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The Secondary Boycott in New York

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vidual may get no satisfaction. If then the employee wishes to sue for his wages, shall he sue under the pre-code contract of his employment. If so, he can only sue for his pre-code wages, but the code benefits are here too denied him. Then, too, what happens to the original contract of employment? Is it still a contract, or does the code supersede and destroy or impair it? It would seem, therefore, that whether you allow the individual his right of action for the code minimum wage under the doctrine of contract, or as a beneficiary to enforce his right corresponding to the duty imposed by the statute, a recovery by the individual in his own name, is indicated. Otherwise, the benefits granted to him under the Recovery Act, while they may be detriments to the recalcitrant employer, to the employee may be no benefits at all.

It is submitted, that were the codes interpreted, as in some instances they have been, to give the individual his right of action, that this would be the most direct and simplest method of procedure. While it is true that the codes have the force of law, it is, nevertheless, also true that they were conceived and executed in the nature of agreements.¹⁶ Ordinarily they cannot be both, and yet they are not clearly and exclusively either. Perhaps, in view of the fact that this is emergency legislation, which creates distinctly new conditions and relations among individuals, groups of individuals, and the government, both legal and, in a sense, contractual, a new category may arise to cover these codes, or "contractual statutes," if you will, with the following, admittedly strained, but perhaps not totally unreasonable, interpretation: Codes to be considered as having the attributes of both legislation and contract, a dual nature, so to speak, in order to allow the individual his right of action in his own name and for his own benefit, following doctrines of contract, and at the same time, enforcing their legal aspect by the methods provided for in the various sections of the Recovery Act.

WALTER W. PADWE.

THE SECONDARY BOYCOTT IN NEW YORK.

The failure of the National Recovery Administration to enforce its own laws for the protection of labor¹ has forced the realization

¹⁶ See President's Special Message, May 17, 1933, recommending passage of Bill introduced by Sen. Wagner (later to become the N. I. R. A.): "But the public interest will be served if, with the authority and guidance of the government, private industries are permitted to make agreements and codes insuring fair competition."

¹ INT. JUR. ASSN. BULL., Vol. 3, No. 2 at 6 (July, 1934); *id.* Vol. 3, No. 4 at 8 (Sept., 1934); *id.* Vol. 2, No. 9 at 1 (Feb., 1934); *id.* Vol. 2, No. 12 at 11 (May, 1934).

that with the possible exceptions of lower wages and higher prices, what labor cannot seize for itself it must forego. And there is a strange but proper logic in the fact that the practical repeal of the anti-trust laws has not been considered applicable to labor—for those laws were never meant to restrain it as they have done;² and why should an administration correct the beneficial errors of its courts?

The New York Court of Appeals has been one of the few to liberate itself from the outmoded doctrines of conspiracy, malice and combination so effectual in restraining labor, and to interpret actions and motives in the light of today's complex industrial scene.³ It did not find "malice" in the desire of two workmen to secure better wages; and it allowed workers to publicize working conditions through picketing.⁴ True, courts of the first instance seemed not to consider the Court of Appeals as authority in industrial matters,⁵ but with amusing regularity, when after a strike had been broken a case finally reached the highest court, injunction decrees against labor were either modified or reversed.⁶

However, in the recent memorandum affirmance of *Stuhmer v. Korman*,⁷ this court has failed to do justice to its reputation. With Justices Lehman and Crouch dissenting, defendant union was enjoined from picketing the stores of plaintiff's customers. The Appellate Division opinion in affirmance of the court below considered defendant's actions to constitute an illegal secondary boycott. Its decision was based upon threats of picketing made to plaintiff's customers (bakeries) if they sold plaintiff's bread and of actual picketing when compliance was refused. There was no violence unless a "truculent manner" can be so defined, despite the fact that fifteen hundred bakeries were picketed for a number of months. The avowed purpose

² 21 CONG. REC. 2562, 2606, 2729 (1890), speeches of Senators Teller, Stewart and Hoar, to the effect that amendments excluding labor were unnecessary. Application of the Sherman Act in: *United States v. Workmen's Amalgamated Council of New Orleans*, 54 Fed. 994 (*first application granted*); *Loew v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301 (1908); *cf. In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900 (1895); see BERMAN, LABOR AND THE SHERMAN ACT.

³ FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) at 46.

⁴ *Stillwell v. Kaplan*, 259 N. Y. 405, 182 N. E. 63 (1932); *Exchange Bakery v. Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1926).

⁵ *Nathan's Famous, Inc. v. Winter*, Sup. Ct. Kings Co., April 24, 1933; see INT. JR. ASSN. BULL. Vol. 3, No. 1, at 1 (June, 1934); *Kronowitz & Lutz v. Schlansky*, N. Y. L. J., May 22, 1934, Kings Co. Sup. Ct., Spec. Term, Pt. I; *Specialty Bakery Owners of America, Inc. v. Rose*, N. Y. L. J., Aug. 30, 1933, Sup. Ct. Kings Co., Spec. Term., Pt. I.; see *Wood Mowing & Reaping Machine Co. v. Toohey*, 114 Misc. 185, 196, 197 (1921) for effect and purpose of such an injunction.

⁶ *J. H. & S. Theatres v. Fay*, 260 N. Y. 315, 183 N. E. 509 (1932) and cases cited; *Stillwell v. Kaplan*, *Exchange Bakery v. Rifkin*, both *supra* note 4; *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931); *Interboro v. Lavin*, 247 N. Y. 65, 159 N. E. 863 (1928).

⁷ *George F. Stuhmer & Co. v. Louis Korman*, as Treas. of Bakery & Confectionery Workers Int'l Union of Am., Local 505, *et al.*, 265 N. Y. 39, 191 N. E. — (1934), *aff'g*, 241 App. Div. 702, 269 N. Y. Supp. 788 (2d Dept. 1934).

of the picketing was to unionize the plaintiff's factory; the pickets carried signs stating: "Demand Bread with the International Union Label." But the opinion stated that the singling out of plaintiff among a number of non-union bakers was inferential of a design not to better labor conditions but to destroy plaintiff's business.⁸

The boycott in labor disputes is a combination of workers to cease all dealing with another and usually to induce or coerce third parties to do the same.⁹ Its purpose is to force such other to comply with a demand or to punish him for non-compliance in the past. The usual distinction between "primary" and "secondary" boycott has been held to be whether there is merely cessation by concerted action of dealings with another—or an attempt to procure others to cease dealing as well;¹⁰ and if the procurement is by coercion, the boycott is called "compound" or "illegal secondary."¹¹ Here, however, the court adopts the view of the United States Supreme Court that a secondary boycott is

" * * * a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss of damage to themselves should they deal with it." ¹²

Though the Appellate Division's short opinion admits that "the precise question presented by this appeal has never been determined by the Court of Appeals" the latter has not seen fit to explain its affirmance. It seems unjustifiable because (1) it is not in accord with the rationale of its past decisions; (2) it shows no understanding of the fierceness and inequality of the struggle between what is known as capital and labor; (3) it shows no right of which defendant has deprived the plaintiff, or (4) why means used by employers are considered illegal here; (5) it forecloses the right of free speech.

In *Bossert v. Dhuy*,¹³ the court refused to enjoin a union from striking when the employers of its members gave them material made in plaintiff's non-union mill. The court justified this boycott by an analogy to *National Protective Association v. Cummings*¹⁴ where the

⁸ 241 App. Div. 702, 269 N. Y. Supp. 788, 789 (2d Dept. 1934).

⁹ LAIDLER, *BOYCOTTS AND THE LABOR STRUGGLE* (1914) at 64; *Butterick Pub. Co. v. Typo. Union No. 6*, 50 Misc. 1, 100 N. Y. Supp. 292 (1906).

¹⁰ OAKES, *ORGANIZED LABOR AND INDUSTRIAL CONFLICTS* (1927) at 606.

¹¹ LAIDLER, *supra* note 9.

¹² *Duplex v. Deering*, 254 U. S. 443 at 466, 41 Sup. Ct. 17, 254 at 47 (1920).

¹³ 221 N. Y. 342, 117 N. E. 582 (1917), *rev'g*, 166 App. Div. 251, 151 N. Y. Supp. 877 (2d Dept. 1914).

¹⁴ 170 N. Y. 315, 63 N. E. 369 (1902), *aff'g*, 53 App. Div. 227, 65 N. Y. Supp. 946 (1st Dept. 1900); in accord: *Clemmitt v. Watson*, 144 Ind. App. 38, 42 N. E. 367 (1895).

right to strike against (or boycott) non-union co-workers was upheld. Among the conditions of employment, says the *Bossert* opinion, are not merely those of environment and wages but the union status of co-workers and of materials.

The *Auburn*¹⁵ case attempted to distinguish between its facts and those above. Here defendant unions had employers of their members withdraw patronage from plaintiff through fear of labor troubles. The desire to ruin plaintiff instead of helping themselves and the aim of putting plaintiff in economic Coventry is the distinction claimed.

In the recent case of *Willson & Adams Co. v. Pearce*,¹⁶ we meet with either a justification of the difference between this and the *Bossert* case as against the *Auburn* case as resting upon public policy—or a reversal of the *Auburn* case. Here, plaintiff, dealers in building materials, employed non-union drivers and helpers—though their mills were unionized. Defendant unions called a strike in all building trades to which defendant through non-union drivers delivered materials. The strikers were of two types: (1) those required to install non-union material, and (2) those who merely worked on the erection of the buildings for which non-union materials were used.

The court found that "defendants were attempting to accomplish a lawful purpose" * * * "to induce the employment of union teamsters, chauffeurs and helpers in the transportation of materials and supplies for use in the erection of buildings in which union men were employed."¹⁷ It considered the loading and carrying to be a necessary part of the construction of the building and therefore a condition of defendant's members' employment. Consideration of the *Auburn* case is found in this principle:

"that the right to make contracts for the purchase of labor of others and the sale of one's own labor is subject to the condition that its exercise in any particular case shall not be 'inconsistent with the public interest or hurtful to the public order or detrimental to the common good.'" ¹⁸

What is it that makes this boycott by picketing illegal and the *Bossert* and *Willson* boycotts legal. The Appellate Division's reason is that it "constituted a form of interference and coercion of plaintiff's customers which compelled their compliance through fear of loss or damage to themselves."¹⁹

¹⁵ *Auburn v. Wardell*, 227 N. Y. 1, 124 N. E. 97 (1919); *cf.* *Gill v. Doerr*, 214 Fed. 111 (S. D. N. Y. 1914).

¹⁶ 264 N. Y. 521, 191 N. E. 545, *aff'g*, 240 App. Div. 718, 178 N. Y. Supp. 713 (2d Dept. 1934); similar conclusion in *Reardon v. Caton*, 189 App. Div. 501 (2d Dept. 1919); *cf.* *Paine Lumber Co. v. Neal*, 244 U. S. 459, 37 Sup. Ct. 718 (1917).

¹⁷ 240 App. Div. 718, 265 N. Y. Supp. 624, 625 (2d Dept. 1933).

¹⁸ *Id.* at 719, 265 N. Y. Supp. 624-626.

¹⁹ *Ibid.*

This court like many others has been frightened by that boggy word "coercion." Elsewhere has been pointed out what suggestive effect words like "coercion, intimidation, conspiracy, threats," have upon decisions.²⁰ Yet the coercion involved here is neither through fraud or violence, nor threats thereof; it is only the refusal to trade and the request to others to do the same. It is but an example of "the right of an individual or group of individuals to protest in a peaceable manner against injustice or oppression, actual or merely fancied * * *." If asking bakeries not to deal with plaintiff is permissible,²¹ why should not the same be true of asking customers not to deal with bakeries who by their buying support the plaintiff? Do not these bakers aid in the maintenance of objectionable policies?²² In both cases there is one purpose: to unionize plaintiff's shop, an aim considered legal in this state.²³ The method is the same—the refusal to buy and the request to others through picketing to do the same.

If in the *Stuhmer* case, economic coercion were illegal, then defendants themselves could not refuse to buy from the bakeries, obviously an absurdity. So, too, if they knew that others might take notice of their abstention and decide to imitate it. If we agree that a person may refuse to trade with another with or without reason—and that his action does not become illegal because others are of the same mind—can it be that he may not advise his neighbor or friends not to trade with another—particularly when he gives, as a reason, an aim recognized in law.²⁴ No one as yet has a property right in the trade of any particular person in the absence of contract;²⁵ if he had, all advertising would be an avenue to legal liability for alienating the affection of a customer from this or that food product. Even more anomalous is it to allow direct methods of striking and boycotting against *Stuhmer* and to give it a right of action because another has been picketed and boycotted. If a direct injury gives no right of action, how can we find it in this indirect form?

Boycotts like the one in question are not new in New York. In

²⁰ Caldwell, J., *dissenting* in *Hopkins v. Oxley Stove Co.*, 83 Fed. 912, 924 (C. C. A. 8th, 1897). For holdings that there is an absolute right to threaten to do what you have a right to do: *Nat. Prot. Ass'n v. Cummings*, *supra* note 14; *Vegelehn v. Guntner*, *Holmes, J., dissenting*—167 Mass. 92, 44 N. E. 1077, 1079 (1890); *Ware & De Freville, Ltd. v. Motor Trade Ass'n*, 3 K. B. 40 at 69 (1921).

²¹ *Foster v. Retail Clerks Protective Ass'n*, 39 Misc. 48, 78 N. Y. Supp. 860 (1902); *Sinsheimer v. United Garment Workers*, 77 Hun 215, 28 N. Y. Supp. 321 (1894); *supra* note 6.

²² *Parkinson Co. v. Bldg. Trades Council*, 154 Cal. 581, 98 Pac. 1027 (1908).

²³ *Nat. Prot. Ass'n v. Cummings*, *supra* note 14; *Tallman v. Gaillard*, 27 Misc. 114, 57 N. Y. Supp. 419 (1899); *supra* note 6.

²⁴ *Ulery v. Chicago Live Stock Exchange*, 54 Ill. App. 233 (1894).

²⁵ *Lindsay & Co. v. Montana Fed. of Labor et al.*, 37 Mont. 264, 96 Pac. 127 (1908).

Spanier Window Cleaning Co. v. Awerkin,²⁶ the Appellate Division, First Department, modified a Special Term order so as to permit peaceful picketing of plaintiff's customers' offices, provided no sign bore the names of plaintiff's customers and their buildings. In *Engelmeyer v. Simon*,²⁷ Justice Hammer held that it was not a secondary boycott to picket places of business of plaintiff's customers with placards bearing the union label. Likewise in *Public Baking Co. v. Stern*,²⁸ Proskauer, J., in an opinion affirmed by the First Department, held that defendant had the right to make a pacific appeal and use legitimate persuasion in an endeavor to induce plaintiff's customers and the ultimate consumer to purchase bread made by its members. These decisions seem proper in their view that one can't be intimidated in the sense of unlawful compulsion by being induced to forego business relations with *A* rather than lose the benefit of more profitable relations with *B* and his friend *C*. They are supported by the appellate courts of other states.²⁹

The unfairness of the *Stukmer* decision is manifest when we see the laxness with which societal groups other than labor are permitted to use the boycott. In New York, for example, where various merchants combined and induced manufacturers not to allow a rebate to the plaintiff merchant among others unless he agreed to maintain standard prices to customers, an injunction was denied.³⁰ If Local 505 used coercive tactics so did the National Wholesale Druggists Association. The converse of the instant decision is seen in a Pennsylvania decision³¹ which held legal an agreement to withdraw patronage from wholesalers selling to a contractor who had conceded an eight-hour day to his employees. Legal, too, have been held actions of associations whose members refused to buy from those who sold to non-members;³² or who declined to bid if a particular individual or certain groups were allowed to bid.³³ And publication of the

²⁶ 225 App. Div. 735 (1st Dept. 1928), *memorandum*.

²⁷ 148 Misc. 621, 265 N. Y. Supp. 636 (1933).

²⁸ 216 App. Div. 831 (1st Dept., *aff'g*, 127 Misc. 229, 1926); similarly: *Blumenthal and ano. & c. v. Feintuch etc.*, Spec. Term, Pt. I, N. Y. Sup. Ct., N. Y. L. J., June 29, 1934, at 3155.

²⁹ *Infra* note 38.

³⁰ *Park & Sons v. Nat. Wholesale Druggists Ass'n*, 175 N. Y. 1, 67 N. E. 136 (1903); *cf. Straus v. Am. Publishers Ass'n*, 177 N. Y. 473, 69 N. E. 1107 (1904) limiting this doctrine as result of Laws of 1899, c. 690 *re* monopolies. But see *Roseneau v. The Empire Circuit Co. et al.*, 131 App. Div. 429 (4th Dept. 1909).

³¹ *Cote v. Murphy*, 159 Pa. 420, 28 Atl. 190 (1894).

³² *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119 (1893); *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 43, 41 S. E. 553 (1902); *cf. Anderson v. United States*, 171 U. S. 604, 43 Sup. Ct. 300 (1898).

³³ *Master Builders Ass'n v. Domascio*, 16 Colo. App. 25, 63 Pac. 782 (1901); *Glasgow Fleshers Case*, 35 S. L. R. 645. Note that this does not merely present a situation where an association has properly coerced its members through its rules not to buy from another; here the coercion is upon a non-member.

names not merely of those who sold at tabooed prices but of those who sold to them, together with a request not to buy from or sell to those on the list have received the approval of the law. An English case³⁴ sums up the rule applicable to this type of boycott:

“one who procures another to do an act which is not wrongful so far as that other is concerned can only be made legally responsible for its consequences if he has procured his object by the use of illegal means.”

In our case, the coercion was the result of the persuasion of the bakeries' customers. Since they had no contract to buy, the request was to do a legal act. It is not apparent how the court can justify the suppression of the right of free speech. The rationalization of the United States Supreme Court that:

“the unfair list coupled with the agreement to act in concert has a force not inherent in the words themselves * * *”³⁵

simply means that it was successful. An injunction against a boycott regards as irrelevant the constitutional protection of the right of free speech:

“Every citizen may freely speak, write and publish his sentiments on all subjects being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or the press.”³⁶

The purpose of the section is penalty, not prevention, and other jurisdictions have held that the ideas of absolute freedom and responsibility therefore cannot co-exist with that of preventing free speech of any kind.³⁷ Injunctions against similar boycotts have been refused on this ground, in part, in California, Montana and Missouri.³⁸

³⁴ *Ware & De Freville, Ltd. v. Motor Trade Ass'n*, 3 K. B. 40 (1921).

³⁵ *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 439, 31 Sup. Ct. 492 (1909).

³⁶ CONSTITUTION OF THE STATE OF N. Y., art. I, §8; cf. *Stuart v. Press Publishing Co.*, 83 App. Div. 467, 477, 82 N. Y. Supp. 401, 408 (1st Dept. 1903). This right is recognized as pre-existing, not merely as created by the constitutions of the various states. COOLEY, CONST. LIM. (6th ed.) 511 *et seq.*

³⁷ *Marx & Haas Jeans Clothing Co. v. Watson*, *infra* note 38, at 144.

³⁸ *Marx & Haas Jeans Clothing Co. v. Watson*, 168 Mo. 133, 67 S. W. 391 (1902), that “wherever the authority of injunction begins, there the right of free speech, free writing, free publication ends” (at 149); *City of St. Louis v. Glover*, 210 Mo. 502, 109 S. W. 30 (1908); *Parkinson Co. v. Bldg. Trades Council*, *supra* note 22; *Lindsay & Co. v. Montana Fed. of Labor*, *supra* note 25; *Pierce v. Stablemen's Union*, Local No. 760, 156 Cal. 70, 103 Pac. 324 (1909); cf. *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 114 S. W. 997 (1908).

In New York, acts "injurious to society" such as licentiousness or advocacy of revolution may permit control of the press—but such control is legislative, not judicial.³⁹ The restraint of publication to protect property has issued only where there was property in the publication—as in the case of a private letter.⁴⁰ Though a libel may injure one's property⁴¹ and damages therefor be recovered, it will not be restrained.⁴² The instant case gives the New York Constitution a new ambiguity, for in *Stillwell v. Kaplan*⁴³ it was said:

"it has never been held by this court that a labor union is without justification in fairly setting forth its claims in a controversy over terms and conditions of employment by sign, handbill or newspaper advertisement as a *legitimate means of economic coercion*." (Italics ours.)

Here the defendant union is making this appeal at the best place: the point of consumption, rather than production.

None of the four cases cited by the Appellate Division are either controlling or applicable. *Duplex v. Deering*,⁴⁴ being a decision of the United States Supreme Court is not the law of New York;⁴⁵ it is complicated by the use of the anti-trust laws and the aura of the conspiracy doctrine. If this and the *Auburn*⁴⁶ case are applicable, so then is the *Willson*⁴⁷ case which reached a contrary conclusion. And in the two window cleaning⁴⁸ cases cited, in which injunctions were granted, not only was violence shown, but one expressly recognized the authority of *Spanier v. Awerkin*.⁴⁹

It seems impossible for a court with a knowledge of trade union methods to assert that from *singling out* we must infer a desire to

³⁹ *People v. John Most*, 171 N. Y. 423, 431, 64 N. E. 175, 178 (1902); *cf. Ulster Square Dealer v. Fowler*, 58 Misc. 325, 11 N. Y. Supp. 16 (1908) where police officers were restrained from interfering with the circulation of a paper claimed to be libelous and scurrilous.

⁴⁰ See 2 STORY, EQUITY JURISPRUDENCE (14th ed. 1918) p. 627, §1279.

⁴¹ In the sense currently used: that business is property.

⁴² *Brandreth v. Lance*, 34 Am. Dec. 368, 8 Paige 330 ((N. Y. 1839) where the principle of equity's "protecting the rights of property" can be seen limited by references to *Gee v. Pritchard*, 2 Swanst. 403 and STORY, *supra* note 40, to the "private letter" case; for equity's refusal to restrain a libel see *Kent. Ch.*, in *People v. Crosswell*, 3 Johns. Cas. 336, 393; *Life Ass'n of Am. v. Boogher*, 3 Mo. App. 173; *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384, 64 N. E. 163.

⁴³ 259 N. Y. 405, 410, 182 N. E. 63 (1932).

⁴⁴ 254 U. S. 443, 41 Sup. Ct. 17 (1920).

⁴⁵ *Stillwell*, *supra* note 43; *Paine Lumber Co. v. Neal*, *supra* note 16.

⁴⁶ *Supra* note 15.

⁴⁷ *Supra* note 16.

⁴⁸ *Commercial House & Window Cleaning Co. v. Awerkin*, 226 App. Div. 734, 233 N. Y. Supp. 728 (1st Dept. 1929); *id.* 138 Misc. 512, 240 N. Y. Supp. 797; *Allied Window & House Cleaning Contractors, Inc. v. Palmerie*, 229 App. Div. 854, 243 N. Y. Supp. 848 (1st Dept. 1930).

⁴⁹ *Supra* note 26.

ruin.⁵⁰ Very few strikes or boycotts are used against a group of employers simultaneously; the practice is to concentrate upon one at a time and the general strike in industry is a rarity. But courts have been prone to anathematize every labor boycott they disapproved of as one aimed at injury to another rather than an aid to themselves. And this despite the fact that the unions would lose a primary function if they destroyed the employers who give their members work. Grant injunctions if you will, but let this fiction die.

Judicial examination of society every score of years or so, would lead to more understanding decisions. Just as formerly many courts could not imagine the existence of beneficial and legal trade unions, so today they forget the conflict between employees who are attempting to get the most for their services and their masters who wish to give the least.⁵¹ Neither side is very scrupulous about its weapons. The masters use the blacklist, the lockout, and boycott against workers and those who aid them, and by way of advertising control of newspapers the suppression and exaggeration of news.⁵² The workers have their few ineffectual publications (only recently showing some strength), the strike and the boycott. Though the strike is speedier and more direct than the boycott, it hurts the workers economically and psychologically—for they must quit their jobs. The boycott is slow, requires careful planning and often great expense—but sometimes it is the only practical plan, either because the employer is too strong, or the men in the shop anti-union or indifferent. In such case we have this appeal to the public.⁵³ As Justice Brandeis points out, the common law of New York declares the right of industrial

⁵⁰ But in *Bossert v. Dhuy*, though the Appellate Division drew the same conclusion from the concentration of union activities, the Court of Appeals discovered a different aim.

⁵¹ *Vegeahn v. Guntner*, *supra* note 20, at 108.

⁵² LAIDLER, *supra* note 9, at 36, 39 (blacklist and employers' boycott); *N. Y. Times*, Oct. 30, 1934, p. 1 (lockout); VILLARD, O. G., *SOME NEWSPAPERS AND NEWSPAPER MEN* (1923) 102, 103, 107, 108, 164, 165 (advertising control); 2 *COMMONS AND ASSOCIATES, HISTORY OF LABOR IN THE U. S.* (1926) 64, 195; HOXIE, *TRADE UNIONISM IN THE U. S.* (1928) 236, 237 (blacklist) and at 188 *et seq.* (employers' associations); *cf.* 2 *INT. JUR. ASS'N BULL.* (Jan., 1934) No. 8, at 7 and 8 (labor injunctions by employers' associations).

⁵³ In *Julie Baking Co., Inc. v. Graymond*, Sup. Ct., Spec. Term, Pt. I, Bronx Co., N. Y. L. J., Aug. 17, 1934, Mr. Justice Hofstadter recognized the right of consumers to picket: "The right of an individual or group of individuals to protest in a peaceful manner against injustice or oppression, actual or merely fancied, is one to be cherished and not to be proscribed in any well ordered society. * * *"; *cf.* *Bernstein v. Retail Cleaners' and Tailors' Ass'n*, 31 *Ohio Nisi Prius* 438, where a tailors' association was permitted to picket the store of a cut-rate tailor.

Note that the position of plaintiff in *Nann v. Raimist*, *supra* note 6, is analogous to that of plaintiff in instant case: each has something to sell to the bakeries picketed—one labor, the other bread; each suffers financial loss and each claims protection of "property rights." That one plaintiff is a manufacturer and the other a labor union should not change principles of equity; yet the decisions are contradictory.

combatants to push their struggle to the limits of self interest.⁵⁴ And continually, the great financial loss is shown.⁵⁵ Free competition is not limited to struggles between persons of the same class for the same end,⁵⁶ and unfortunate though it may seem, employers and their employees have a right to fight; where equal rights clash, great businesses may be destroyed and men impoverished, but equity is helpless.⁵⁷

LEONARD B. BOUDIN.

THE "THIRD DEGREE."

Michael Alex was arrested at 11:00 P. M., June 15, 1931, suspected of the murder of a Queens groceryman. He was arraigned at about 11:00 A. M., June 17, 1931. In the interval of 36 hours, during which time he was held *incommunicado* at the police station, Alex confessed that he was implicated in the murder.

The defendant was tried in the Queens County Court on April 8, 1932. Although the prosecution presented a case containing various points, there was very little evidence to connect Michael Alex with the crime, excepting his confession to the police, which was, of course, offered in evidence. On the trial the defendant claimed that the confession was not voluntary because the police had beaten it out of him, and he sought to introduce evidence to that effect. This

⁵⁴ *Supra* note 12, at 448. Justice Holmes in (1894) 8 HARV. L. REV. 1, COLLECTED LEGAL PAPERS (1920) states a principle since then followed in many cases: that the intentional infliction of temporal damage is actionable unless some ground of justification is shown, this justification being dependent upon considerations of policy and of social advantage (*Vegeahn v. Guntner*). This, of course, would put the burden upon the boycotter to show a reason acceptable to the "social temperament" of the judges. A better approach seems to be suggested in *Ware & De Freville, Ltd. v. Motor Trade Ass'n* (*supra* note 34): that causing damage to another raises no presumption of unlawfulness and plaintiff must show that a right or duty has been violated. See INT. JUR. ASS'N BULL., Vol. 3, No. 3 (Aug., 1934) at 1 *et seq.*

⁵⁵ *Supra* note 6.

⁵⁶ *Vegeahn v. Guntner*, *supra* note 20, at 197.

⁵⁷ *Gill v. Doerr*, *supra* note 15. The peculiar light in which labor cases are seen, even today, will be more evident when the following question is considered: What judge would have issued an injunction to a storekeeper in 1765 when the Sons of Liberty boycotted merchants selling English goods; or against the American Federation of Catholic Societies when in 1911 it threatened theatre managers who contemplated giving proscribed performances; or against the United States government for refusing to accept the bids of a dealer of Ford cars—thereby depriving Mr. Ford of his property (prospective business) without due process of law? The labor boycott is no more illegal or less potent than these were—what would be unthinkable in those cases is present in the field of labor law because the judiciary is in the habit of granting injunctions. Yet, where is the distinction?