

1941

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Recommended Citation

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THE APEX AND HUTCHESON CASES

By HELEN CAREY*

THE recent Supreme Court decisions in *Apex Hosiery Co. v. Leader*¹ and *United States v. Hutcheson*² have again focused public attention on the cases dealing with labor under the anti-trust laws. Before an attempt can be made to analyze the effect of these two cases upon the existing law, a review of the prior legal development on the point is necessary.

I. THE ANTI-TRUST LAWS

Although it appears clear that the dominant purpose of Congress in enacting the Sherman Anti-Trust Law³ was the regulation of monopolistic business enterprises,⁴ the language found in sec. 1 of the law, that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal" is amenable to an interpretation which would include labor combinations within the scope of the Act. This interpretation was early made. The most famous, or infamous, depending upon the point of view, of these early decisions was

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¹(1940) 310 U. S. 469, 60 Sup. Ct. 982, 84 L. Ed. 1311, 128 A. L. R. 1044 and note. The Apex litigation is discussed in Gregory, *Labor's Coercive Activities under the Sherman Act—The Apex Case*, (1940) 7 U. Chi. L. Rev. 347; Cohen and Gerber, *Organized Labor or the Sherman Act*, (1939) 2 Nat'l Lawyers' Guild Q. 103; Landis, *The Apex Case*, (1940) 8 I. C. C. Pract. J. 24; Steffen, *Labor Activities in Restraint of Trade: The Apex Case*, (1941) 50 Yale L. J. 787; Gregory, *The Sherman Act v. Labor*, (1941) 8 U. Chi. L. Rev. 222; Cavers, *Labor v. The Sherman Act*, (1941) 8 U. Chi. L. Rev. 246; Landis, *The Apex Case*, (1941) 26 Corn. L. Q. 191; Brown, *The Apex Case and Its Effect Upon Labor Activities and The Anti-Trust Laws*, (1941) 21 Boston U. L. Rev. 48; (1939) 39 Col. L. Rev. 1247; (1940) 54 Harv. L. Rev. 146; (1940) 29 Geo. L. J. 120; (1940) 35 Ill. L. Rev. 424; (1941) 39 Mich. L. Rev. 462; (1940) 26 Va. L. Rev. 518; (1937) 15 N. Y. U. L. Q. Rev. 135; (1937) 51 Harv. L. Rev. 169.

²(1941) 61 Sup. Ct. 463, discussed in Landis, *The Apex Case*, (1941) 26 Corn. L. Q. 191, 212A; Steffen, *Labor Activities in Restraint of Trade: The Apex Case*, (1941) 50 Yale L. J. 787, 812; (1941) 54 Harv. L. Rev. 887.

³1 Mason's U. S. Code, tit. 15, secs. 1-7, 15 U. S. C. A. secs. 1-7, 4 F. C. A. tit. 15, secs. 1-7.

⁴Boudin, *The Sherman Act and Labor Disputes: I*, (1939) 39 Col. L. Rev. 1283; Shulman, *Labor and the Anti-Trust Laws*, (1940) 34 Ill. L. Rev. 769, 770, 787; Cohen and Gerber, *Organized Labor or the Sherman Act*, (1939) 2 Nat'l Lawyers' Guild Q. 103, 104.

Loewe v. Lawlor.⁵ This was an action for triple damages under the Sherman Act brought by an employer against a labor union which not only had gone on strike, but also had boycotted plaintiff's hats in the hands of dealers in states other than the state of manufacture. In finding a cause of action under the Sherman Act, the Supreme Court stated that there was a combination falling within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except upon conditions that the combination imposed.

This decision aroused a storm of protest from labor that led to agitation for congressional action to free labor from the incubus of the Sherman Act. The product of labor's crusade was the Clayton Act, sec. 6⁶ of which declared 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 . . . organizations . . . 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." Section 21⁷ provided:

"That no restraining order or injunction shall be granted by any court of the United States . . . 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 . . .," went on to list certain acts which shall not be enjoined,⁸ and con-

⁵(1908) 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815. Shulman, *Labor and Anti-Trust Laws*, (1940) 34 Ill. L. Rev. 769, 770, says that the whole structure of labor cases under the anti-trust laws is an inverted pyramid resting on the holding in this case, in spite of the fact that even here the issue was little considered.

⁶1 Mason's U. S. Code, tit. 15, sec. 17, 15 U. S. C. A., sec. 17, 4 F. C. A., tit. 15, sec. 17.

⁷2 Mason's U. S. Code, tit. 29, sec. 52, 29 U. S. C. A., sec. 52, 9 F. C. A., tit. 29, sec. 52.

⁸No person or persons, singly or in concert shall be enjoined ". . . 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 person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably as-

cluded "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

Labor's jubilation over the passage of its "Magna Charta" was cut short, however, by the decisions construing the Act, which severely limited the scope of its promised effectiveness in freeing labor from the Sherman Law. The starting point of this construction was that the Clayton Act does not have the effect of legalizing any act which was previously unlawful,⁹ that the provisions of section 20 are ". . . merely declaratory of what was the best practice always."¹⁰ After the judicial process of construction was completed, it had been determined that the Clayton Act precluded injunctions only in the immediate employer-employee relationship;¹¹ that union interference with existing contractual relationships might still be enjoined;¹² that labor could not combine with capital to boycott non-union products from another state,¹³ nor could it alone refuse to work on non-union products which had been manufactured out of state,¹⁴ and still claim the protection of the Clayton Act.

sembling 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; . . ."

⁹*Kroger Groc. & Bak. Co. v. Retail Clerks' I. P. Ass'n*, (E.D. Mo. 1918) 250 Fed. 890.

¹⁰*American Steel Found. v. Tri-City Council*, (1921) 257 U. S. 184, 203, 42 Sup. Ct. 72, 66 L. Ed. 189.

¹¹*Duplex Printing Press Co. v. Deering*, (1921) 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196; *Buyer v. Guilan*, (C.C.A. 2d Cir. 1921) 271 Fed. 65, 16 A. L. R. 216; *Waitresses' Union v. Benish Restaurant Co.*, (C.C.A. 8th Cir. 1925) 6 F. (2d) 568; see *American Steel Found. v. Tri-City Council*, (1921) 257 U. S. 184, 202, 42 Sup. Ct. 72, 66 L. Ed. 189, 27 A. L. R. 360. See generally on the matter of limitations placed on the Clayton Act, *Frankfurter and Greene, Congressional Power over the Labor Injunction*, (1931) 31 Col. L. Rev. 385, 404-405; *Landis, The Apex Case*, (1940) 8 I. C. C. Pract. J. 24, 29.

¹²*Kinloch Tel. Co. v. Local Union No. 2*, (C.C.A. 8th Cir. 1921) 275 Fed. 241, cert. denied (1921) 257 U. S. 662, 42 Sup. Ct. 270, 66 L. Ed. 423, which enjoined a union's inducing a breach of contract by plaintiff's employees, which contract provided for arbitration before striking; *Central Metal Prod. Corp. v. O'Brien*, (N.D. Ohio 1922) 278 Fed. 827, app. dismissed (C.C.A. 6th Cir. 1922) 284 Fed. 850, (contract between the plaintiff and its customer).

¹³*United States v. Brims*, (1926) 272 U. S. 549, 47 Sup. Ct. 169, 71 L. Ed. 403.

¹⁴*Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, (1927) 274 U. S. 37, 47 Sup. Ct. 522, 71 L. Ed. 916, 54 A. L. R. 791, discussed in *Witte, The Journeymen Stonecutters' Decision*, (1927) 17 Am. Labor Legislation Rev. 139, and in *Royce, Labor, the Federal Anti-Trust Laws, And the Supreme Court*, (1928) 5 N. Y. U. L. Rev. 19; *Duplex Printing Press Co. v. Deering*, (1921) 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196; *Columbus Heat. & Vent. Co. v. Pittsburgh Bldg. T. Co.*, (W.D. Pa. 1927) 17 F. (2d) 806. A related situation was presented by *Buyer v. Guilan*, (C.C.A. 2d Cir. 1921) 271 Fed. 65, 16 A. L. R. 216,

On the other hand, interference through strikes with the manufacturing or other processing of goods destined for interstate commerce—designated by the courts as an “indirect” restraint—is not in violation of the antitrust laws¹⁵ unless it is found that the strikers intended to restrain or control a commodity’s supply moving in interstate commerce, or its price in interstate markets.¹⁶ In contrast is the judicial treatment of “direct” restraints on interstate commerce, best illustrated in the transportation and communication cases. Here it is said that if the necessary effect of the acts involved would be to restrain interstate commerce, the acts are illegal irrespective of the objectives or purposes of the actors; in other words, their intent is not relevant.¹⁷

II. THE NORRIS-LA GUARDIA ACT

Such was the existing situation when the Norris-LaGuardia Act¹⁸ became law. This Act, which was based on Congress’ power to regulate the jurisdiction of the congressionally-created courts, deprived these courts of jurisdiction to issue injunctions

where refusal of union employees of a transportation company to transport plaintiff’s non-union made goods was held to be a conspiracy violating the Sherman Act.

¹⁵United Mine Workers v. Coronado Coal Co., (1922) 259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975; Gable v. Vonnegut Mach. Co., (C.C.A. 6th Cir. 1921) 274 Fed. 66; United Leather Workers v. Herkert, (1924) 265 U. S. 457, 44 Sup. Ct. 623, 68 L. Ed. 1104, 33 A. L. R. 566; Landis, The Apex Case, (1940) 8 I. C. C. Pract. J. 24, 32; Landis, The Apex Case, (1941) 26 Corn. L. Q. 191, 205; (1933) 32 Mich. L. Rev. 240.

¹⁶Coronado Coal Co. v. United Mine Workers, (1925) 268 U. S. 295, 45 Sup. Ct. 551, 69-L. Ed. 963, (the second Coronado Case) commented on in (1926) 74 U. Pa. L. Rev. 321, and in (1925) 35 Yale L. J. 111; see United Mine Workers v. Coronado Coal Co., (1922) 259 U. S. 344, 410, 42 Sup. Ct. 570, 66 L. Ed. 975, 27 A. L. R. 762, (the first Coronado Case); Industrial Ass’n v. United States, (1925) 268 U. S. 64, 77, 45 Sup. Ct. 403, 69 L. Ed. 849, (industrial combination rather than labor). Gregory, Labor’s Coercive Activities Under the Sherman Act—The Apex Case, (1940) 7 U. Chi. L. Rev. 347, 352 expresses the view that in the second Coronado Case the Supreme Court developed a device permitting all coercive labor activities designed to achieve immediate ends such as better wages, and for condemning the same activities when aimed at the spread of union power through the closed shop in industries serving national markets.

¹⁷Williams v. United States, (C.C.A. 5th Cir. 1923) 295 Fed. 302, cert. denied (1923) 265 U. S. 591, 44 Sup. Ct. 636, 68 L. Ed. 1195; Western Union Tel. Co. v. Internat’l B. of E. Workers, (N.D. Ill. 1924) 2 F. (2d) 993, aff’d (C.C.A. 7th Cir. 1925) 6 F. (2d) 444, 46 A. L. R. 1538; see United States v. Railway Employees’ Dept., (N.D. Ill. 1922) 283 Fed. 479, 491; Note, (1940) 49 Yale L. J. 518, 520-521.

¹⁸Mason’s U. S. Code, Perm. Supp. No. 3, tit. 29, secs. 101-115, 29 U. S. C. A., 1940 Supp., secs. 101-115, 9 F. C. A., tit. 29, secs. 101-115.

The congressional history of this act and a discussion of its provisions is to be found in Witte, The Federal Anti-Injunction Act, (1932) 16 MINNESOTA LAW REVIEW 638; see, also, (1932) 30 Mich. L. Rev. 1257.

against the doing of specifically enumerated acts¹⁹ by the participants in a labor dispute as defined²⁰ in the Act. No direct employer-employee relationship need exist to bring a case within the ambit of the Norris-LaGuardia Act;²¹ it is enough if the parties are engaged in the same industry²² or have some other interest in the terms and conditions of employment involved in the dispute.²³ Thus, jurisdictional disputes between unions can no longer be enjoined by an employer on the ground that none of the members of one of the unions are in his employ.²⁴ Nor can a union refusal to work on non-union products in the hands

¹⁹Mason's U. S. Code, Perm. Supp. No. 4, tit. 29, sec. 104, 29 U. S. C. A. sec. 104, 9 F. C. A. tit. 29, sec. 104.

²⁰Mason's U. S. Code Perm. Supp. No. 4, tit. 29, sec. 113, 29 U. S. C. A., sec. 113, 9 F. C. A., tit. 29, sec. 113.

²¹*New Negro Alliance v. Sanitary Grocery Co.*, (1938) 303 U. S. 552, 58 Sup. Ct. 703, 82 L. Ed. 1012, commented on in (1938) 86 U. Pa. L. Rev. 784; *Diamond F. F. Hosiery Co. v. Leader*, (E.D. Pa. 1937) 20 F. Supp. 467, app. dismissed (C.C.A. 3d Cir. 1937) 99 F. (2d) 1001; *Cinderella Theater Co. v. Sign Writers' Local Union*, (E.D. Mich. 1934) 6 F. Supp. 164; *Dean v. Mayo*, (W.D. La. 1934) 8 F. Supp. 73. (1938) 36 Mich. L. Rev. 1146, 1157, in discussing this case, erroneously says that it repudiated the prior holdings that conspiracies directly to restrain interstate commerce could be enjoined. The case held that because a labor dispute existed and the jurisdictional prerequisites of the Norris-LaGuardia Act were not satisfied, the court could not consider the case on its merits. The plaintiff was granted the injunction in a later case, after complying with the procedural requirements. (W.D. La. 1934) 9 F. Supp. 459, aff'd (C.C.A. 5th Cir. 1936) 82 F. (2d) 554.

²²*Levering & Garrigues Co. v. Morrin*, (1933) 289 U. S. 103, 53 Sup. Ct. 549, 77 L. Ed. 1062, discussed in *Monkemeyer*, *Five Years of the Norris-La Guardia Act*, (1937) 2 Mo. L. Rev. 1, 12; *Diamond F. F. Hosiery Co. v. Leader*, (E.D. Pa. 1937) 20 F. Supp. 467, app. dismissed (C.C.A. 3d Cir. 1937) 99 F. (2d) 1001; *Blankenship v. Kurfman*, (C.C.A. 7th Cir. 1938) 96 F. (2d) 450; *Lauf v. E. G. Shinner & Co.*, (1938) 303 U. S. 323, 58 Sup. Ct. 578, 82 L. Ed. 872. This case in the appellate court (C.C.A. 7th Cir. 1936) 82 F. (2d) 68, is discussed in (1936) 84 U. Pa. L. Rev. 1027; (1936) 21 St. Louis L. Rev. 350; (1937) 31 Ill. L. Rev. 688; Note, (1937) 15 N. Y. U. L. Q. Rev. 116; and the Supreme Court decision which reversed it is noted in (1938) 23 MINNESOTA LAW REVIEW 108; (1938) 86 U. Pa. L. Rev. 784; (1938) 13 Ind. L. J. 516; (1938) 24 Va. L. Rev. 684. But cf. *Fehr Baking Co. v. Bakers' Union*, (W.D. La. 1937) 20 F. Supp. 691.

²³*New Negro Alliance v. Sanitary Groc. Co.*, (1938) 303 U. S. 552, 58 Sup. Ct. 703, 82 L. Ed. 1012, commented on in (1938) 86 U. Pa. L. Rev. 784. Here the interest involved was that of a Negro society in the employment of members of its own race.

On the general question of when a "labor dispute" exists, see, in addition to the comments cited in footnotes 21 and 22 above, (1936) 84 U. Pa. L. Rev. 771; (1937) 50 Harv. L. Rev. 1295. (1937) 21 MINNESOTA LAW REVIEW 467, and (1938) 22 MINNESOTA LAW REVIEW 271 deal with the same problem arising under state statutes patterned after the federal act.

²⁴See *Blankenship v. Kurfman*, (C.C.A. 7th Cir. 1938) 96 F. (2d) 450, 453; but see *M. & M. Wood Work Co. v. Plywood & Veneer Workers Local*, (D.D. Or. 1938) 23 F. Supp. 11, 20; *United States v. Drivers, Chauffeurs, etc., Union*, (D.C. 1940) 32 F. Supp. 594, 599, 600.

of customers in order to force unionization of the manufacturer be enjoined.²⁵

Although the concept of interstate commerce was broadened by the decisions²⁶ under the National Labor Relations Act,²⁷ this broadened concept has no application under the antitrust laws.²⁸

It was generally believed that the scope of the Norris-LaGuardia Act was purely jurisdictional, affecting only the power of the federal courts to grant injunctions, and that it had no effect on the substantive law,²⁹ although a few predictions to the contrary were ventured.³⁰

It was against this background that the *Apex*³¹ and *Hutcheson*³² decisions were projected.

III. THE APEX AND HUTCHESON CASES

The *Apex Case* was an action for triple damages under the Sherman Act by an employer whose plant, which manufactured hosiery, 80 per cent of which was sold in interstate commerce, had been seized by sit-down strikers. The strikers refused to permit shipment of already-completed hosiery to fill orders in interstate commerce. The purpose of the strike was found to be

²⁵*Levering & Garrigues Co. v. Morrin*, (1933) 289 U. S. 103, 53 Sup. Ct. 549, 77 L. Ed. 1062, discussed in *Monkemeyer, Five Years of the Norris-LaGuardia Act*, (1937) 2 Mo. L. Rev. 1, 11-12. This case held that the union acts were to suppress the use of steel, and the use was said to be a purely local matter. But cf. *Fehr Baking Co. v. Bakers' Union*, (W.D. La. 1937) 20 F. Supp. 691.

²⁶The leading case is *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, (1937) 301 U. S. 1, 57 Sup. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352 and note.

²⁷*Mason's U. S. Code, Perm. Supp. No. 4, tit. 29, secs. 151-166*, 29 U. S. C. A., 1940 Supp., sec. 151-166, 9 F. C. A., tit. 29, secs. 151-166.

²⁸*Blankenship v. Kurfman*, (C.C.A. 7th Cir. 1938) 96 F. (2d) 450. See *Brown, The Apex Case and Its Effect Upon Labor Activities and the Anti-Trust Laws*, (1941) 21 Boston U. L. Rev. 48, 87-90; Note, (1940) 24 MINNESOTA LAW REVIEW 940, 952-953; (1937) 15 N. Y. U. L. Q. Rev. 135, 136; (1937) 5 U. Chi. L. Rev. 149, 150; (1938) 36 Mich. L. Rev. 844; (1939) 39 Col. L. Rev. 1247.

²⁹*United States v. Drivers, Chauffeurs, etc., Union*, (D.C. 1940) 32 F. Supp. 594; see *Cinderella Theater Co. v. Sign Writers' Union*, (E.D. Mich. 1934) 6 F. Supp. 164, 168-169; (1932) 30 Mich. L. Rev. 1257, 1269, note 51; *Frankfurter and Greene, Congressional Power Over the Labor Injunction*, (1931) 31 Col. L. Rev. 385, 408; *Gregory, Labor's Coercive Activities Under the Sherman Act—The Apex Case*, (1940) 7 U. Chi. L. Rev. 347, 356-357; Note (1940) 49 Yale L. J. 518, 529; *Cohen and Gerber, Organized Labor or the Sherman Act*, (1939) 2 Nat'l Lawyers' Guild Q. 103.

³⁰(1940) 7 U. Chi. L. Rev. 388, 394; *Monkemeyer, Five Years of the Norris-LaGuardia Act*, (1937) 2 Mo. L. Rev. 1, 3.

³¹(1940) 310 U. S. 469, 60 Sup. Ct. 982, 84 L. Ed. 1311, 128 A. L. R. 1044.

³²(1941) 61 Sup. Ct. 463.

to force the unionization of the Apex plant. The case was held not within the Sherman Act, the court interpreting that Act to prohibit conspiracies to obstruct interstate transportation only when in purpose or effect they will or do result in a form of market control of a commodity such as to monopolize the supply, control its price, or discriminate between its would-be purchasers.

In the flood of comment generated by the *Apex Case*, the proposition expressed in the majority opinion, that the market control test is not novel in labor cases but was the real basis for the decisions in the *Lowe*, *Duplex*, and *Bedford Cases*, meets with some approval.³³ It is submitted, however, that while market control may have been involved in the fact situations of these cases, the decisions were not placed on this ground.

Another notion seemingly implicit in the *Apex Case* is that whether or not the Sherman Act applies in a given situation is a matter of statutory construction rather than a question of whether the activity restrains interstate commerce as that concept is limited under the commerce power.³⁴ The latter was the test of the older cases.

This case also marks the end of the application of different ideologies to labor cases as distinguished from industrial cases³⁵ arising under the Sherman Act because the "market control" test, in effect if not in words, has been consistently applied in the latter cases.³⁶

In *Milk Wagon Drivers' Union v. Lake Valley F. Prod.*,³⁷ decided shortly after the *Apex Case*, the supreme court held that since the Norris-LaGuardia Act, the federal courts have no juris-

³³See (1940) 54 Harv. L. Rev. 146; but see Brown, The Apex Case and Its Effect Upon Labor Activities and the Anti-Trust Laws, (1941) 21 Boston U. L. Rev. 48, 94-95.

³⁴See Cavers, Labor v. The Sherman Act, (1941) 8 U. Chi. L. Rev. 246, 250; (1941) 39 Mich. L. Rev. 462, 463; cf. Brown, The Apex Case and Its Effect Upon Labor Activities and the Anti-Trust Laws, (1941) 21 Boston U. L. Rev. 48, 90.

³⁵Standard Oil Co. v. United States, (1911) 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N.S.) 834, Ann. Cas. 1912D 734; Standard Sanitary Mfg. Co. v. United States, (1912) 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107; United States v. American Tobacco Co., (1911) 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663.

³⁶See Brown, The Apex Case and Its Effect Upon Labor Activities and the Anti-Trust Laws, (1941) 21 Boston U. L. Rev. 48, 95; Landis, The Apex Case, (1941) 26 Corn. L. Q. 191, 208; (1940) 35 Ill. L. Rev. 424.

³⁷(1940) 61 Sup. Ct. 122, discussed in (1941) 25 MINNESOTA LAW REVIEW 534; (1941) 26 Corn. L. Q. 328; (1941) 39 Mich. L. Rev. 653; (1941) 26 Iowa L. Rev. 411; (1941) 29 Geo. L. J. 658; (1941) 21 Boston U. L. Rev. 171.

diction to grant injunctions in cases growing out of a labor dispute merely because there is an alleged violation of the Sherman Act.

The restricted scope of the remedy of injunction under the Norris-LaGuardia Act had led to predictions of the increased employment of criminal prosecution under the Sherman Act in labor disputes cases.³⁸ But this weapon against labor was virtually destroyed by the recent decision in *United States v. Hutcheson*.³⁹ Here the defendant carpenters' union was engaged in a jurisdictional dispute with the machinists over certain jobs at the plant of Anheuser-Busch, which obtained materials for its manufacturing from, and sold its finished product largely into, interstate commerce. Because of the dispute, the carpenters called a strike against Anheuser-Busch, picketed it and its tenant, and requested that union members and their friends refrain from buying Anheuser-Busch beer. It was held, Mr. Justice Frankfurter writing the opinion, that an order sustaining a demurrer to the indictment under the Sherman Act be sustained. The reasoning used was that since the passage of the Norris-LaGuardia Act, the Clayton Act must be read in the light of the Congressional policy toward labor expressed by the enactment of the former, and, in this light, the acts enumerated in sec. 20 of the latter must be taken to be lawful. The acts alleged come within sec. 20, are therefore lawful, and hence do not support the indictment.

The technique of statutory construction employed by Mr. Justice Frankfurter in this case has been criticized on the ground that a more forthright method of achieving the same result would be to have held that the Clayton Act had been previously misinterpreted by the courts.⁴⁰ But, as pointed out by Dean Landis,⁴¹ the method used does save the court from the criticism that it is busily engaged in overruling cases decided before the recent changes in its membership. However, Dean Landis also contends that the validity of the process employed by Mr. Justice Frankfurter must be determined by the correctness of his interpretation of the Congressional policy expressed in the Norris-LaGuardia Act, and concludes that it would seem that the intent of Congress

³⁸Feidler, *Labor Law—The Norris-LaGuardia Act*, (1936) 11 Wis. L. Rev. 552, 562; Arnold, *Fair and Effective Use of Present Antitrust Procedure*, (1938) 47 Yale L. J. 1294, 1299.

³⁹(1941) 61 Sup. Ct. 463.

⁴⁰(1941) 54 Harv. L. Rev. 887, 888.

⁴¹Landis, *The Apex Case*, (1941) 26 Corn. L. Q. 191, 212B.

was to affect procedure only,⁴² and that the Norris-LaGuardia Act was to supplant, not supplement, the Clayton Act. It may be true that Congress, thinking it had only the power to affect procedure, intended that the act be confined to procedural changes. Nevertheless, a broader policy of legalizing certain of labor's activities may have been manifested by Congress even though it was not carried into execution by the provisions as enacted.

IV. CONCLUSION

What is the combined effect of the *Apex* and *Hutcheson Cases*? It is probable that the "market control" test will be applied by the court in those cases where the conduct involved does not come within the terms of sec. 20 of the Clayton Act. Thus, even if the acts alleged are not within the scope of sec. 20, they will not violate the antitrust laws unless, in purpose or effect, they result in the market control of a commodity by monopolizing the supply, controlling its price, or discriminating between would-be purchasers. Thus it would seem that the net result is that the anti-trust acts are no longer applicable to labor in so far as its normal activities are concerned and that its conduct comes within their interdict only in the unusual situations of the type represented by *United States v. Brims*, where labor combined with industrialists to keep non-union products out of the market.

⁴²This idea was expressed even by Frankfurter, who was one of the drafters of the Act, in Frankfurter and Greene, *Congressional Power Over the Labor Injunction*, (1931) 31 Col. L. Rev. 385, 408.

⁴³(1926) 272 U. S. 549, 47 Sup. Ct. 169, 71 L. Ed. 403.