which a Republican Congress has ever since refused to enact, relating to contempts in Federal courts and providing for trial by jury in case of indirect contempt." PROCEEDINGS OF THE DEMOCRATIC NATIONAL CONVENTION (1908) 168.

[226] H. R. 22591, 62d Cong., 2d Sess.

[227] Sections 21 and 22 of the Clayton Act. 38 STAT. 738 (1914), 28 U. S. C. §§ 386, 387 (1926).

[228] H. Rep. No. 613, 62d Cong., 2d Sess. p. 6.

criminal offence under any statute of the United States or under the laws of the state in which the alleged contempt was committed. In such cases there must be presented a formal charge giving reasonable grounds for belief that a contempt has been committed; the defendant must be given an opportunity to purge himself of the contempt; he is not to be arrested unless he refuses to answer; provision is made for reasonable bail pending the disposition of the charge; when demanded by the accused, trial must [229] be by jury.[230] But even in this limited class of cases, the right to jury trial does not apply when the contempt is in the presence of the court or so near as to obstruct the administration of justice, or when the contempt is violation of an injunction granted on behalf of the United States. Limits are also set to the court's discretion in imposing punishment upon a verdict of guilty: imprisonment for not more than six months, and a fine of not more than $1000.[231]

The requirement of jury trial is, of course, the heart of these reforms and the feature against which, according to the Clayton committee, "the most strenuous argument has been directed." [232] It was said to "cast suspicion and reflection on every judge," [233] to frustrate enforcement of injunctions in labor disputes by "sending the accused to the friends of the accused for trial." [234]

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[229] "Such trial may be by the court, or, upon the demand of the accused, by a jury. . . ." was held to be mandatory and not a permissive provision within the power of judges to withhold. Michaelson v. United States, 266 U. S. 42, 45 Sup. Ct. 18 (1924); *cf.* Supervisors v. United States, 4 Wall. 435, 446-47 (U. S. 1866). The point was argued in the congressional debates. 51 CONG. REC. 16284 (1914).

[230] The minority report offered a substitute bill (H. R. 21722, 62d Cong., 2d Sess.) which in lieu of a right to jury trial, gave the accused the right to have a judge, other than the one who issued the injunction, designated to try and determine the charge of contempt.

[231] The sections of the Clayton Act dealing with contempt appear 38 STAT. 738-739 (1914), 28 U. S. C. §§ 386, 387, 388, 389 (1926). Section 25 of the Act provides: "No proceeding for contempt shall be instituted against a person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts." 38 STAT. 740 (1914), 28 U. S. C. § 390 (1926).

[232] H. Rep. No. 613, 62d Cong., 2d Sess. to accompany H. R. 22591, p. 6.

[233] See 51 CONG. REC. 9670 (1914).

[234] Mr. Walker, testifying concerning contempt bill in House Hearings said: "Congress would be sending the accused to the friends of the accused for trial and the friends of the accused would acquit the accused just as the ecclesiastical courts always acquitted a clergyman when accused of crime. The result would be that the injunctions issued by the Federal judge in labor disputes never could be enforced." HEARINGS BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY, INJUNCTIONS (1912) 62d Cong., 1st Sess. p. 145.

G. F. Monaghan, attorney for National Founders' Association, testifying against a bill requiring jury trial for contempt cases (H. R. 13578, 62d Cong., 2d Sess.): "If such a condition were imposed it would be tanta-

To which answer was made by Senator Walsh of Montana, spokesman of the view that prevailed:

"Test the plan by what may be considered likely to be its operation in connection with the very class of cases that give rise to the prominence it has attained in present day thought. An injunction has issued in an industrial dispute. It is charged that it has been violated. If the judge himself assumes to determine whether it has been or it has not been, he can scarcely hope to make a decision that will not subject him to the charge, if he finds the prisoner guitly, of subserviency to the capitalistic interests or hostility to organized labor, or if he shall acquit, to pusillanimity or the ambition of the demagogue. In either case his court suffers in the estimation of no inconsiderable body of citizens. How much wiser it would be to call in a jury to resolve the simple question of fact as to whether the defendant did or did not violate the injunction. What good reason is there for believing that a jury will be likely to disregard their oaths, turn a deaf ear to the plain admonitions of duty, and acquit a defendant flagrantly guilty? . . . Their verdict would silence caviling and strengthen in the minds of the people the conviction that the courts are indeed the dispensers of justice and not engines of oppression." [235]

Another decade had to pass before what Congress did was given meaning and validity by the courts. Resort to jury trials for contempt was a marked innovation in this country.[236] Naturally enough, the courts rigorously applied the restrictions which Congress had itself expressed.[237] But however restricted, the right to a trial by jury upon charge of contempt was a gift which

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mount to a denial to the court of the right to issue an injunction in any instance. . . . It must be understood that a violation of the court's order is to be answered at once and by a court not so likely to be swayed by considerations of sentiment or interest as is usually the case with juries." *Ibid.* 175.

[235] 51 CONG. REC. 14369 (1914); see also the powerful argument of John W. Davis of West Virginia, 48 CONG. REC. App. 313 (1912).

[236] As to the place of the jury in the vindication of law and in fostering confidence in its administration, see Frankfurter and Landis, *op. cit. supra* note 219, at 1054, n. 160. Reference is therein made, *inter alia*, to these judgments upon the jury system: Hamilton—"the more the operation of the institution [of trial by jury] has fallen under my observation, the more reason I have discovered for holding it in high estimation."; Mr. Justice Story—"The trial by jury is justly dear to the American people."; Chief Justice von Moschzisker—"I have taken part in one capacity or another, in the trial or review of thousands of cases, and this experience has given me faith in the jury system . . . . particularly where inferences must be drawn . . . . the advantage in deciding questions of fact lies on the side of the . . . . jury."; Lord Justice Bankes—"The standard of much that is valuable in the life of the community has been set by juries in civil cases. They have proved themselves in the past to be a great safeguard against many forms of wrongs and oppression. They are essentially a good tribunal to decide cases in which there is hard swearing on either side, or a direct conflict of evidence on matters of fact. . . ."

Congress could not bestow. Such was the constitutional challenge against these provisions, and it prevailed with two lower federal courts.[238] This, in brief, was the argument: the power to issue decrees implies the power to vindicate the court's authority upon disobedience, by punishment for contempt if necessary; this is an "inherent power" of the federal courts, which may not be taken away or modified by congressional changes of procedure. In so ruling, the courts deemed themselves loyal to a cardinal dogma of American constitutional law—the doctrine of the separation of powers. Judge Baker, a very able judge who spoke for the Circuit Court of Appeals for the Seventh Circuit, resolved by a metaphor constitutional doubts affecting the validity of a long-matured statute:

"Viewing the inferior courts, and also the Supreme Court as an appellate tribunal, we see that Congress, the agency to exercise the legislative power of the United States, can, as a potter, shape the vessel of jurisdiction, the capacity to receive; but, the vessel having been made, the judicial power of the United States is poured into the vessel, large or small, not by Congress, but by the Constitution." [239]

Happily, the Supreme Court of the United States discarded this empty dialectic, and put the statute in the context of reality

[237] Couts v. United States, 249 Fed. 595 (C. C. A. 8th, 1918). Also see Cole v. United States, 298 Fed. 86 (C. C. A. 8th, 1924); Patton v. United States, 288 Fed. 812, 815 (C. C. A. 4th, 1923); Taliaferro v. United States, 290 Fed. 906 (C. C. A. 4th, 1923). It has been suggested in one case that contempt of a federal injunction is itself a crime against the United States. Taylor v. United States, 2 F. (2d) 444 (C. C. A. 7th, 1924); Armstrong v. United States, 18 F. (2d) 371 (C. C. A. 7th, 1927), *cert.* denied, 275 U. S. 534, 48 Sup. Ct. 30 (1927); Forrest v. United States, 277 Fed. 873 (C. C. A. 9th, 1922), *cert.* denied, 258 U. S. 629, 42 Sup. Ct. 462 (1922). It was held that the jury trial provision is applicable only when the relation of employer and employee exists, and that relation does not exist in the case of an illegal strike. Michaelson v. United States, 291 Fed. 940 (C. C. A. 7th, 1923), *rev'd*, 266 U. S. 42, 45 Sup. Ct. 18 (1924), criticized in Note (1924) 37 HARV. L. REV. 486. For a similar result, see Sandefur v. Canoe Creek Coal Co., 293 Fed. 379 (C. C. A. 6th, 1923), *aff'd*, 266 U. S. 42, 70, 45 Sup. Ct. 18, 21 (1924). In Canoe Creek Coal Co. v. Christinson, 281 Fed. 559 (W. D. Ky. 1922), it was held that only contempts based on the anti-trust laws were within the purview of the jury trial sections and consequently, contemnors of a federal injunction where federal jurisdiction was based on other federal statutes or on diversity of citizenship, could not claim a jury trial. This was quickly reversed. 293 Fed. 379 (C. C. A. 6th, 1923). So, also, a case where the plaintiff was a receiver, the contempt proceedings were held not within the purview of the section. McGibbony v. Lancaster, 286 Fed. 129 (C. C. A. 5th, 1923); see Note (1924) 37 HARV. L. REV. 486.

[238] In re Atchison, 284 Fed. 604 (S. D. Fla. 1922) and Michaelson v. United States, 291 Fed. 940 (C. C. A. 7th, 1923). These decisions are criticized in (1923) 32 YALE L. J. 843; Note (1923) 36 HARV. L. REV. 1012; and in Frankfurter and Landis, *op. cit. supra* note 219, especially at n. 136.

[239] Michaelson v. United States, *supra* note 238, at 946.

and experience.[240] The Court concluded that "the statute now under review," granting the privilege of "a trial by jury upon demand of the accused in an independent proceeding at law for a criminal contempt which is also a crime," did not "invade the powers of the courts as intended by the Constitution or violate that instrument in any other way."[241] But state courts discovered more controlling bars in the Constitution against similar state legislation. They found the doctrine of the separation of powers more inflexible than it had revealed itself to the Supreme Court. As to the mode of proceeding for criminal contempt, what has been must remain. Summary practice in contempt proceedings, which had been justified on historic grounds now known to be spurious,[242] was deemed by these courts beyond legislative reach.

These state decisions indicate the important time element in constitutional adjudications. They came in the earlier stages of the movement for this reform and, unfortunately, before the Supreme Court of the United States gave the lead to a more statesman-like perception that the doctrine of separation of powers is a political maxim[243] and not a rigid and technical rule of law.[244] Failure to appreciate this led to early nullifications, by the courts of Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma and Virginia, of statutes providing for jury trial in contempt proceedings.[245] The Michigan Supreme Court placed itself in the grip of one of those factitious arguments, which so often ensnare judges by making them forget that the complexities of life cannot be confined within a dialectic dilemma:

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[240] United States v. Michaelson, 266 U. S. 42, 45 Sup. Ct. 18 (1924).

[241] *Ibid.* 66-67, 45 Sup. Ct. at 20.

[242] The practice of summary punishment for contempt and the theory on which it is based, rest on the undelivered judgment of Mr. Justice Wilmot in The King v. Almon (1765), printed by his son in WILMOT'S NOTES (1802) 243. See Fox, *op. cit. supra* note 218, at 5 *et seq.*; Frankfurter and Landis, *op. cit. supra* note 219, at 1042. *et seq.*

[243] See correspondence by Madison in xlvii THE FEDERALIST (Lodge ed.) 299; see also MAINE, POPULAR GOVERNMENT (1886) 219.

[244] "The exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible proximation, as that of the separation of powers." Cardozo, C. J. in Matter of Richardson, 247 N. Y. 401, 410, 160 N. E. 655, 657 (1928).

[245] State v. Shepard, 177 Mo. 205, 76 S. W. 79 (1903); Smith v. Speed, 11 Okla. 95, 66 Pac. 511 (1901); Carter's Case, 96 Va. 791, 32 S. E. 780 (1899); Burdett's Case, 103 Va. 838, 48 S. E. 878 (1904); Nichols v. Judge of Superior Court, 130 Mich. 187, 89 N. W. 691 (1902); Hale v. The State, 55 Ohio St. 210, 45 N. E. 199 (1896); Ex Parte McCown, 139 N. C. 95, 51 S. E. 957 (1905); Watson v. Williams, 36 Miss. 331 (1858).

"There is no middle ground; either the courts have the absolute control under the Constitution in contempt proceedings or they have only such as the legislature may see fit to confer." [246]

More recently, in 1911, the Massachusetts Supreme Judicial Court also held unconstitutional [247] a requirement for trial by jury "on the issue of fact only as to whether he [the accused] committed the acts alleged to constitute the said violation." [248] The court felt itself bound by the following earlier dictum of Chief Justice Gray:

"The summary power to convict and punish for contempt tending to obstruct or degrade the administration of justice is inherent in Courts of Chancery and other Superior Courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights." [249]

The United States Supreme Court has shown that also in law there is such a thing as adaptation of means to ends; that we need not choose between arbitrary limitation upon the power of courts to vindicate their authority and arbitrary restriction upon the forms of such vindication. In order to mitigate abuses of judicial power without attenuating its essential authority, new forms may be devised or old forms revived. Trial by jury in contempt proceedings is an innovation in modern practice, but it is a return to what is old in the history of English law.[250]

Since the Clayton Act, provisions for jury trial have been adopted in New Jersey, Utah and Wisconsin.[251] Two such bills were before the New York legislature in 1928.[252] They failed of passage. Lawyers predominate in legislatures, and their views on this subject largely reflect the sentiment expressed in the

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[246] Nichols v. Judge of Superior Court, *supra* note 245.

[247] Walton Lunch Co. v. Kearney, 236 Mass. 310, 128 N. E. 429 (1920).

[248] MASS. STAT. (1911) c. 339, § 1. In the Massachusetts legislature for 1929, a bill (House—No. 315) was introduced providing for trial by jury whenever the violation of an injunction involves "an act which is a crime *per se*."

[249] Cartright's Case, 114 Mass. 230, 238 (1873).

[250] It cannot be too often recalled that "Novelty is not a constitutional objection. . . ." Arizona Employers' Liability Cases, 250 U. S. 400, 419, 39 Sup. Ct. 553, 555 (1919). But jury trial for contempt out of court has an ancient English pedigree. F. Solly-Flood, Q. C., *The Story of Prince Henry of Monmouth and Chief Justice Gascoign* (1885) 3 TRANS. ROYAL HIST. SOC. (N. S.) 47, 147. See FOX, *op. cit. supra* note 242, at App. 227 *et seq.*; Frankfurter and Landis, *op. cit. supra* note 219, at 1042 *et seq.*

[251] N. J. Laws 1925, c. 169 (leaving trial by jury for contempt of any order relating "to a labor dispute" to "the discretion of the vice chancellor"); UTAH COMP. LAWS (1917) § 3655; WIS. STAT. (1927) § 133.07(4) (the constitutionality of this statute now awaits decision before the Supreme Court of Wisconsin in Adler & Sons Co. v. Maglio).

[252] Assembly Bills Nos. 113, 949.

adverse report made by a committee of the Association of the Bar of the City of New York:

"The court is practically stripped of its power to enforce its mandate. A jury is required to pass upon the question, a cumbersome and expensive method. The wish of one juror would frustrate the proceeding. Court mandates would fall into disrepute and become innocuous." [253]

Such Cassandra wails come readily to lawyers' lips.[254] If these forebodings are nourished by reason rather than by fear of change, surely there would be some proof that the federal courts have suffered evil consequences through the introduction of jury trial in contempt cases. Such ill effects, if any there were, would have found some expression in responsible professional opinion or through the Conference of Senior Circuit Judges,[255] now serving as the articulate voice of the needs of the lower federal courts.

This concludes a resumé of the main currents of legislation affecting labor injunctions. What are we to say of its meaning? Surely that the position of labor before the law has been altered, if at all, imperceptibly. Common-law doctrines of conspiracy and restraint of trade still hold sway; activities widely cherished as indispensable assertions of trade union life continue to be outlawed. Statutes designed to contract equity jurisdiction have

[253] ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *op. cit. supra* note 212, at 154.

[254] The psychologic factors which condition the attitude of lawyers towards reform have been luminously analyzed by Senator Root: "Lawyers are essentially conservative. They do not take kindly to change. They are not naturally reformers. . . . The most successful lawyers are, as a rule, continually engrossed in their own cases and they have little time and little respect for the speculative and hypothetical. The lawyers who have authority as leaders of opinion are men, as a rule, who have succeeded in their profession, and men naturally tend to be satisfied with the conditons under whch they are succeeding. . . . The measure which the committees of the Association have advocated have got a little farther each year, and they will ultimately arrive, but at every stage they have been blocked by opposition from lawyers. This has always come from lawyers who had succeeded and were content with things as they were; who did not want practice and proceedings changed from that with which they were familiar and who never had acquired the habit of responding to any public opinion of the Bar of the United States. If the administration of justice in the United States is to improve rather than to deteriorate, there must be such a public opinion of the Bar, and it must create standards of thought and of conduct which have their origin not in the interest of particular cases but in the broader considerations of those relations which the profession of the law bears to the administration of justice as a whole." Elihu Root, *The Layman's Criticism of the Lawyer* (1914) 39 A. B. A. REP. 386, 390-91. See also ROOT, ADDRESSES ON CITIZENSHIP AND GOVERNMENT (1916) 433.

[255] See FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT (1928) c. 6.

been construed merely as endorsements of the jurisdiction theretofore exercised. Even the procedural incidents of the equity process which make it so dangerous a device in labor controversies have not been systematically adjusted to modern needs; safeguards are all too dependent on the wisdom and fair-dealing of occasional judges. The one notable change, so far as the federal courts and a few states are concerned, is the protection of jury trial in contempt proceedings involving accusations of crime.

This record of legislative ineffectiveness is the product of more than a temper of inhospitality on the part of the judiciary. Shortcomings in legislative draftsmanship are factors, and the interests of labor, in so far as they coincide with the civilized aims of society, are too often handicapped by lack of highly skilled legal advisers. But when three decades of legislative activity leave a dominant impression of futility, it is fair to assume that a sufficiently strong and informed public opinion either does not care enough about these measures or is incapable of translating its purposes into law.