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A STUDY OF THE JUDICIAL ATTITUDE TOWARD TRADE UNIONS AND LABOR LEGISLATION

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EQUITY jurisprudence has many times been accused of shirking the great task which is the reason for its existence—that of making the law fit present day living.¹ The courts of equity in which the vast majority of all labor controversies are decided are subject to the charge that they have lost the common touch. They have become enmeshed in fine-spun theories, in abstract questions of rights and principles. The fact that we must have theories and rights and principles does not mean that the courts should mistake them for ends. People do not live in an abstract world; neither do they always act in accordance with theories which fit some economic or juridical Utopia.² Compulsions to action must, in the final analysis, be controlled and regulated by a living, ever-changing and adaptive jurisprudence grounded in the life of the people from which that jurisprudence springs.

Present day treatment of labor problems is still tainted by the fictions which gained currency coincident with the beginnings of the breakdown of the economy of the so-called feudal era and the emergence of the industrial age. The endeavor of the business classes to secure their interests and to freeze the economic order which they were building led to a pseudo-sanctification of private

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¹Warm, *A Study of Some of the Problems Concerning Foreclosure Sales and Deficiency Judgments*, (1936) 6 Brooklyn L. Rev. 167, 168, 169. Not all courts are subject to this criticism. For a discussion of the function of equity see, *Toledo, etc., Ry. Co. v. Pennsylvania Co.*, (N.D., Ohio, 1893), 54 Fed. 746, 751.

²Mumford, *The Culture of Cities* (1938) page 9; Russell, *Power* (1938) 196.

rights, especially of rights in property and the security of transactions in relation to property, at the expense of the public interest.

The nineteenth century was a period of rapid industrial expansion. As business grew in size, scope and power, it introduced a host of new problems and intensified many old ones. One of the most vexatious of these, a problem which was at the same time old in substance but new in form, was the status of the worker. The mad scramble for a foothold in the world of business led to an intensification of old labor abuses and to the introduction of many new ones. The individual worker soon discovered that he was no match for the economically more powerful employer. In order to obtain a semblance of economic equality with his employer, he began to find it more necessary than ever before to join with his fellows. The rise and growth of the modern trade union movement in this country was the result of this feeling of insecurity on the part of the workers. However, this movement was not to continue unmolested. Employers were quick to understand that it constituted a serious challenge to their theretofore undisputed dominance of the field of labor relations. The challenge did not long remain unanswered. Employers began to make effective use of such weapons as the open shop, the yellow dog contract, blacklists, lockouts, and a host of others, and these were supplemented by the expansion of the doctrines of conspiracy, inalienable and natural rights, free flow of labor, restraint of trade, boycotts, and the like.

A study of the means which employers have used in their attempts to impede the growth of the labor movement and of the positions which the courts have adopted with reference to them, may be of some advantage in casting light where light is very much needed.

THE OPEN SHOP

Let us begin our study with a discussion of the so-called open shop. The open shop may be a shop where none of the employees are members of a union or where the employees are both union and nonunion indiscriminately.³ The argument for an open shop of either type is that,

³Construction Company v. St. Paul Building Trades Council, (1917) 136 Minn. 167, 161 N. W. 520; State v. Employers of Labor, (1918) 102 Neb. 768, 169 N. W. 717; Cushman's Sons Co. v. Amalgamated F. W. B., (1926) 127 Misc. Rep. 152, 215 N. Y. S. 401; Clark Lunch Company v. Waiters Local, (1926) 22 Ohio App. 265, 154 N. E. 362; Shine v. Fox Bros. Manufacturing Company, (C.C.A. 8th Cir. 1907) 156 Fed. 357; Duplex Company v. Deering, (1921) 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349.

"It is a cardinal principle that an employer may conduct his business as he sees fit, so long as he does not infringe upon the legal rights of others. If he determines that his interest will best be served by the employment of nonunion help, the law will protect him equally with those who operate union shops. . . . Union and nonunion shops stand with their feet on the same level in the eyes of the law."⁴

On its face this argument seems harmless enough, but from it have sprung a number of vicious half truths and much specious reasoning.

The open shop is an economic application of the age old politico-military strategy of divide and rule. As long as an employer can treat with each employee separately, his control over his immediate labor situation is quite satisfactory to him. To the employer the matter of hiring or discharging an employee is of comparatively small consequence, but to the employee a job means the difference between food and shelter and the lack of it. The emergence of the giant corporate employer as a symbol of the industrial life of the late nineteenth and twentieth centuries has but served to emphasize this difference in the situations of the employer and the employee.⁵ Thus the open shop and its variation, the company union shop, have been widely used and desperately fought for by the employer in his endeavor to keep wages down and profits up.

The open shop in and of itself may be acceptable. Whether it is or not depends in each case upon the conditions under which it is operated. So long as the employees are sincerely satisfied to

⁴Cushman's Sons Co. v. Amalgamated F. W. B., (1926) 127 Misc. Rep. 152, 155, 215 N. Y. S. 401. Construction Co. v. St. Paul Building Trades Council, (1917) 136 Minn. 167, 161 N. W. 520; Garside v. Hollywood, (1914) 88 Misc. Rep. 311, 150 N. Y. S. 647; Senn v. Tile Layers Protective Union, Local No. 5, (1936) 222 Wis. 383, 268 N. W. 270.

Flaccus v. Smith, (1901) 199 Pa. St. 128, 136, 48 Atl. 894, contains a good statement of the position adopted by these courts. While it is true that an employer may conduct his business as he sees fit, it is true only in a qualified sense. He is certainly responsible to society for any system which he adopts. A continuance of the policy of unalloyed individualism in connection with our intricate industrial world will lead us eventually to chaos and rebellion against accompanying injustices. Cf., Myers v. Louisiana & A. Ry. Co., (W. D. La., 1933) 7 Fed. Supp. 92 (in this case the court issued a temporary injunction restraining the employer from interfering with the selection, by its employees, of a representative to confer with the employer concerning matters affecting relations between the employees and the employer. But quare, whether the same result would have been obtained had there been no Railway Labor Act upon which to base the decision.)

⁵Berle and Means, *The Modern Corporation and Private Property* (1933). See also, *Johnston Harvester Company v. Meinhart*, (1880) 60 How. Prac. (N.Y.) 168, 176.

work in that manner and so long as no union in good faith desires to attempt the unionization of such a business establishment, an open shop employer, as such, is not to be condemned. The question only arises when the employees become restive or an outside union desires, in good faith, to unionize the shop.⁶ The defense of the open shop becomes quite difficult when either or both of these conditions occur. The employer's resistance under either of these conditions is generally the result of a desire to maintain a whip hand over his employees at any cost—an attempt to prevent their unionization because that unionization would enable them to bargain more effectively with him.

THE "YELLOW DOG" CONTRACT AND COMPANY UNION TYPE OPEN SHOP

The individual contract system is one of the most effective means of perpetuating the open shop. Under this system, the employee signs a contract so-called agreeing that in return for employment for an indefinite period he will, during the time employed, refrain from joining a union, or, if he already belongs to one, to resign his membership; and that, if he does join a union thereafter, he will immediately withdraw from the employment.⁷

⁶The term "outside union" is used in this article to denote a union which at the time of the controversy has no relation with the particular employer concerned and is not recognized by the employer as representing its employees.

⁷It is doubtful if agreements of this type can be considered valid in those cases in which the employment is at will because of the lack of mutuality. Even where the period of employment is for a definite time it is suggested that the agreement should be unenforceable because it was obtained by the economic coercion of the employee. To the effect that such an agreement where the employment is at will is not a contract, see the concurring opinion of Kephart, J., and the dissenting opinion of Maxey, J., in *Kraemer Hosiery Co. v. American Fed. of F. F. H. W.*, (1931) 305 Pa. St. 206, 216, 233, 157 Atl. 588. See also, *Exchange Bakery & Restaurant, Inc., v. Rifkin*, (1927) 245 N. Y. 260, 266, 157 N. E. 130; *The Dayton Manufacturing Co. v. The Metal Polishers, etc., Union*, (1901) 8 Ohio N. P. 574, 11 Ohio Dec. N. P. 643. Contra: *Montgomery & Pacific Electric Ry. Co.*, (C.C.A., 9th Cir. 1919) 258 Fed. 382.

See the following cases for various types of yellow-dog arrangements: *Callan v. Exposition Cotton Mills*, (1919) 149 Ga. 119, 99 S. E. 300; *Kraemer Hosiery Co. v. American Fed. of F. F. H. W.*, (1931) 305 Pa. St. 205, 157 Atl. 588; *Nolan v. Farmington Shoe Manufacturing Co.*, (D. Mass. 1928) 25 F. (2d) 906.

Yellow-dog contracts have been protected by a court of equity although the facts indicated that the contracts were secured by the employer after a strike had begun and principally for the purpose of placing the employer in a position to file an action to enjoin the strikers on the ground that the actions of the strikers were intended to bring about breaches of those contracts. *United Tailors v. Amalgamated Workers*, (1927) 26 Ohio N. P. (N.S.) 439. The same result has been reached even where there is no

This type of writing or agreement became a very common occurrence after the decisions by the Supreme Court of the United States in *Coppage v. Kansas*, and *Hitchman Coal & Coke Co. v. Mitchell*, in which such agreements were held valid.⁸ The reasoning used to sustain these so-called contracts is both unsatisfactory and indefensible from any point of view. It presumes that both the employer and the individual employee are free agents and that the employee may freely make his choice whether to continue at work or quit.⁹ The presumption is correct as an

question but that the yellow-dog contracts were executed for that purpose. *Brost Pattern Works v. Reid*, (1922) 24 Ohio N. P. (N.S.) 60.

A good statement with reference to the uncritical practice of labeling yellow-dog contracts as having been voluntarily entered into on both sides, is found in, House Report No. 669, Committee on the Judiciary, 72nd Congress, March 2, 1932, p. 7.

⁸(1915) 236 U. S. 1, 35 Sup. St. 240, 59 L. Ed. 441; (1917) 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260.

The following cases arose after 1915, in which year the *Coppage Case*, (1915) 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441, was decided: *Moore Drop Forging Co. v. McCarthy*, (1923) 243 Mass. 554, 137 N. E. 919; *Cyrus Currier & Sons v. International Molders' Union*, (1921) 93 N. J. Eq. 61, 115 Atl. 66; *Third Ave. Ry. Co. v. Shea*, (1919) 109 Misc. Rep. 18, 179 N. Y. S. 43; *Schwartz & Benjamin, Inc. v. Alexanderson*, (1930) 138 Misc. Rep. 919, 246 N. Y. S. 422, (in which the court justified the yellow dog contract because it would prevent the employment of possible communists. Cf., however, *Schwartz & Benjamin, Inc. v. Alexanderson*, (1930) 138 Misc. Rep. 917, 246 N. Y. S. 419); *Nashville Ry. & Lt. Co. v. Lawson*, (1921) 144 Tenn. 78, 229 S. W. 741, in which a yellow dog contract was held not contrary to public policy; *San Antonio Fire Fighters' Local Union v. Bell*, (Tex. Civ. App. 1920), 223 S. W. 506, (inferred that a municipal corporation could exact a yellow dog contract of its employees.); *Montgomery v. Pacific Electrical Ry. Co.*, (C.C.A., 9th Cir. 1919) 258 Fed. 382; *David Adler & Sons Co. v. Maglio*, (1929) 200 Wis. 153, 228 N. W. 123.

In the following decisions statutes outlawing yellow dog contracts were held invalid on the strength of *Coppage v. Kansas*, (1915) 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441; *People v. Western Union Telegraph Co.*, (1921) 70 Colo. 90, 198 Pac. 146; *Jackson v. Chief of Police*, (1915) 92 Oh. St. 130, 110 N. E. 732, cf., however, the very fine dissenting opinion of Wannamaker, J.; *Montgomery v. Pacific Electric Ry. Co.*, (C.C.A. 9th Cir. 1923) 293 Fed. 680. For cases decided prior to the *Coppage Case*, (1915) 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441; see, *State v. Daniels*, (1912) 118 Minn. 155, 136 N. W. 584; *State v. La Monte Bateman*, (1900) 7 Ohio N. P. 487, 10 Ohio Dec. N. P. 68; *Order of R.R. Telegraphers v. Louisville & N. R. Co.*, (W.D. Ky. 1906) 148 Fed. 437, (a federal anti-yellow dog contract statute was held void as not within the power of Congress to regulate interstate commerce); *Goldfield Consol. Mines Co. v. Goldfield Miners Union No. 220*, (D. Nev., 1908) 150 Fed. 500.

See, *La France Co. v. Electrical Workers*, (1923) 108 Ohio St. 61, 140 N. E. 899, in which the *Hitchman* case is distinguished.

⁹*Construction Co. v. St. Paul Building Trades Council*, (1917) 136 Minn. 167, 161 N. W. 520; *Jersey City Printing Co. v. Cassidy*, (1902) 63 N. J. Eq. 759, 53 Atl., 230; *Albro J. Newton Co. v. Erickson*, (1911) 70 Misc. Rep. 291, 126 N. Y. S. 949; *Journeyman v. Master Horseshoers*, (1912) 13 Ohio N. P. (N.S.) 297, 23 Ohio Dec., N. P., 338; *Moreland Theatres Corp. v. Portland Moving Pictures, etc., Union*, (1932) 140 Or. 35, 12 P. (2d) 333. A typical argument along this line is found in *The New York, Lake*

abstract proposition, but it lacks validity because it is based upon an economic fallacy. The choice actually given to the employee is between security and insecurity; between making a living and facing destitution.¹⁰ This is not a choice in the real sense of the word.

The company union is another phase of the open shop. Ostensibly the employees are unionized, but the union is nevertheless controlled and, in many instances, maintained by the employer.¹¹ In a bona fide union the negotiators representing the employees are usually outsiders—that is, non-employees whose fear of the employer's retribution is minimized. In the case of a company union, however, those who represent the union are also employees and it is reasonable to suppose that they may be constrained by

Erie & Western Railroad Co. v. Wenger, (1887) 17 Ohio Law Bull. 306, 308, 9 Ohio Dec. 815. Cf., *Meltzer v. Kaminer*, (1927) 131 Misc. Rep. 813, 227 N. Y. S. 459, in which it is held that although a man may cease work whenever he pleases, the determination to quit must be his, and not that of another. Such a rule would prevent a union from calling a strike of its members even where those members are employed at will. The rule has not been followed generally.

¹⁰*National Labor Relations Board v. Jones & Laughlin*, (1937) 301 U. S. 1, 32, 57 Sup. Ct. 615, 81 L. Ed. 893; *State v. Daniels*, (1912) 118 Minn. 155, 136 N. W. 584. See also, *Reardon, Inc. v. Caton*, (1919) 189 App. Div. 501, 178 N. Y. S. 713; *Trade Press Publishing Co. v. Moore*, (1923) 180 Wis. 449, 193 N. W. 507, (dissenting opinion).

¹¹*Michaels v. Hillman*, (1920) 112 Misc. Rep. 395, 183 N. Y. S. 195; *Gold Metal Dairy Employees' Protective Ass'n v. Supple-Wills-Jones Milk Co.*, 1 Labor & Unemployment Insurance Service, Prentice-Hall, Inc., page 19525, Pa. 1937), ("Collective bargaining is nothing less than a sham and a delusion when the employer sits on both sides of the table by reason of his domination of a particular organization with which he deals. This domination may take many forms. It may take the form of added compensation to the representatives of the employer in the union. It may also take the form of permitting such representatives to conduct organizational work among the employees during working hours without deduction of pay"); *Texas & N. O. R. Co. v. Ry. Clerks*, (1930) 281 U. S. 548, 50 Sup. Ct. 427, 74 L. Ed. 1034; *Penn. R. R. System v. Penn. Ry. Co.*, (1924) (E.D. Penn.) 296 Fed. 220; *The Virginia Railway Co. v. System Fed. No. 40, Ry. Employees*, (1937) 300 U. S. 515, 57 Sup. Ct. 592, 81 L. Ed. 789.

That a company union is equally as advantageous to the employer as the open shop, is indicated by the fact that a number of employers who have a long history of anti-union and anti-closed shop activity to their credit suddenly enter into an air-tight closed shop agreement with a company union which has sprung up over night. These changes of attitude usually follow immediately upon a demand by an outside union that it be allowed to organize the plant. *Hotel, Restaurant, etc., Local Union No. 181 v. Miller*, (1938) 272 Ky. 471, 114 S. W. (2d) 501. Cf., *Brotherhood of Ry. & S. S. Clerks v. Texas & N. O. R. R. Co.*, (S.D. Tex. 1928) 25 F. (2d) 876, (where the employer promoted a company union and recognized it as the representative of its employees, the employer was held to have violated the Railway Labor Act which provides for the selection by employees of their own representatives without interference or influence of the employer); *House Report No. 1147*, 74th Congress, Committee on Labor, June 10, 1935, pp. 17, 18. But see, *Consolidated Edison Company v. National Labor Relations Board*, (1938) 59 Sup. Ct. 206.

virtue of their economic necessities to acquiesce in the desires and wishes of the employer. Thus the employer attains the same ends reached by the ordinary type of open shop arrangement.

When the employer and his employees, or the employer and an outside union, do not see eye to eye, the usual results have been the strike and the lockout and their by-products, such as picketing, boycotts, blacklisting and many others. All men of good will like to think that the time will come when men will resolve their disputes in a manner more befitting a civilized people, but hoping so is not synonymous with fruition, and we must reconcile ourselves to the scene as it is, and deal with it accordingly.

THE RIGHT TO STRIKE

There is no longer any question that men may now organize themselves into labor unions for the purpose of obtaining the advantages that go with collective action as against individual action.¹² As a corollary to this right to organize there is also

¹²Hardie-Tynes Manufacturing Co. v. Cruse, (1914) 189 Ala. 66, 66 So. 657; Local Union No. 313, v. Stathakis, (1918) 135 Ark. 86, 205 S. W. 450; Paramount Enterprises v. Mitchell, (1932) 104 Fla. 407, 140 So. 328; McMichael v. Atlanta Envelope Co., (1921) 151 Ga. 776, 108 S. E. 226; Robinson v. Hotel & Restaurant Employees, Local No. 782, (1922) 35 Idaho 418, 207 Pac. 132; Carpenters' Union v. Citizens Committee, (1928) 333 Ill. 225, 164 N. E. 393; Schuster v. International Ass'n of Machinists, (1937) 293 Ill. App. 177, 199, 12 N. E. (2d) 50, ("... a single employee is helpless in dealing with his employer and ... labor unions were lawfully organized out of the necessities of the situation to carry out their legitimate objects of securing and maintaining fair wages and conditions of employment."); Hotel, Restaurant, etc., Local Union No. 181 v. Miller, (1938) 272 Ky. 471, 114 S. W. (2d) 501; Keith Theatre v. Vachon, (1936) 134 Me. 392, 187 Atl. 692; International Pocketbook Workers' Union v. Orlove, (1930) 158 Md. 496, 148 Atl. 826; Shinsky v. O'Neil, (1919) 232 Mass. 99, 121 N. E. 790; Beck v. Teamsters' Protective Union, (1898) 118 Mich. 497, 77 N. W. 13; Lohse Patent Door Co. v. Fuelle, (1908) 215 Mo. 421, 114 S. W. 997; State v. Employers of Labor, (1918) 102 Neb. 768, 169 N. W. 717; Cameron v. International Alliance, (1935) 118 N. J. Eq. 11, 176 Atl. 692; Willson & Adams Co. v. Pearce, (1929) 135 Misc. Rep. 426, 237 N. Y. S. 601; People v. Herbert, (1937) 162 Misc. Rep. 817, 819, 295 N. Y. S. 251; Perkins, Campbell & Co. v. Rogg, (1892) 28 Ohio L. Bull. 32, 11 Ohio Dec. Rep. 585; Longshore Printing & Publishing Co. v. Howell, (1894) 26 Or. 527, 38 Pa. St. 547; Kirmse v. Adler, (1933) 311 Pa. St. 78, 166 Atl. 566; Powers v. Journeymen Bricklayers' Union No. 3, (1914) 130 Tenn. 643, 172 S. W. 284; Sheehan v. Levy, (Tex. Civ. App. 1919), 215 S. W. 229; Iron Molders' Union No. 25, v. Allis-Chalmers Co., (C.C.A. 7th Cir. 1908) 166 Fed. 45; Great Northern Ry. Co. v. Local, (D. Mont. 1922) 283 Fed. 557, 561, (good discussion); State v. Stewart, (1887) 59 Vt. 273, 9 Atl. 559; Cole v. Commonwealth, (1937) 169 Va. 868, 193 S. E. 517; Pacific Coast Coal Co. v. Dist. No. 10 U. M. W. A., (1922) 122 Wash. 423, 210 Pac. 953; Parker Paint & Wall Paper Co. v. Local Union No. 813, (1921) 87 W. Va. 631, 105 S. E. 911; Trustees of Wisconsin State Fed. of Labor v. Simplex Shoe Mfg. Co., (1934) 215 Wis. 623, 256 N. W. 56.

Evening Times Printing & Publishing Co. v. American Newspaper Guild,

the right to strike, which, as an abstract right, is no longer denied to workers in any jurisdiction.¹³

A strike has been generally defined as "a concerted refusal to serve in an industry, either to assert a proposed right or to obtain an economic advantage."¹⁴ By the great weight of authority it has been held "that a strike only results where there is the relation of employer and employee; that is, a strike can only be said to exist where there is a trade dispute between the

(1937) 122 N. J. Eq. 545, 549, 195 Atl. 378, ("The right to organize is not only a legal right but it is a natural right—it is a God-given right which formed society and moulded governments.")

¹³Local Union No. 313, v. Stathakis, (1918) 135 Ark. 86, 205 S. W. 450; McMichael v. Atlanta Envelope Co., (1921) 151 Ga. 776, 108 S. E. 225; Robinson v. Hotel & Restaurant Employees, Local No. 782, (1922) 35 Idaho 418, 207 Pac. 132; Plant v. Woods, (1900) 175 Mass. 492, 505, 57 N. E. 1011 (dissenting opinion of Holmes, J.)

Olympia Operating Co. v. Costillo, (1932) 278 Mass. 125, 179 N. E. 804; Minnesota Stove Co. v. Cavanaugh, (1915) 131 Minn. 458, 155 N. W. 638; Bayonne Textile Corp. v. American Federation of S. Workers, (1933) 114 N. J. Eq. 307, 168 Atl. 799, (the court indicates that employees may lose their right to strike if the right to mediate is afforded); National Protective Ass'n etc., v. Cumming, (1902) 170 N. Y. 315, 321, 63 N. E. 369, (in which the right to strike is qualified by the proviso that "the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves."); Laundry Co. v. Dickson, (1923) 121 Misc. Rep. 416, 201 N. Y. S. 173; Hoster Brewing Co. v. Giblon, (1903) 1 Ohio N. P. (N.S.) 377, 14 Ohio Dec. N. P. 305; Kirmse v. Adler, (1933) 311 Pa. St. 78, 166 Atl. 566; Farmers' Loan & Trust Co. v. Northern Pacific RR. Co., (E. D. Wis. 1894) 60 Fed. 803, 821, (although this decision does not represent the views of the vast majority of the courts, it does indicate the bias under which some courts still labor); American Fed. of Labor v. Buck's Stove & Range Co., (1909) 33 App. D. C. 83, 114, ("The right of laboring men to organize into unions and the right of these unions to conduct peaceable strikes is justified because of their inability to compete single-handed in contests with their employers.")

¹⁴Birmingham Trust & Savings Co. v. Ry. Co., (N.D. Ga. 1921) 271 Fed. 743, 745. Other definitions of a strike may be found in, Kemp v. Division No. 241, (1912) 255 Ill. 313, 99 N. E. 389; Keith Theatre v. Vachon, (1936) 134 Me. 392, 187 Atl. 692; Picket v. Walsh, (1906) 192 Mass. 572, 78 N. E. 753; International Ticket Co. v. Wendrich, (1937) 122 N. J. Eq. 222, 193 Atl. 808; Albro J. Newton Co. v. Erickson, (1911) 70 Misc. Rep. 291, 126 N. Y. S. 949; The Hamilton Tailoring Co. v. Cincinnati Joint Board, (1935) 4 Ohio Opinions 295; Moreland Theatres Corp. v. Portland Moving Picture, etc., Union, (1932) 140 Or. 35, 47, 12 P. (2d) 333; Farmers' Loan & Trust Co. v. Northern Pacific R. Co., (E.D. Wis. 1894) 60 Fed. 803; Stephens v. Ohio State Telephone Co., (N.D. Ohio, 1917) 240 Fed. 759, (in which the court for all practical purposes limits the right to strike to the right to quit work.); Uden v. Schaefer, (1920) 110 Wash. 391, 188 Pac. 395; Birmingham Trust & Savings Co. v. Ry. Co., (N.D. Ga. 1921) 271 Fed. 743.

For definitions of a lockout and its distinction from a strike see, Restful Slipper Co. v. United Shoe & Leather Union, (1934) 116 N. J. Eq. 521, 524, 174 Atl. 543; Gill Engraving Co. v. Doerr, (S.D. N.Y. 1914) 214 Fed. 111, 118; Dail-Overland Co. v. Willys-Overland Co. Inc., (N.D. Ohio, 1919) 263 Fed. 171, 187. See also, concurring opinion of Grosscup, J., in Iron Molders' Union No. 125, v. Allis-Chalmers Co., C.C.A. 7th Cir. 1908) 166 Fed. 45, 52.

employer and his workmen."¹⁵ Many courts have confused this limitation of the right to strike with the definition of a labor dispute. It is essential, therefore, that a distinction be clearly made between a strike and a labor dispute. Every strike arises out of a labor dispute, but every labor dispute does not necessarily result in a strike. As a matter of fact, a strike may exist when there is no labor dispute between employer and employee. An example of this is the sympathetic strike.¹⁶

In discussing the right to strike, some courts have unequivocally stated that the lawfulness or unlawfulness of a strike does not depend upon its cause,—that workmen may strike with or without cause; and then they have immediately proceeded to examine the purpose of the strike in order to determine its lawfulness or lack of lawfulness.¹⁷ Other courts have held that the right to strike can be exercised only if the purpose is lawful and there is justification for the action taken.¹⁸ Strikes have

¹⁵*Park v. Hotel, etc., Employees*, (1919) 22 Ohio N. P. (N.S.) 257, 274, 30 Ohio Dec. (N.P.) 64. See also, *Philip Henrici Co. v. Alexander*, (1916) 198 Ill. App. 568; *Blandford v. Duthie*, (1925) 147 Md. 388, 128 Atl. 138; *Mlle. Reif, Inc. v. Randau*, (1937) 166 Misc. Rep. 247, 1 N. Y. S. (2d) 515; *Brown Son v. Mine Workers*, (1925) 25 Ohio N. P. (N.S.) 485; *Webb v. Cooks', Waiters' & Waitresses' Union No. 748*, (Tex. Civ. App. 1918), 205 S. W. 465.

¹⁶*Construction Co. v. St. Paul Bldg. Trades Council*, (1917) 136 Minn. 167, 170, 161 N. W. 520.

¹⁷*Kemp v. Division No. 241*, (1912) 255 Ill. 213, 223, 224, 99 N. E. 389. See also, *Rutan Co. v. Local Union No. 4*, (1925) 97 N. J. Eq. 77, 128 Atl. 622; *National Protective Ass'n of Steam Fitters, v. Cumming*, (1902) 170 N. Y. 315, 63 N. E. 369; *Allis-Chalmers Co. v. Iron Molders' Union No. 125*, (E.D. Wis. 1906) 150 Fed. 155, 171, ("The right to strike for any cause or no cause is clear . . . Even a conspiracy to strike, . . . is not unlawful if formed to better labor conditions.")

¹⁸For cases in which it is held that a strike may be legal or not, depending upon its purpose, see, *Keith Theatre v. Vachon*, (1936) 134 Me. 392, 187 Atl. 692; *Reynolds v. Davis*, (1908) 198 Mass. 294, 84 N. E. 457; *Wabash R. Co. v. Hannahan*, (E.D. Mo. 1903) 121 Fed. 563; *Barker Painting Co. v. Brotherhood of Painters*, (C.C.A. 3rd Cir., 1926) 15 F. (2d) 16, 17; *Delaware, L. & W. R. Co. v. Switchmen's Unions*, (W.D. N.Y. 1907) 158 Fed. 541, (employees may strike if they do so in good faith and peaceably); cf., *United Shoe Machinery Corp. v. Fitzgerald*, (1921) 237 Mass. 537, 130 N. E. 86, (where the purpose of the employer in requiring yellow-dog contracts with its employees was to weaken the influence of the union and impair its power to strike, was held valid.)

For cases in which it is held that whether any particular strike is lawful is a question of law, see, *Cornellier v. Haverhill Shoe Manufacturer's Ass'n*, (1915) 221 Mass. 554, 109 N. E. 643; *Bossert v. United Brotherhood, C. & J. of A.*, (1912) 77 Misc. Rep. 592, 599, 137 N. Y. S. 321.

Whether or not a strike is for a lawful purpose often turns upon the question of injury to the employer. On many occasions where the employer is suffering financially because of the strike, the courts have enjoined the strikers on the ground that the primary purpose of the strike was to injure the employer and not to benefit the strikers. A typical statement is found in *Rosen v. United Shoe & Leather Workers' Union*, (1936) 287 Ill. App.

been held lawful where the purpose of the striking employees was to obtain a concession from the employer in connection with a demand relating to terms and conditions of employment;¹⁹ to force the employer to abide by a contract made with the union of which the striking employees are members;²⁰ to force the employer to rectify a supposed injustice to one of his union employees;²¹ to force the employer to bargain collectively with them;²² to force the discharge of an employee who is not a member of the union to which the striking employees belong.²³ But the fact that a particular strike may have a lawful purpose does not necessarily prevent a court from outlawing it. Very

49, 55, 4 N. E. (2d) 507. But see, *Kemp v. Division No. 241*, (1912) 255 Ill. 213, 241, 99 N. E. 389, ("It is difficult to conceive of a strike without the damage to the parties involved in the dispute. The employees intend to deprive the employers of their labor, and prevent them from getting others to take their places. They intentionally inflict harm as a means of compelling the employers to yield to their demands.")

¹⁹*Local Union No. 313 v. Stathakis*, (1918) 135 Ark. 86, 205 S. W. 450; *L. D. Willcut & Sons Co. v. Bricklayers' Benevolent & P. U. No. 3*, (1908) 200 Mass. 110, 85 N. E. 897; *Gray v. Building Trades Council*, (1903) 91 Minn. 171, 97 N. W. 663; *Bayonne Textile Corp. v. American Fed. of Silk Workers*, (1934) 116 N. J. Eq. 146, 172 Atl. 551; *Carter v. Fortney*, (N.D. W. Va., 1909) 170 Fed. 463; *Iron Molders' Union No. 125, etc. v. Allis-Chalmers Co.*, (C.C.A. 7th Cir., 1908) 166 Fed. 45. See also, *Maisel v. Sigman* (1924), 123 Misc. Rep. 714, 723, 205 N. Y. S. 807.

²⁰*Preble v. Architectural, etc., Union*, (1931) 260 Ill. App. 435; *Smith v. Bowen*, (1919) 232 Mass. 106, 121 N. E. 814; *Spivak v. Wanofsky*, (1935) 155 Misc. Rep. 530, 278 N. Y. S. 562; *Roosevelt Amusement Corp. v. Empire State, etc., Union*, (1930) 144 Misc. Rep. 644, 258 N. Y. S. 240, (courts have also granted injunctions to employers to prevent a breach by the union of a contract between it and the employer.) See also, *Walton Lunch Co. v. Kearney*, (1920) 236 Mass. 310, 128 N. E. 429, (the court held lawful a strike called because the employer intentionally failed to keep an appointment with his employees to discuss an agreement for a closed shop.)

²¹*Pierce v. Stablemen's Union Local No. 8760*, (1909) 156 Cal. 70, 103 Pac. 324; *Machinery Co. v. Toohey*, (1921) 114 Misc. Rep. 185, 186 N. Y. S. 95. Contra: *Mechanics' Foundry & Machine Co. v. Lynch*, (1920) 236 Mass. 504, 128 N. E. 877; *Rutan Co. v. Local Union No. 4*, (1925) 97 N. J. Eq. 77, 128 Atl. 622.

²²*Bayonne Textile Corp. v. American Fed. of S. Workers*, (1934) 116 N. J. Eq. 146, 172 Atl. 551; *A. S. Beck Shoe Corp. v. Johnson*, (1934) 153 Misc. Rep. 363, 274 N. Y. S. 946; *El Paso Electric Co v. Elliot*, (W. D. Texas, 1936) 15 F. Supp. 81. Contra: *Folsom Engraving Co. v. McNeil*, (1920) 235 Mass. 269, 126 N. E. 479 (the court seems to be more concerned with the interference to the employer's business caused by a strike for the purpose of enforcing a demand for collective bargaining than with the right to bargain collectively.) See also, *Cook v. Wilson*, (1919) 108 Misc. Rep. 438, 178 N. Y. S. 463.

²³*Pierce v. Stablemen's Union Local No. 8760*, (1909) 156 Cal. 70, 103 Pac. 324; *Connors v. Connolly*, (1913) 86 Conn. 641, 86 Atl. 600, (although the means adopted to achieve the end were held unlawful); *Minasian v. Osborne*, (1911) 210 Mass. 250, 96 N. E. 1036; *Bansback v. Reiff*, (1914) 244 Pa. St. 559, 91 Atl. 224. Contra: *Kemp v. Division No. 241*, (1912) 255 Ill. 213, 99 N. E. 389; *New England Wood Heel Co. v. Nolan*, (1929) 268 Mass. 191, 167 N. E. 323.

often, in cases where the purpose of the strike is lawful, the courts will nevertheless make an inquiry as to the goodness or badness of the motives of the strikers.²⁴

An inquiry into the motives of the strikers is not always attended by satisfactory results. Unless motives are clearly expressed, or the actions of the strikers leave no reasonable doubt as to their motives (and neither of these is often the case), the court is treading upon dangerous ground when it attempts to delve into motivation. One of the results of the application of this test is that the reports are filled with cases in which the courts have decided strike cases in accordance with their personal economic and social predilections, and not upon the facts.²⁵ Whenever a court adopts a test which allows it a wide leeway in the introduction of its own economic and social views into the questions before it, the chances of a just result being reached are impaired. What may or may not be the motive or motives of the strikers is, in nearly all cases, a matter which borders on the nebulous. Unless the strikers expressly state what their motives are, a court must resort to conjecture, and this conjecture is usually based upon the results of the strikers' actions. What may be a good motive to one court may be a sinister motive to another.²⁶ Such a test can lead and has led to confusion and injustice. By far the better view, although it represents the minority, is that "the motive actuating a strike, or the withdrawal of men from employment, is immaterial."²⁷

²⁴*Jetton-Dekle Lumber Co. v. Mather*, (1907) 53 Fla. 969, 43 So. 590; *Michaels v. Hillman*, (1920) 112 Misc. Rep. 112, 183 N. Y. S. 195. See also, *Kemp v. Division No. 241*, (1912) 255 Ill. 213, 240, 99 N. E. 389; *Hughes v. Kansas City Motion Picture M. O. Local No. 170*, (1920) 282 Mo. 304, 318, 221 S. W. 95; *Barr v. Essex Trades Council*, (1894) 53 N. J. Eq. 101 30 Atl. 881.

²⁵*United Shoe Machinery Corp. v. Fitzgerald*, (1921) 237 Mass. 537, 541, 130 N. E. 86. See also, *Plant v. Woods*, (1900) 176 Mass. 492, 57 N. E. 1011; cf., majority and minority opinions; *Roraback v. Motion Picture Machine Operators' Union*, (1918) 140 Minn. 481, 168 N. W. 766; *Grimes v. Durmin* (1921) 80 N. H. 145, 114 Atl. 273; cf., *Four Plating Co. v. Mako*, (1937) 122 N. J. Eq. 298, 194 Atl. 53; *Webb v. Cooks', Waiters', & Waitresses' Union No. 748*, (Tex. Civ. App. 1918) 205 S. W. 465; *In re, Higgins* (N.D. Tex. 1886) 27 Fed. 443.

²⁶Compare majority and minority opinions in *Pacific Typesetting Co. v. International Typo. Union*, (1923) 125 Wash. 273, 216 Pac. 358; compare, *Machinery Co. v. Toohey*, (1921) 114 Misc. Rep. 185, 186 N. Y. S. 95; and *Hotel & Railroad News Co. v. Lowenthal*, (1922) 243 Mass. 317, 137 N. E. 534.

²⁷*Greenwood v. Building Trades Council of Sacramento*, (1925) 71 Cal. App. 159, 169, 233 Pac. 823. See also, *Carpenters' Union v. Citizens' Committee*, (1928) 333 Ill. 225, 164 N. E. 393; *Saulsberry v. Coopers' International Union*, (1912) 147 Ky. 170, 143 S. W. 1018; *Burke v. Fay*, (1908) 128 Mo. App. 690, 1070 S. W. 408; *Graves v. McNulty*, (1912) 13 Ohio N. P.

The terms, "justification" and "motive," are sometimes used interchangeably by the courts, although there is a very real distinction. As in the case of the test of motives, so in considering the question of justification, a court is almost forced to interpret the social and economic views of the disputants in terms of its own social and economic views in order to arrive at its conclusion. While the test of justification is not as indefinite as the test of motive, nevertheless it leaves some doubt that the end result may not have been colored by the bias and prejudices of the court.²⁸ A court ought not to allow itself to be consciously placed in such a position. A lawful justification has been defined as a "bona fide exercise of some right."²⁹ In some jurisdictions justification has been related to self-interest, but this self-interest must not be too remote.³⁰ The vagueness of the terminology used is symptomatic of the weakness of the whole theory of justification in this connection. What is a bona fide exercise of a right and what is self-interest? It has been held that these are questions of law for the court to decide.³¹ Too often the degree of effectiveness of the strike has affected the decision.³²

(N.S.) 110, 22 Ohio Dec. N. P. 425; *Parker v. The Bricklayers' Union No. 1*, (1839) 21 Ohio Law Bull. 223, 226, 10 Ohio Dec. Rep. 458; *Union Pacific R. Co. v. Reuf*, (D. Neb. 1902) 120 Fed. 102; cf., *Plant v. Woods*, (1900) 176 Mass. 492, 499, 57 N. E. 1011. See, *Alfred W. Booth & Bro. v. Burgess*, (1906) 72 N. J. Eq. 181, 199, 65 Atl. 226, ("Whatever definition of malice may be laid down, the weakness of these broad generalizations in my judgment lies in the fact that they are practically useless.")

An attitude similar to that expressed in the cases above has often been adopted by the courts in regard to the right of an employer to discharge his employees. *Harmon v. United Mine Workers*, (1924) 166 Ark. 255, 258, 266 S. W. 84.

²⁸*Carlson v. Carpenter Contractors' Ass'n*, (1912) 305 Ill. 331, 137 N. E. 222; *Yankee Network v. Gibbs*, (Mass. 1936) 3 N. E. (2d) 228; *George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n*, (1911) 77 N. J. Eq. 219, 79 Atl. 262; *Welinsky v. Hillman*, (App. Div. 1920) 185 N. Y. S. 257; *M. & M. Wood Working Co., Inc. v. Plywood & Veneer Workers*, (D. Or. 1938) 23 F. Supp. 11, 17. See, however, the dissenting opinion of Holmes, J., on the question of jurisdiction in *Vegeahn v. Guntner*, (1896) 167 Mass. 92, 44 N. E. 1077. See also, *Scofes v. Helmar*, (1933) 205 Ind. 596, 187 N. E. 662.

²⁹*Moreland Theatres Corp. v. Portland Moving Picture, etc., Union* (1932) 140 Or. 35, 12 P. (2d) 333; *Kemp v. Division No. 241*, (1912) 255 Ill. 213, 239, 99 N. E. 389; *Minasian v. Osborne*, (1911) 210 Mass. 250, 96 N. E. 1036; *Driver v. Smith*, (1918) 89 N. J. Eq. 339, 104 Atl. 717; *Exchange Bakery & Restaurant, Inc. v. Rifkin*, (1927) 245 N. Y. 260, 157 N. E. 130; *Brewing Co. v. International Union*, (1911) 12 Ohio N. P. (N.S.) 257, 24 Ohio Dec. N. P. 102; *Mangum Electric Co. v. Border*, (1923) 101 Okla. 64, 222 Pac. 1002, (not a labor relations case).

³⁰*United Chain Theatres v. Philadelphia, etc., Union*, (E. D. Pa., 1931) 50 F. (2d) 189; Dissenting opinion of Brandeis, J., in *Duplex Co. v. Deering*, (1921) 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349.

³¹*Minasian v. Osborne*, (1911) 210 Mass. 250, 96 N. E. 1036.

³²*Folsom v. Lewis*, (1911) 208 Mass. 336, 338, 94 N. E. 316; *Connett*

Although a strike may be called lawfully, it may, nevertheless, run afoul of the law because of the means and methods by which it is conducted. It is generally held that strikers may "use such means to render a strike effective as are not in themselves unlawful or inconsistent with the rights of others."³³ These means must be free from malicious falsehood, deceit, defamation, malice, duress, force, intimidation, or actual injury to the property of the employer.³⁴ Furthermore, the strikers must not obstruct the means of ingress and egress to the property or business of the complainant.³⁵ There has also been a general insistence on peace-

v. *United Hatters of North America*, (1909) 76 N. J. Eq. 202, 208, 74 Atl. 188.

³³*Fulforth Co. v. Garment Workers*, (1913) 15 Ohio N. P. (N.S.) 353, 359, 27 Ohio Dec. 675; *Minnesota Stove Co. v. Cavanaugh*, (1915) 131 Minn. 458, 155 N. W. 638; *Rogers v. Evarts*, (1894) 17 N. Y. S. 264; *Blumauer v. Portland Moving Picture Machine Operators*, (1933) 141 Or. 399, 17 Pac. (2d) 1115; *Interborough Rapid Transit Co. v. Lavin*, (1928) 247 N. Y. 65, 159 N. E. 863; *Kirmse v. Adler*, (1933) 311 Pa. St. 78, 166 Atl. 566; *Iron Molders' Union No. 125 v. Allis-Chalmers Co.*, (C.C.A. 7th Cir. 1908) 166 Fed. 45. See also, *Perkins, Campbell & Co. v. Rogg*, (1892) 28 Ohio Law Bull. 32, 11 Ohio Dec. Rep. 458; *Langenberg Hat Co. v. United Cloth Hat & Cap Makers*, (E.D. Mo. 1920) 266 Fed. 127, 129, (the court lays down the rule that the test of what means and methods striking employees may lawfully adopt is: "Would any ordinary citizen be permitted to do the acts complained of in this case if no strike, or labor dispute existed?") It is submitted that what men do in normal circumstances is not a valid test of what they may do in times of stress. To require the standard which this court lays down is to disregard the situation that actually exists and would, if generally adopted, prevent effective action by workers); *Parker Paint & Wall Paper Co. v. Local Union No. 813*, (1921) 87 W. Va. 631, 639, 105 S. E. 911.

Whether the means adopted are unreasonable, that is, opposed to public policy is a question of law for the court. *Connors v. Connolly*, (1913) 86 Conn. 641, 86 Atl. 600.

³⁴*Paramount Enterprises v. Mitchell*, (1932) 105 Fla. 407, 140 So. 328; *McMichael v. Atlanta Envelope Co.*, (1921) 151 Ga. 776, 108 S. E. 226; *Robison v. Hotel & Restaurant Employees, Local No. 782*, (1922) 35 Idaho 418, 207 Pac. 132; *Olympia Operating Co. v. Costello*, (1932) 278 Mass. 135, 179 N. E. 804 (in this case an injunction was granted against picketing because of false statements made by strikers and which the court held was an unlawful means of conducting the strike. It would seem that the court went further than it was justified in going. The court could have enjoined the use of the false placards and allowed the picketing to continue but it is possible that the court was influenced by the fact that the picketing had materially reduced the business of the employer); *Bossert v. Dhuy*, (1917) 221 N. Y. 342, 117 N. E. 582; *Citizens' Co. v. Asheville Typographical Union*, (1924) 187 N. C. 42, 121 S. E. 31; *Local Branch v. Solt*, (1918) 8 Ohio App. 437, 28 Ohio C. C. 501; *Jefferson v. Indiana Coal Co. v. Marks*, (1926) 287 Pa. St. 171, 134 Atl. 430; *Stephens v. Ohio State Telephone Co.*, (N.D. Ohio, 1917) 240 Fed. 759.

In, *Connett v. United Hatters of North America*, (1909) 76 N. J. Eq. 202, 74 Atl. 188, the court held that it would take judicial notice of the fact that a strike has been attended by riot, mobs, etc., for six months last past.

³⁵*Ossey v. Retail Clerks' Union*, (1927) 326 Ill. 405, 158 N. E. 162; *Ex parte Heffron*, (1914) 179 Mo. App. 639, 162 S. W. 652; *Kenffel &*

ful tactics.³⁶ The difficulty with this last requirement is that a strike is generally the culmination of a difference of opinion between the employer and his employees and tempers are at the straining point. It is a time of passionate crisis. To require of the striker the conduct of a gentleman engaged in an abstract discussion at his club is to misunderstand the situation that actually exists.³⁷

Undoubtedly such things as malicious falsehood, deceit, violence and acts of a similar nature ought not to be condoned. It is perfectly possible to conduct the most heated argument or dispute without resorting to means which are unfair and which may result in an unfavorable public opinion. The reported cases vary widely in their definitions as to what constitutes an unlawful act, as to when an unlawful act becomes inconsistent with the rights of others, and as to what constitutes coercion and intimidation. Here again the courts fall into the error of using vague and indefinite terms. In fact, this very indefiniteness has brought about a situation in which every labor dispute is an experiment in method which may or may not meet the approval of the court.

Some courts have placed a further limitation upon the right to strike. It has been held that if union employees are bound by contract for a definite period of time, neither they nor the union may call a strike until the expiration of the contract of employment, unless the employer has violated the contract.³⁸ This would

Esser v. International Ass'n of Machinists, (1922) 93 N. J. Eq. 429, 116 Atl. 9; Exchange Bakery & Restaurant, Inc. v. Rifkin, (1927) 245 N. Y. 260, 157 N. E. 130; Remington Rand v. Crofott, (1936) 248 App. Div. 356, 289 N. Y. S. 1025; Heitkemper v. Central Labor Council, (1920) 99 Or. 1, 192 Pac. 765; Mackall v. Ratchford, (D.W. Va. 1897) 82 Fed. 41; American Steel & Wire Co. v. Wire Drawers', etc., Unions, (N.D. Ohio, 1898) 90 Fed. 608.

³⁶Southern California Iron & Steel Co. v. Amalgamated Ass'n, (1921) 186 Cal. 604, 200 Pac. 1; Clemitt v. Watson, (1895) 14 Ind. App. 38, 42 N. E. 367; Aberon Bakery Co. v. Raimist, (1931) 141 Misc. Rep. 774, 254 N. Y. S. 38; Hoster Brewing Co. v. Giblon, (1903) 1 Ohio N. P. (N.S.) 377, 14 Ohio Dec. N. P. 305; In re, Sweitzer, (1917) 13 Okla. Cr. 154, 162 Pac. 1134; Pennsylvania Mining Co. v. United Mine Workers, (C.C.A. 8th Cir. 1928) 28 Fed. (2d) 851; Pacific Coast Coal Co. v. Dist. No. 10, U. M. W. A., (1922) 122 Wash. 423, 210 Pac. 953.

³⁷Machinery Co. v. Toohey, (1921) 114 Misc. Rep. 185, 186 N. Y. S. 95; Great Northern Railway Co. v. Brosseau, (D.N.D. 1923) 286 Fed. 414.

³⁸Hardie-Tynes Mfg. Co. v. Cruse, (1914) 189 Ala. 66, 66 So. 657; Pierce v. Stablemen's Union Local No. 8760, (1909) 156 Cal. 70, 103 Pac. 324; Paramount Enterprises v. Mitchell, (1932) 104 Fla. 407, 140 So. 328; Burgess v. Georgia, F. & A. Ry. Co., (1918) 148 Ga. 415, 96 S. E. 864; Carpenters' Union v. Citizens Committee, (1928) 333 Ill. 225, 164 N. E. 393; Folsom v. Lewis, (1911) 208 Mass. 336, 94 N. E. 316; Lohse Patent Door Co. v. Fuelle, (1908) 215 Mo. 421, 114 S. W. 997; Rutan Co. v. Local

seem to be sound. If contracts of employment are to be effective instruments of industrial peace, they ought to receive the fullest protection by the courts. However, where there is no existing contract

"it is within the power of labor unions, and it is lawful for them to instruct or order their members not to accept employment with an individual, or to continue in such persons' employment, where the action of the union is justifiable in the sense that it is to promote the welfare of the members of the union."³⁹

Picketing by striking employees frequently has been enjoined because the strike was called while their contracts of employment were still operative.⁴⁰ The reason given by the courts which adopt this position is that "individuals may work for whom they please,

Union No. 4, (1925) 97 N. J. Eq. 77, 128 Atl. 622; Spivak v. Wankofsky, (1935) 155 Misc. Rep. 530, 278 N. Y. S. 562.

See, Birmingham Trust & Savings Co. v. Ry. Co., (N.D. Ga., 1921) 271 Fed. 743, 744; Delaware, L. & W. R. Co. v. Switchmen's Union, (W.D. N.Y. 1907) 158 Fed. 541, (held that if union officials try to have the members of the union break their contracts of employment or urge them to leave their employment, such action may be enjoined but if the workmen themselves upon their own individual responsibility desire to breach their contract and quit because of alleged grievances or any other reason, they may do so); cf., F. C. Church Shoe Co. v. Turner, (1926) 218 Mo. App. 516, 279 S. W. 232; Kemp v. Division No. 241, (1912) 255 Ill. 213, 99 N. E. 389; Clemitt v. Watson, (1895) 14 Ind. App. 38, 42 N. E. 367; Lundoff-Bicknell Co. v. Smith, (1927) 24 Ohio App. 294, 156 N. E. 243.

See also, La France Co. v. Electrical Workers, (1923) 108 Oh. St. 61, 85, 89, 140 N. E. 899. Cf., Schwartz v. Driscoll, (1922) 217 Mich. 384, 186 N. W. 522, (the court indicates that apparently the obligations which are imposed upon employees and labor unions are not always imposed upon employers.) But see, Robison v. Hotel & Restaurant Employees, Local No. 782, (1922) 35 Idaho 418, 207 Pac. 132; Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n, (1899) 59 N. J. Eq. 49, 46 Atl. 208; Boyer v. Western Union Tel. Co., (E.D. Mo. 1903) 124 Fed. 245.

See also, Laundry Co. v. Dickson, (1923) 121 Misc. Rep. 416, 419, 201 N. Y. S. 173; Feller v. Local 144 International L. G. W. Union, (1937) 121 N. J. Eq. 452, 455, 191 Atl. 111, (undertakes to explain the basis for the rule laid down in Laundry Co. v. Dickson, (1923) 121 Misc. Rep. 416, 201 N. Y. S. 173); Knudson v. Benn, (D. Minn. 1903) 123 Fed. 636, 638.

³⁹Seymour Ruff & Sons v. Bricklayers', etc., Union, (1933) 163 Md. 687, 700, 164 Atl. 752. Exchange Bakery & Restaurant, Inc. v. Rifkin, (1927) 245 N. Y. 260, 157 N. E. 130; Local Branch v. Solt, (1918) 8 Ohio App. 437, 28 Ohio C. C. 501.

In Rosenwasser Bros. v. Pepper, (1918) 104 Misc. Rep. 457, 574, 172 N. Y. S. 310, the court qualified the right of a union to advise its members to strike for any cause when the nation is at war on the ground that "the life of our nation is dependent upon an uninterrupted production of those things needed to successfully carry on the war in which our country is engaged."

Truax v. Bisbee Local No. 380, (1918) 19 Ariz. 379, 171 Pac. 121. Contra: Farmers' Loan & Trust Co. v. Northern Pac. R. Co., (E. D. Wis. 1894) 60 Fed. 803.

⁴⁰Hughes v. Kansas City Motion Picture M. O. Local No. 170, (1920) 282 Mo. 304, 221 S. W. 95; Rosenwasser Bros. v. Pepper, (1918) 104 Misc. Rep. 457, 172 N. Y. S. 310.

and quit work when they please, provided they do not violate their contract of employment."⁴¹ While the language used by these courts would seem to indicate that the employee under contract for a definite term to his employer cannot leave before the expiration of that term except where the employer has himself violated the contract, in actual practice it has meant that these employees may leave their employment but they may not picket the plant of their employer or interfere in any way with the operation of his business.⁴²

THE STATUS OF A STRIKING EMPLOYEE

Many of the rights of strikers revolve about the status of the striker and the employer. If the view is adopted that the strikers lose their status as employees or even as striking employees as soon as they go on a strike, then they become strangers to the employer, with the result that they have no "legal interest or concern in the company and its new employees."⁴³ Thus, having no interest in the employer's business, they have no right to interfere in any way. The handicap thus imposed upon the striking employees by this view seriously impedes, or altogether destroys, the effectiveness of the concerted action undertaken by them. The more recent and the better view is that employees may strike and not lose their status as employees.⁴⁴ Courts which maintain

⁴¹Cohn v. Roth Electric Co. v. Bricklayers Union, (1917) 92 Conn. 161, 165, 101 Atl. 659.

⁴²Jensen v. Cooks' & Waiters' Union, (1905) 39 Wash. 531, 81 Pac. 1069.

⁴³Goldfield Consolidated Mines Co. v. Goldfield Miners' Union, (D. Nev. 1908) 159 Fed. 500, 519. See also, Hoster Brewing Co. v. Giblon, (1903) 1 Ohio N. P. (N.S.) 377, 14 Ohio Dec. N. P. 305; Fulforth Co. v. Garment Workers, (1913) 15 Ohio N. P. (N.S.) 353, 27 Ohio Dec. N. P. 675, (the court applied the same rule to employees on strike and employees who had been locked out); Birmingham Trust & Savings Co. v. Ry. Co., (N.D. Ga. 1921) 271 Fed. 743, (this federal case no longer represents the point of view of the federal courts on this point since the adoption of the Wagner Labor Relations Act, but serves to illustrate the view still held by some courts.)

In the following cases the strikers were referred to as former employees but no effort was made to deny them the right to continue the strike as long as their methods and purposes were lawful. Jones v. Maher, (1909) 62 Misc. Rep. 388, 116 N. Y. S. 180; Statler Co. v. Employees' Alliance, (1914) 19 Ohio N. P. (N.S.) 375, 27 Ohio Dec. N. P. 178. Contra: Knudson v. Benn, (D. Minn. 1903) 123 Fed. 636; Southern Ry. Co. v. Machinists' Local Union, (W. D. Tenn. 1901) 111 Fed. 49.

Many of the courts which hold that an employee who goes on strike thereby severs all connection with the employers and is to be treated as a total stranger for some unaccountable reason, allow these "strangers" the right to picket, although this right is denied to other "strangers" who have never been employed by the particular employer.

⁴⁴State v. Personett, (1923) 114 Kan. 680, 220 Pac. 520; Keith Theatre v. Vachon, (1932) 134 Me. 392, 187 Atl. 692; Farmers' Loan & Trust Co.

this position concede that strikers do have an interest in the employer's business and that their efforts to solve the differences between themselves and their employer do not constitute meddling or unwarranted interference with that business.

It is obvious that the practical differences between these two views are considerable. Some courts have preferred to refer to the status of strikers as that of striking employees.⁴⁵ The end result, however, is the same whether the strikers are considered employees or striking employees. Regardless of whether or not the striking worker is considered as remaining an employee in every sense of the word or as acquiring the special status of striking employee, it is definitely certain that when he goes on strike there is no intention on his part of renouncing definitively his employment. His purpose is to hasten the solution of his differences with his employer. To construe such an action by the employee as a final and complete severance of relations is completely to misunderstand the real situation.⁴⁶ Under the Wagner Labor Relations Act, the Supreme Court of the United States has held that strikers remain employees for the remedial purposes specified in the Act. How long this relationship continues is not made clear.⁴⁷

How long the status of "striking employee" should continue is a question that is difficult to answer definitely. Certainly the

v. Northern Pacific R. Co., (E. D. Wis. 1894) 60 Fed. 803; Jeffrey-De Witt Insulator Co. v. National Labor Relations Board, (C.C.A. 4th Cir. 1937) 91 F. (2d) 134.

⁴⁵Restful Slipper Co. v. United Shoe & Leather Union, (1934) 116 N. J. Eq. 521, 174 Atl. 543; Iron Molders' Union No. 125, etc. v. Allis-Chalmers Co., (C.C.A. 7th Cir. 1908) 166 Fed. 45; Michaelson v. United States, (C.C.A. 7th Cir. 1923) 291 Fed. 940; National Labor Relations Board v. Carlisle Lumber Co., (C.C.A. 9th Cir. 1937) 94 F. (2d) 138. In the Michaelson case, *supra*, it was held that employees who are locked out by their employer do not, on that account, lose their status as employees.

⁴⁶State v. Personett, (1923) 114 Kan. 680, 220 Pac. 520; Restful Slipper Co. v. United Shoe & Leather Union, (1934) 116 N. J. Eq. 521, 174 Atl. 543; La France Co. v. Electrical Workers, (1923) 108 Oh. St. 61, 140 N. E. 899; Farmers' Loan & Trust Co. v. Northern Pacific R. Co., (E. D. Wis. 1894) 60 Fed. 803. The same reasoning which has been applied to the case of a strike has been applied to a lockout. The rule in one case ought to be the same as in the other. There is no essential difference except that in the one case the employees take the initiative and in the other case the employer is the actor. See the opinion of Grosscup, J., in, Iron Molders' Union No. 135, etc. v. Allis-Chalmers Co., (C.C.A. 7th Cir. 1908) 116 Fed. 45, 52.

⁴⁷National Labor Relations Board v. Mackay Radio & Telegraph Co., (1938) 304 U. S. 333, 58 Sup. Ct. 904, 82 L. Ed. 861; Black Diamond Steamship Corp. v. National Labor Relations Board, (C.C.A. 2nd Cir. 1938) 94 F. (2d) 875. Cf., M. & M. Wood Working Co., Inc. v. Plywood & Veneer Workers, (D. Or., 1938) 23 F. Supp. 11, 20, for an interpretation in connection with the Norris-La Guardia Anti-Injunction Act.

status can be said to have changed when the strikers have obtained regular and substantially equivalent employment elsewhere, or have ceased to be interested in being actively employed by the employer against whom they went on strike.⁴⁸ The mere fact, however, that strikebreakers or other workmen have been engaged to take the places of the strikers should not be considered as changing the relationship, neither should the passage of a considerable period of time, or the operation of the plant with a full complement of employees, be held to effect a change.⁴⁹

SYMPATHETIC AND SIT-DOWN STRIKES

There are two special types of strikes that ought to be considered at this point. These are the sympathetic strike and the sit-down strike. The so-called sympathetic strike has been employed upon a number of occasions by trade unions as an effective means of forcing a conclusion to a labor dispute in which the strikers do not have a primary interest. It consists of a strike by workers not directly affected by the principal strike, and who have no dispute with their employer, as an aid to the principal strikers.⁵⁰ The courts have not generally looked with favor upon such a strike.⁵¹ The test which is usually applied is

"the extent to which those who co-operate have in point of fact a common interest, and are justified in what they do by honest motives to advance self-interest, as opposed to malicious intent to injure the business or good will of another."⁵²

⁴⁸*Mooresville Cotton Mills, Inc. v. National Labor Relations Board*, (C.C.A. 4th Cir. 1938) 94 F. (2d) 61.

⁴⁹*Moreland Theatres Corp. v. Portland Moving Pictures, etc., Union*, (1932) 140 Or. 35, 12 P. (2d) 333, (dissenting opinion of Belt, J.); *Jeffrey-De Witt Insulator Co. v. National Labor Relations Board*, (C.C.A. 4th Cir. 1937) 91 F. (2d) 134. But see, *Moore Drop Forging Co. v. McCarthy*, (1923) 243 Mass. 554, 137 N. E. 919; *Mode Novelty Co. v. Taylor*, (1937) 122 N. J. Eq. 593, 195 Atl. 810, (the plant was operating normally; therefore the strikers were held to have no further interest in the matter); *Yates Hotel Co. v. Meyers*, (1922) 195 N. Y. S. 558, (the court held the strikers were no longer employees where the strike had lasted for more than a year and the places of the strikers had been filled to the satisfaction of the employer); *Moreland Theatres Corp. v. Portland Moving Picture, etc., Union*, (1932) 140 Or. 35, 12 P. (2d) 333; *Birmingham Trust & Savings Co. v. Ry. Co.*, (N.D. Ga. 1921) 271 Fed. 743; *Waitresses' Union, Local No. 249 v. Benish Restaurant Co. Inc.*, (C.C.A. 8th Cir. 1935) 6 F. (2d) 568; Dissenting opinion in *Jeffrey-De Witt Insulator Co. v. National Labor Relations Board*, (C.C.A. 4th Cir. 1937) 91 F. (2d) 134.

⁵⁰"A strike in which the strikers made no demands on their own employers, but try to bring pressure against the employers of other workers on strike." Webster's, *New International Dictionary* (2d ed. 1935) 2556.

⁵¹*Reynolds v. Davis*, (1908) 198 Mass. 294, 84 N. E. 457; *Foster v. Retail Clerks' International Protective Ass'n*, (1902) 39 Misc. Rep. 48, 55, 78 N. Y. S. 860; *Public Baking Co. v. Stern*, (1926) 127 Misc. Rep. 229, 215 N. Y. S. 537.

⁵²*Aeolian Co. v. Fischer*, (S.D. N.Y., 1928) 27 F. (2d) 560, 564.

The test of common interest does not impose impossible conditions but the tests of motive and malicious intent to injure are so vague as to leave much too broad a field of action to the court. They are an invitation to the court to declare unlawful whatever may not meet with its personal approval. Bad motives and malicious intent can be read into almost any action, especially when that action is part and parcel of a contest that is bound to cause incidental damage, at least, to property and property rights. Even if the test of common interest alone is imposed, a court should nevertheless exercise considerable care in distinguishing between the facts and its personal views. Every worker has a definite interest in the well being of every other worker. A reduction or lag in the labor standards of one group of workers will eventually affect the standards of all groups regardless of whether or not they may be employed in the same industry or be members of the same craft. This was clearly proved in the late depression. Therefore, the active support of workers for each other, even by means of a sympathetic strike, should not be disparaged so long as violence or acts directly conducive to violence are not indulged in.⁵³

The sit-down strike is of recent origin. A sit-down strike occurs when the employers forcibly take and remain in physical possession of the plant in which they have been working and attempt by this means to force the employer to terms. The slow-up strike is a similar method of bringing to a head a dispute between the employees and their employer. In this type of strike the employees continue to work but do so at such a slow pace as to reduce production to an unprofitable basis. Both of these methods have been held unlawful by the courts, and rightfully so.⁵⁴ While it is true that an employee has more than a casual interest in his employer's business, it is also true that his interest does not approximate the right to appropriate, without permission, that business or the physical plant in which it is conducted. Our present economic system does not admit that an employee has such an

⁵³Rutan Co. v. Local Union No. 4, etc., (1925) 97 N. J. Eq. 77, 128 Atl. 622. But cf., Duplex Co. v. Deering, (1921) 254 U. S. 443, 474, 41 Sup. Ct. 172, 65 L. Ed. 349.

⁵⁴Ohio Leather Co. v. De Chant, (1937) 8 Ohio Opinions 31, 24 Ohio L. Abs. 187; Welch v. State, (Ala. App. 1938) 183 So. 886; Apex Hosiery Co. v. Leader, (C.C.A. 3d Cir. 1937) 90 F. (2d) 155; Fansteel Metallurgical Corp. v. Lodge 66, (1938) 295 Ill. App. 323, 14 N. E. (2d) 991; Cf. Houston Funeral Home v. Boe, (Tex. Civ. App. 1934) 78 S. W. (2d) 1091, in which the court held that injunction is not a remedy which can be used for the purpose of recovering possession of property. However, it should be noted that this case did not involve a labor controversy.

interest which would permit him to take this step. Likewise in the case of the slow-up, the employer is entitled to receive the amount of work he has bargained for. If the employees feel aggrieved, there are a number of steps they can take which are both effective and sanctioned. To continue to report for work and then to shirk that work is to weaken their case in the eyes of both the public and the courts. Such conduct indicates that the very employees who are complaining of unfair treatment at the hands of their employer have themselves adopted the tactics of unfair treatment.

The sit-down strike situation has been best summed up in *Ohio Leather Co. v. De Chant*, in which the court said,

"Can it be said that the positions of employment of the defendants carry with them the right to possession of their employer's plant?"

"Manifestly the defendants have no vested claim to the plant, nor to the right to occupy it because they had jobs therein.

"Their positions of employment do not carry with them the right to property in which they work; and they are asserting a property right as against the plaintiff when they possess the property.

"Ownership of property, without the right of possession thereof, is an empty sham."⁵⁵

We have already noted that there is no longer any doubt of the right of employees to organize into labor unions or similar organizations. That they may organize for the purpose of improving their condition by collective bargaining is now universally conceded. But there is a wide divergence of opinion between the right to organize and (1) the validity of the means to be adopted in obtaining the improved condition and (2) the legitimacy of the ends sought.

PICKETING

The commonest and, apparently, one of the most effective means of concluding a labor dispute with the employer, is the use of pickets. For a long time a number of jurisdictions barred picketing in connection with labor controversies, on the ground that peaceful picketing is a contradiction in terms because picketing is always coercive, and coercion is the sole reason for its use. The fact that the picketing in any particular instance was actually peaceful made no difference—it was still coercive and, therefore, not peaceful.⁵⁶ In those jurisdictions in which picketing

⁵⁵(1937) 8 Ohio Opinions 31, 32, 24 Ohio L. Abs. 187.

⁵⁶*A. R. Barnes & Co. v. Chicago Typographical Union No. 16*, (1908)

has been allowed, it has been allowed when it is peacefully conducted.⁵⁷ Of course, what is peaceful picketing is subject to

232 Ill. 424, 83 N. E. 940, (since reversed by a statute legalizing picketing. It is strange how the spectres conjured up by some courts fail to materialize. None of the dire consequences predicted by this court if picketing were allowed, have come to pass since the statute legalizing picketing was adopted); *Clarage v. Lumphringer*, (1918) 202 Mich. 612, 168 N. W. 440; *Schwartz v. Cigar Makers International Union*, (1922) 219 Mich. 589, 189 N. W. 55; *Baldwin Lumber Co. v. Local No. 560*, (1920) 91 N. J. Eq. 240, 109 Atl. 147, (this case does not represent the view of the New Jersey courts today but it does state the position of those courts which still frown upon picketing); *Heitkemper v. Central Labor Council*, (1920) 99 Or. 1, 192 Pac. 765, (in which picketing held unlawful, even though peaceable, where the controversy is not between employer and employee. Cf., dissenting opinion, and see also, recent Oregon legislation); *Phillips S. & T. P. Co. v. Amalgamated Ass'n of I. S. & T. W.*, (S.D. Ohio, 1913) 208 Fed. 335, 338; *Danz v. American Fed. of Musicians, Local 76*, (1925) 133 Wash. 186, 233 Pac. 630, (however, this ruling has been changed by statute; see, chap. 7, Laws Ex. Sess. 1933); *Sterling Chain Theatres v. Central Labor Council*, (1930) 155 Wash. 217, 283 Pac. 1081, (a man carrying a banner one hundred or more feet away from the place of business of the employer was held to be a disseminator of information but not a picket). Cf., these cases with *Forstmann & Huffmann Co. v. United Front C. of T. Workers*, (1926) 99 N. J. Eq. 230, 234, 133 Atl. 202, (in which there is a very fine statement with reference to the question of the right to picket, which all courts would do well to study).

⁵⁷*Jones v. E. Van Winkle Gin & Machine Works*, (1908) 131 Ga. 336, 62 S. E. 236; *Scofes v. Helmar*, (1933) 205 Ind. 596, 187 N. E. 662; *Music Hall Theatre v. Moving Picture M. O. Local No. 165*, (1933) 249 Ky. 639, 61 S. W. (2d) 283; *Berry Foundry Co. v. International Moulders' Union*, (1914) 177 Mo. App. 84, 164 S. W. 245; *Empire Theatre Co. v. Cloke*, (1917) 53 Mont. 183, 163 Pac. 107; *Connett v. United Hatters of North America*, (1909) 76 N. J. Eq. 202, 74 Atl. 188; *Keuffel & Esser v. International Ass'n of Machinists*, (1922) 93 N. J. Eq. 429, 431, 116 Atl. 9; *International Ticket Co. v. Wendrich*, (1937) 122 N. J. Eq. 222, 193 Atl. 808; *Goldfinger v. Feintuch*, (1937) 276 N. Y. 281, 285, 11 N. E. (2d) 910; *Citizens' Co. v. Asheville Typographical Union*, (1924) 187 N. C. 42, 121 S. E. 31; *Fulforth Co. v. Garment Workers*, (1913) 15 Ohio N. P. (N.S.) 353, 27 Ohio Dec. N. P. 675; *La France Co. v. Electrical Workers*, (1923) 108 Oh. St. 61, 140 N. E. 899; *Ohio Leather Co. v. De Chant*, (1937) 8 Ohio Opinions 31, 24 Ohio L. Abs. 187; *Geo. B. Wallace Co. v. International Ass'n*, (1936) 155 Or. 652, 63 P. (2d) 1090; *Kirmse v. Adler*, (1933) 311 Pa. St. 78, 166 Atl. 566; *Bomes v. Providence Local No. 223*, (1931) 51 R. I. 499, 155 Atl. 581; *People v. Harris*, (Colo. 1937) Labor and Unemployment Insurance Service, Prentice Hall, Inc., p. 19551, 19552; *Phillips S. & T. P. Co. v. Amalgamated Ass'n*, (S.D. Ohio, 1913) 208 Fed. 335.

See also, *Buy-Wise Markets v. Winokur*, (1938) 167 Misc. Rep. 235, 236, 2 N. Y. S. (2d) 854; *Stuyvesant Lunch & Bakery Corp. v. Reiner*, (1920) 110 Misc. Rep. 357, 181 N. Y. S. 212, 214 (it was held that picketing even though "peaceable, may not be employed, when its purpose is in effect a malicious and wanton interference with another's business or vocation." Such a rule opens the door wide to decisions based wholly on each individual court's feeling as to whether the purpose is wanton and malicious. The test is definitely too vague to be effective); and see, *Brandt-Rosen v. Golden*, (1932) 143 Misc. Rep. 867, 256 N. Y. S. 824, (contains an excellent statement on the question of picketing). *Olympia Operating Co. v. Costello*, (1932) 278 Mass. 125, 179 N. E. 804, (picketing was completely enjoined because the billposters used by the union bore the legend that the strikers had been locked out and the court found this to be a false statement); *Starr v. Laundry & Dry C. Workers' L. Union No. 101*, (1936) 155 Or. 634,

much difference of opinion. If the term "peaceful" is to be refined down to its most pacific meaning, then there is something to be said for those courts which hold all picketing unlawful. If, however, we are to take into consideration the underlying realities of the typical situation in which picketing occurs, then the term "peaceful" must connote any state of affairs in which the pickets operate without resort to physical violence and without the use of such numbers as to make it reasonably impossible to gain ingress or egress to the business or property of the employer. Any further restrictions on the term must inevitably lead to a distortion which bears no resemblance to the struggle between the parties. It is necessary to bear in mind constantly the fact that men are differing over what to them are deeply important issues. No matter how much a court may differ over the value of the benefits to be gained or the privileges to be lost, it should never lose sight of the fact that its part in the dispute is that of an arbiter, and not a participant. The use of the homely language of the street, including such a term as "scab," the use of epithets and invective, should not be condemned because they are unbecoming a gentleman. The language and conduct of the drawing room cannot be used as the measure of the language and conduct of a picket.⁶⁸

63 P. (2d) 1104, (picketing merely to gratify a whim or caprice is not permissible. *Campbell v. Motion Picture Machine Operators Union*, (1922) 151 Minn. 220, 186 N. W. 781, dissenting opinion of Dibell, J.; *Ex parte Heffron*, (1914) 179 Mo. App. 639, 162 S. W. 652; See also *Forstmann & Huffmann Co. v. United Front C. of T. Workers*, (1926) 99 N. J. Eq. 230, 696, 133 Atl. 202, (contains an excellent statement on this question); *Wise Shoe v. Lowenthal*, (1935) 266 N. Y. 264, 194 N. E. 749, expresses a more reasonable view); *Saltzman v. Employers' Local*, (1937) 10 Ohio Opinions 6, 9, 25 Ohio L. Abs. 354; See also, *Keith Theatre v. Vachon*, (1936) 134 Me. 392, 187 Atl. 692, (picketing is not permissible even though peaceable where it is done by outsiders endeavoring to unionize a nonunion shop).

⁶⁸*Machinery Co. v. Toohey*, (1921) 114 Misc. Rep. 185, 189, 186 N. Y. S. 95, ("What language is permitted? What is prohibited? The nomenclature of the strike is not the language of the parlor. Men become earnest and excited and vigorous at such times. A vital principle is at stake. It is not within the limits of human nature to remain calm and gentle under such circumstances. . . . Must laboring men be held down to a more stringent rule? Must they be under constant restraint? Are they forced to be placid in the hour of contention? It is well, perhaps, to do so, but does the law demand it? I think not. Strikers may talk in their own language; the plan, common, strong, everyday language of the laboring man"); *Paylay Hats, Inc. v. Zaritsky*, (1934) 151 Misc. Rep. 569, 571, 271 N. Y. S. 786.

Lisse v. Local Union No. 31, (1935) 2 Cal. (2d) 312, 41 P. (2d) 314, (the use by picketers of grimaces and insulting gestures and the waving of newspapers containing derogatory headlines was enjoined by the court); *Levy & Devaney v. International Pocketbook W. Union*; (1932) 114 Conn. 319, 158 Atl. 795, (the court indicates its displeasure with black and threatening looks on the part of picketers); *Evening Times Printing & Publishing Co. v. American Newspaper Guild*, (1938) 124 N. J. Eq. 71, 199 Atl. 599, (the use of sound trucks to announce the existence of a strike

Picketing has on occasion been denied where the number of pickets is deemed by the court to be excessive, that is, more than the immediate purpose demands.⁵⁹ Sometimes it has been denied where the court believes that the number of pickets is so large as to act as an intimidating force upon non-striking employees, prospective employees or customers.⁶⁰ It is difficult to lay down a rule as to how many pickets are a proper number, because the circumstances in each case are bound to vary. Generally, however, it may be said that the number should bear a direct relation to the area to be patrolled and the number of workmen remaining at work or employed in spite of the strike.⁶¹ In any event, the means

was permitted); *Jones v. Maher*, (1909) 62 Misc. Rep. 388, 116 N. Y. S. 180, (the use of verbal abuse was held unlawful); *Goldfinger v. Feintuch*, (1937) 276 N. Y. 281, 11 N. E. (2d) 910, (shouting and the use of loud-speakers by pickets have been deprecated); See also, *Beaton v. Tarrant*, (1902) 102 Ill. App. 124; *Murdock v. Walker*, (1892) 152 Pa. St. 595, 25 Atl. 492, (verbal abuse and ridicule were enjoined); *Pacific Coast Coal Co. v. Dist. No. 10, U. M. W. A.*, (1922) 122 Wash. 423, 210 Pac. 953, (the court held that picketing must not be conducted in a boisterous fashion, that pickets must adopt the position of missionaries and not annoy or harass loyal workers.)

⁵⁹*Levy & Devaney v. International Pocketbook W. Union* (1932), 114 Conn. 319, 158 A. 795, (35 employees, 20 pickets—but the court did not merely enjoin the use of an excessive number of pickets—it enjoined all picketing).

⁶⁰*Southern California Iron & Steel Co. v. Amalgamated Ass'n, etc.*, (1921) 186 Cal. 604, 200 Pac. 1; *Jones v. E. Van Winkle Gin & Machine Works*, (1908) 131 Ga. 336, 62 S. E. 236; *Beaton v. Tarrant*, (1902) 102 Ill. App. 124; *Karges Furniture Co. v. Amalgamated W. L. Union*, (1905) 165 Ind. 421, 75 N. E. 877; *Keuffel & Esser v. International Ass'n of Machinists*, (1922) 93 N. J. Eq. 429, 116 Atl. 9; *Bayonne Textile Corp. v. American Fed. of S. Workers*, (1933) 114 N. J. Eq. 307, 168 Atl. 799, (manifestly, the use of a large number of pickets cannot reasonably be regarded as intended for a lawful purpose.) *Goldfinger v. Feintuch*, (1937) 276 N. Y. 281, 11 N. E. (2d) 910; *Hoster Brewing Co. v. Giblon*, (1903) 1 Ohio N. P. (N.S.) 377, 14 Ohio Dec. N. P. 305; *Geo. B. Wallace Co. v. International Ass'n*, (1936) 155 Or. 652, 63 P. (2d) 1090; *Phillips S. & T. P. Co. v. Amalgamated Ass'n*, (S.D. Ohio, 1913) 208 Fed. 335, 338, ("It should be done . . . by such limited numbers as not to awaken the fear and lead to the intimidation of workmen"); *American Steel Foundries v. Tri-City Central Trades Council*, (1921) 257 U. S. 184, 42 Sup. Ct. 72, 66 L. Ed. 189. In, *R. A. Freed & Co. v. Doe*, (1935) 283 N. Y. S. 186, the court indicated its dissatisfaction with picketing that was conducted in such a way as to cause crowds to collect. In, *Gevas v. Greek Restaurant Workers' Club*, (1926) 99 N. J. Eq. 770, 134 Atl. 309, the court intimates that even a small number of pickets may be intimidating. *Iverson v. Dilno*, (1911) 44 Mont. 270, 119 Pac. 719, the court held that large numbers of pickets constituted an enjoivable nuisance under section 6162 of the Montana Code.

⁶¹*International Pocketbook Workers' Union v. Orlove*, (1930) 158 Md. 496, 148 Atl. 826; *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n*, (1899) 59 N. J. Eq. 49, 46 Atl. 298; *Searle Mfg. Co. v. Terry*, (1905) 56 Misc. Rep. 265, 106 N. Y. S. 438; *Segenfeld v. Friedman*, (1922) 117 Misc. Rep. 731, 733, 193 N. Y. S. 128, ("Nor is it material whether one or several pickets be maintained. Right or wrong is not determined by mere numerical considerations. The act of a single man, if right, is not made wrong because it is performed by several men"); *Great Northern Ry. Co.*

of ingress and egress to the shop ought not to be unreasonably impaired. Whether mass picketing ought to be denied on the ground that it serves to intimidate or coerce others, will be discussed in connection with the question of intimidation.

Picketing usually is employed by strikers for four reasons: (1) to inform prospective employees, customers and prospective customers, and the public, that a dispute exists between the employer and his employees; (2) to observe who the employees are who still remain at work, who the prospective employees are, and who the customers are, so that they can be approached then or at some future time and induced to cease working for the employer and join with the strikers, not to seek employment with the employer, and not to deal with the employer as a customer, respectively; (3) to maintain the morale of the strikers; (4) to cause by means of (1), (2), and (3), a diminution in the shop owner's business and a shortage of labor sufficient to compel him to seek to negotiate a settlement of the dispute.⁶²

v. Local G. F. L. of I. A. of M., (D. Mont. 1922) 283 Fed. 557, 562; Great Northern Ry. Co. v. Brosseau, (D. N. D. 1923) 286 Fed. 414, 418, ("The impartial history of strikes teaches that there is as much danger to strikers on the picket line from private detectives and sometimes from new employees, as there is of the same kind of wrong on the part of strikers against new employees. My experience in the present strike clearly confirms that view. The strikers on the picket line are entitled to have enough present to shield them against the temptation of their adversaries to resort to violent methods. They also need the same protection against trumped-up charges or unfair evidence relative to any assaults that may occur on either side"); Mackall v. Ratchford, (D.W. Va. 1897) 82 Fed. 41. Cf., Jefferson & Indiana Coal Co. v. Marks, (1926) 287 Pa. St. 171, 134 Atl. 430.

⁶²Davis v. State, (1928) 200 Ind. 88, 161 N. E. 375; Music Hall Theatre v. Moving Picture M. O. Local No. 165, (1933) 249 Ky. 639, 61 S. W. (2d) 283; Keith Theatre v. Vachon, (1936) 134 Me. 392, 187 Atl. 692; Berry Foundry Co. v. International Moulders Union, (1914) 177 Mo. App. 84, 164 S. W. 245; W. A. Fletcher Co. v. International Ass'n of Machinists, (N.J. 1903) 55 Atl. 1077; Mills v. United States Printing Co., (1904) 99 App. Div. 605, 91 N. Y. S. 185; Machinery Co. v. Toohey, (1921) 114 Misc. Rep. 185; 186 N. Y. S. 95; Citizens' Co. v. Asheville Typographical Union, (1924) 187 N. C. 42, 121 S. E. 31; Bernstein v. Cleaners & Dyers Ass'n, (1934) 31 Ohio N. P. (N.S.) 433; La France Co. v. Electrical Workers, (1923) 108 Oh. St. 61, 140 N. E. 899; Geo. B. Wallace Co. v. International Ass'n, (1936) 155 Or. 652, 63 P. (2d) 1090; Alaska S. S. Co. v. International Longshoremen's Ass'n, (W.D. Wash. 1916) 236 Fed. 964.

See, Hammer v. Baum, (1930) 136 Misc. Rep. 490, 240 N. Y. S. 145, Commercial House & Window Cleaning Co. v. Awerkin, (1930) 240 N. Y. S. 797, (the place to picket is the employer's office and not the place in which the employer works); cf., Local Union No. 313 v. Stathakis, (1918) 135 Ark. 86, 205 S. W. 450. See also, Paramount Enterprises v. Mitchell, (1932) 104 Fla. 407, 140 So. 328, (contains a remarkable statement by a court which does not hesitate to set down its bias and prejudice against effective picketing); Robison v. Hotel & Restaurant Employees, Local No. 782, (1922) 35 Idaho 418, 407 Pac. 132, (the court held pickets cannot be used in front of or near the place of business of an employer who deals directly with the public because such picketing is necessarily intimidating in

Picketing frequently also is employed by outside unions in an attempt to unionize a nonunion shop. There has been a sharp cleavage of opinion among the courts as to the right of a union to picket in such a situation. Many employers, in order to forestall unionization, enter into individual contracts with their employees, which forbid their joining a union while employed, while other employers organize company unions and enter into exclusive contracts with them. In both of these situations, outside unions frequently are enjoined from endeavoring to persuade the employees to join the outside union.⁶³ The reason advanced is that the action of the outside union constitutes an interference with existing contracts of service and is, therefore, an unlawful and unwarranted interference with the business of the employer which a court of equity will enjoin. Some courts have made a distinction between those situations in which the outside union, with knowledge of the existing employment contracts, counsels the employees to leave and those situations in which it has no knowledge of such contracts. In the former case, the union has been enjoined, while in the latter an injunction has been refused.⁶⁴

Injunctions also have been issued against attempts by an outside union to obtain proselytes among nonunion workers in cases

character and there is an intimation that picketing might be allowed if the employer conducts a business which does not come into direct contact with the public such as a manufacturing plant); *Ellis v. Journeyman Barbers' I. U. of A.*, (1922) 194 Iowa 1179, 191 N. W. 111; *Geo. B. Wallace Co. v. International Ass'n*, (1936) 155 Or. 652, 63 Pac. (2d) 1090.

⁶³*Hotel, Restaurant, etc., Local Union No. 181 v. Miller*, (1938) 272 Ky. 471, 114 S. W. (2d) 501, (in this case the employer exhibited animosity toward an outside union's attempt to unionize his employees but was very helpful in the formation of a company union. It is strange that the employer-complainant objected so strenuously in one case and so ardently blessed the other, unless, perhaps, his control over the company union made it a valuable instrument in his hands); *Mitnick v. Furniture Workers Union*, (1938) 124 N. J. Eq. 147, 200 Atl. 553; *Third Ave. Ry. Co. v. Shea*, (1919) 109 Misc. Rep. 18, 179 N. Y. S. 43; *United Tailors v. Amalgamated Workers*, (1927) 26 Ohio N. P. (N.S.) 439.

⁶⁴In the following cases the union knew the employees were under contract to their employer: *Callan v. Exposition Cotton Mills*, (1919) 149 Ga. 119, 99 S. E. 300, (contract by implication in this case). See, however, *Nusbaum v. Retail Clerks' Int. Protective Ass'n*, (1922) 227 Ill. App. 206; *Vail-Ballou Press, Inc. v. Casey*, (1925) 125 Misc. Rep. 689, 212 N. Y. S. 113; *Kraemer Hosiery Co. v. American Fed. of F. F. H. W.*, (1931) 305 Pa. St. 206, 157 Atl. 588, (see dissenting opinion also); *Delaware L. & W. R. Co. v. Switchmen's Union*, (W.D. N.Y. 1907), (the court held that a union may counsel a strike even though the employees, its members were under contract to their employer).

In the following cases the union did not know that the employees were under contract to their employer: *Piermont v. Schlesinger*, (1921) 196 App. Div. 658, 188 N. Y. S. 35; *Parker v. The Bricklayers' Union No. 1*, (1889) 21 Ohio Law Bul. 223, 10 Ohio Dec. Rep. 458.

in which the employment is at will. The theory is that the action of the union constitutes an unlawful interference with a property right of the employer, the property right being the right of the employer to the good will of his employees.⁶⁵ An increasingly large number of courts are inclining to the view that so long as no contract exists between an employer and his employees, an outside union is entitled to attempt to induce the employees, by peaceful persuasion, either to join the union or to strike, or both.⁶⁶

There can be no doubt that the failure of the trade union movement to attain any real strength in this country is due, in large part, to the fact that the efforts of unions to unionize non-union plants have been placed under such severe restrictions by many courts. A better and more reasonable attitude would seem to be that a union may, by any means short of violence, malicious falsehood, deceit, and acts of a similar nature, attempt to sell itself to the employees of a particular employer whether under contract or not.⁶⁷ The employer has no real interest in the matter unless it can be said to be his interest to prevent his employees from gathering sufficient strength to bargain with him on a basis that approximates equality. The courts should long ago have denied him the right to interfere in the process of unionization on the ground of insufficient interest.

⁶⁵*McMichael v. Atlanta Envelope Co.*, (1921) 151 Ga. 776, 108 S. E. 226; *Third Ave. Ry. Co. v. Shea*, (1919) 109 Misc. Rep. 18, 179 N. Y. S. 43, (represents the point of view of a number of jurisdictions although it no longer represents the position of the New York courts); *Eagle Glass & Mfg. Co. v. Rowe*, (1917) 245 U. S. 275, 38 Sup. Ct. 80, 62 L. Ed. 286; cf., *Patterson Glass Co. v. Thomas*, (1919) 41 Cal. App. 559, 183 Pac. 190, (where the employees were employed for an indefinite period either side having the right to terminate the employment on seven days notice; this was held to be a definite contract and not an employment at will and, therefore, an outside union could be enjoined from interfering). See also, *La France Co. v. Electrical Workers*, (1923) 108 Oh. St. 61, 140 N. E. 899, (a distinction is made on the basis that the strikers did not ask the employees who had signed yellow dog contracts to continue at work and join the union but asked them to quit their employment and join the union.)

⁶⁶*Iron Molders' Union v. Greenwald Co.*, (1906) 4 Ohio N. P. (N.S.) 161, 16 Ohio Dec. 678; *Pennsylvania Mining Co. v. United Mine Workers*, (C.C.A. 8th Circ. 1928) 28 F. (2d) 851.

⁶⁷*Interborough Rapid Transit Co. v. Lavin*, (1928) 247 N. Y. 65, 159 N. E. 863. *Contra*: *Vegeahn v. Guntner*, (1896) 167 Mass. 108, 44 N. E. 1077; *Machine & Iron Co. v. Willard*, (1922) 242 Mass. 566, 136 N. E. 629. See also, *F. C. Church Shoe Co. v. Turner*, (1926) 218 Mo. App. 516, 279 S. W. 232, (it was held that third parties may not seek to compel the breaking of a contract entered into between an employer and its employees, but striking employees may take such action. The distinction which the court makes does not seem to be reasonable.)

The same right has been granted to the employer, see, *H. B. Rosenthal-Ettlinger Co. v. Schlossberg*, (1933) 149 Misc. Rep. 210, 266 N. Y. S. 762; *Exchange Bakery & Restaurant, Inc. v. Rifkin*, (1937) 245 N. Y. 260, 157 N. E. 130.

It may be contended that in many instances the employees, or the majority of them, show no interest in the outside union and that, therefore, the union is an intermeddler causing more harm than good and that the employer has, under these circumstances, a right to interfere.⁶⁸ The answer to this is that very often employees fear to take any steps which may cost them their livelihood. Thus, knowing that their employer is opposed to the unionization of his plant, they may well hesitate to express any views or take any steps that will conflict with the views held by the employer. The result is an apparent indifference or seeming opposition to unionization on the part of the employees, a position adopted by them as the better part of valor under the circumstances. This argument does not, of course, apply in every such situation, but has been true often enough to be taken into consideration by the courts. One of the real values of an outside union lies in the fact that its representatives are not in a position to be economically intimidated by a particular employer when conducting negotiations or making demands.⁶⁹ Employers have been

⁶⁸Keith Theatre v. Vachon, (1936) 134 Me. 392, 187 Atl. 692; Elkind & Sons v. Retail Clerks' International P. Ass'n, (1933) 114 N. J. Eq. 586, 169 Atl. 494; 218-220 Market Street Corp. v. Delicatessen, etc., Local 410, (1935) 118 N. J. Eq. 448, 179 Atl. 689, (in which 80 employees "voluntarily" signed a statement that they "deeply resented" the efforts of an outside union in trying to unionize their employer's business); Stuyvesant Lunch & Bakery Corp. v. Reiner, (1920) 110 Misc. Rep. 357, 181 N. Y. S. 212; Brace Bros. v. Evans, (1888) 5 Pa. Co. Ct. 163; Culinary Workers' Union No. 331 v. Fuller, (Tex. Civ. App. 1937) 105 S. W. (2d) 295; United States v. Haggerty, (N.D. W.Va. 1902) 116 Fed. 510, (illustrates clearly the bias which underlies the decisions of many courts on this question); Montgomery v. Pacific Electric Ry. Co., (C.C.A. 9th Cir. 1923) 293 Fed. 680; cf., Miller Parlor Furniture Co. v. Furniture W. I. Union, (D. N.J. 1934), 8 F. Supp. 209, (in which the court holds that the Norris-La Guardia Act prevents interference by federal courts in situations of the type under consideration); Safeway Stores v. Retail Clerks' Union, Local No. 148, (1935) 184 Wash. 322, 51 P. (2d) 372, (cf., dissenting opinion). But see, Geo. B. Wallace Co. v. International Ass'n, (1936) 155 Or. 652, 669, 63 P. (2d) 1090; cf., however, Crouch v. Central Labor Council, (1930) 134 Or. 612, 292 Pac. 729, (decided prior to the enactment of the state Norris-La Guardia Act); cf., also, Jefferson & Indiana Coal Co. v. Marks, (1926) 287 Pa. St. 171, 134 Atl. 430; People v. Kostka, (1886) 4 N. Y. Cr. Rep. 429, 434, (contains a strange statement which has been the foundation of a number of similar decisions—this case is no longer the law of New York); Kraemer Hosiery Co. v. American Fed. of F. F. H. W., (1931) 305 Pa. St. 206, 229, 157 Atl. 588, (dissenting opinion of Maxey, J.); American Furniture Co. v. I. B. of T. C. & H. of A., (1936) 222 Wis. 338, 268 N. W. 250, (the court's decision was based on the Wisconsin Labor Code.

⁶⁹Geo. B. Wallace Co. v. International Ass'n, (1936) 155 Or. 652, 667, 63 P. (2d) 1090, ("The mere fact that the employees are not complaining against the terms and conditions of employment under which they are working is not conclusive. In many instances where sweat shop conditions prevail—although not in the instant cases—the employee, through the greed and avarice of capital, is bound down in abject physical and mental slavery.

quick to realize this, as is illustrated by the large number of instances in which we find individual employer-employee contracts and company unions. If this were not so, how else explain these phenomena? Why have not the courts been as quick to realize the same thing? Instead, the courts have talked in terms of inalienable rights, natural rights, liberty of contract, and other equally vague and abstract terms.

Many courts have puzzled over whether picketing should be permitted where no strike exists. The question usually arises when an outside union has undertaken to unionize a particular shop against the employer's wishes. It has also arisen in cases in which the strikers picket the business of a customer of the employer, the customer having refused a request of the strikers to cease dealing with the employer until the dispute between him and his employees, the strikers, is settled, and in those cases in which strikers picket the homes of non-striking or of strike-breaking employees. The argument against permitting picketing where there is no strike in progress is that picketing is a concomitant of a strike. Therefore, to picket a shop at which no strike exists is an anomaly and should be enjoined as unlawful, regardless of the peacefulness of the picketing and the truth of the contentions of the pickets.⁷⁰ Every day thousands of people make statements to friends and strangers about the service, merchandise and policy of particular establishments. Often these statements are not complimentary, but as long as they state the truth they are not actionable. Suppose these people should undertake to make these statements in close proximity to the establishments they are referring to. This would not make these statements unlawful or actionable. Yet courts have held that men may not confederate to make these statements as pickets. Why? As long as they state the truth there can be no harm for which the law will compensate. By the same token, equity should not interfere by injunction. ". . . Picketing without a strike is no more unlawful than a strike without picketing."⁷¹ To proscribe picketing

It is idle to talk about the protest of the individual laborer under such conditions. How can an employee exercise freedom of thought and expression when hungry children are dependent upon him for support? Protest against terms and conditions of employment with some employers simply means that the wage earner goes home without a job. It is through concerted action and collective bargaining that the laborer hopes for some semblance of economic freedom.")

⁷⁰Keith Theatre v. Vachon, (1936) 134 Me. 392, 187 Atl. 692; Feller v. Local 144 International L. G. W. Union, (1937) 121 N. J. Eq. 452, 191 Atl. 111; Brown & Son v. Mine Workers, (1925) 25 Ohio N. P. (N.S.) 485.

⁷¹Wil-Low Cafeterias, Inc. v. Kramberg, (1929) 134 Misc. Rep. 841,

under these circumstances is to limit the right of free speech guaranteed under the federal constitution and all of the state constitutions.

The right to picket the place of business of a patron of the employer who is engaged in a dispute either with his employees or with an outside union also has been denied on the ground that no labor dispute exists between the patron and the pickets, and that such picketing is too indirect an approach to the objective.⁷² This type of picketing is a comparative newcomer in the methodology of conducting a labor controversy. It should not be condemned without serious consideration. Strictly speaking, the customer of an employer is not a primary party involved in a labor dispute between the employer and his employees. But in dealing with the employer, is not the customer lending his aid, albeit indirectly, to the employer? If the pickets do no more than publicize the fact that the customer patronizes the employer against whom a strike is being conducted, this is only stating a fact, and is no more unlawful than such a statement would be if made in one's home to family or guests. He who deals in the goods or services of another who is beset with an industrial dispute should be willing to accept the inconveniences which may be a concomitant of that dispute. He is, in fact, involved in that dispute by his connection with the employer.⁷³

The picketing of the home of a workman employed in a shop at which a strike is in progress has been denied on the theory that the workman has a right to be secure and unmolested in his home in exactly the same manner as any other citizen not concerned with the strike.⁷⁴ The same reasoning that applies to the

844, 237 N. Y. S. 76. *Williams v. Quill*, (1938) 277 N. Y. 1, 12 N. E. (2d) 547; *Moreland Theatres Corp. v. Portland Moving Picture, etc., Union*, (1932) 140 Or. 35, 12 P. (2d) 333, (dissenting opinion of Belt, J.) See also, *Foster v. Retail Clerks' International Protective Ass'n*, (1902) 39 Misc. Rep. 48, 56, 78 N. Y. S. 860.

⁷²*Mears Slayton Lumber Co. v. District Council*, (1910) 156 Ill. App. 327; *Evening Times Printing & Publishing Co. v. American Newspaper Guild*, (1938) 124 N. J. Eq. 71, 199 Atl. 599; *Mlle. Reif, Inc. v. Randau*, (1937) 166 Misc. Rep. 247, 1 N. Y. S. (2d) 515; *Parker Paint & Wall Paper Co. v. Local Union No. 813*, (1921) 87 W. Va. 631, 105 S. E. 911.

⁷³*Engelmeyer & Simon*, (1933) 148 Misc. Rep. 621, 265 N. Y. S. 636; *Manhattan Steam Bakery & Schindler*, (1937) 294 N. Y. S. 783, 250 App. Div. 467, 468; cf., *Gertz v. Randau*, (1937) 162 Misc. Rep. 786, 295 N. Y. S. 871, (which seems to be contra.) See also, *Mlle. Reif, Inc. v. Randau*, (1937) 166 Misc. Rep. 247, 248, 1 N. Y. S. (2d) 515; cf., *Goldfinger v. Feintuch*, (1937) 276 N. Y. 281, 286, 11 N. E. (2d) 910.

⁷⁴*Davis v. State*, (1928) 200 Ind. 88, 161 N. E. 375; *Baltic Mining Co. v. Houghton, Circuit Judge*, (1913) 177 Mich. 632, 144 N. W. 209; *International Ticket Co. v. Wendrich*, (1938) 123 N. J. Eq. 172, 196 Atl. 474;

picketing of the shop itself and of the place of the business of the patron of the shop should apply here. The picketing ought to be permitted. An abuse of the privilege is always subject to the remedial processes of the courts.

The use of peaceful persuasion by strikers has been the subject of much discussion. Strikers have now generally been conceded the right to persuade non-strikers to cease working and to join with them, so long as they do not interfere with any contract relations between the non-striker and the employer; the purpose of the strike is lawful; the motives are good; the strike is justifiable; and the persuasion is peaceful.⁷⁵ The same rules are applied where the strikers attempt to persuade those seeking employment to discontinue their efforts in that direction, and where persuasion is addressed to customers and the general public not

Murdock v. Walker, (1893) 152 Pa. St. 595, 25 Atl. 492; R. R. Kitchen & Co. v. Local Union No. 141, (1922) 91 W. Va. 65, 112 S. E. 198.

⁷⁵Hardie-Tynes Mfg. Co. v. Cruse, (1914) 189 Ala. 66, 66 So. 657; Hughes v. Kansas City Motion Picture Machine Operators Local No. 170, (1920) 282 Mo. 304, 221 S. W. 95; W. & A. Fletcher Co. v. International Ass'n of Machinists, (N.J. 1903) 55 Atl. 1077; Bayer v. Brotherhood of Painters, (1931) 108 N. J. Eq. 257, 154 Atl. 759; cf., Johnston Harvester Company v. Meinhardt, (1880) 60 How. Prac. 168, 172, 175; Grassi Contracting Co. v. Bennett, (1916) 174 App. Div. 244, 160 N. Y. S. 279; Statler Co. v. Employees' Alliance, (1914) 19 Ohio N. P. (N.S.) 375, 27 Ohio Dec. N. P. 178; American Fed. of Labor v. Buck's Stove & Range Co., (1909) 33 App. D. C. 83. See, however, F. C. Church Shoe Co. v. Turner, (1926) 218 Mo. App. 516, 279 S. W. 232; Connett v. United Hatters of North America, (1909) 76 N. J. Eq. 202, 74 Atl. 188.

Southern California Iron & Steel Co. v. Amalgamated Ass'n, (1921) 186 Cal. 604, 200 Pac. 1; Levy & Devaney v. International Pocketbook W. Union, (1932) 114 Conn. 319, 158 Atl. 795; Jones v. E. Van Winkle Gin & Machine Works, (1908) 131 Ga. 336, 340, 62 S. E. 236, ("In many cases it may be difficult to draw the line of demarcation between intimidation and inoffensive persuasion"); Burgess v. Georgia, (1918) 148 Ga. 417, 96 S. E. 865; Minnesota Stove Co. v. Cavanaugh, (1915) 131 Minn. 458, 155 N. W. 638; Campbell v. Motion Picture Machine Operators' Union, (1922) 151 Minn. 220, 186 N. W. 781; Berry Foundry Co. v. International Moulders' Union, (1914) 177 Mo. App. 84, 164 S. W. 245; Forstmann & Huffmann Co. v. United Front C. of T. Workers, (1926) 99 N. J. Eq. 230, 133 Atl. 202; cf., Frank v. Herold, (1901) 63 N. J. Eq. 443, 52 Atl. 152, (in which the strikers were told to hire a hall and do their persuading there); Machinery Co. v. Toohey, (1921) 114 Misc. Rep. 185, 186 N. Y. S. 95; Citizens' Co. v. Asheville Typographical Union, (1924) 187 N. C. 42, 121 S. E. 31; Statler Co. v. Employees' Alliance, (1914) 19 Ohio N. P. (N.S.) 375, 27 Ohio Dec. N. P. 178; La France Co. v. Electrical Workers, (1923) 108 O. S. 61, 140 N. E. 899; Kirmse v. Adler, (1933) 311 Pa. St. 78, 166 Atl. 566; Levering v. Garrigues Co. v. Morin, (C.C.A. 2nd Cir. 1934) 71 F. (2d) 284, (under the Norris-La Guardia Act can encourage others to refuse to work); Everett Waddey Co. v. Richmond Typographical Union, (1906) 105 Va. 188, 53 S. E. 273; Pacific Coast Coal Co. v. Dist. No. 10, U. M. W. A., (1922) 122 Wash. 423, 210 Pac. 953. See, however, Sherry v. Perkins, (1888) 147 Mass. 212, 17 N. E. 307, (the carrying of banners with inscriptions which were not false and which did not disparage the employer, was prohibited.)

to deal with the employer. Some jurisdictions have extended these same rights to outside unions in their attempt to organize a nonunion plant under similar conditions.⁷⁶

What does a court mean when it uses the term "peaceful persuasion?" Again, like much of the terminology used in the field of labor disputes, the term "peaceful persuasion" can mean and has meant many different things to many different courts. Under a strict construction, it has been held that men have a right to be on the streets or in their homes without being molested by others. Thus, if the person to whom the argument is being directed indicates an unwillingness to listen, or signifies that he is not convinced, he is not to be disturbed further no matter how peaceful the persuasive attempts may be. A second effort to persuade such a person is construed by strict constructionist courts as an interference with the right of the individual to go freely about his business.⁷⁷ Those courts which adopt a liberal view hold that

⁷⁶*Diamond Block Coal Co. v. United Mine Workers*, (1920) 188 Ky. 477, 222 S. W. 1079; *Schuster v. International Ass'n of Machinists*, (1937) 293 Ill. App. 177, 12 N. E. (2d) 50; *International Pocketbook Workers' Union v. Orlove*, (1930) 158 Md. 496, 501, 148 Atl. 826; *Commonwealth v. Hunt*, (1842) 4 Metc. (Mass.) 111; *Beck v. Teamsters' Protective Union*, (1898) 118 Mich. 497, 77 N. W. 13; *Johnston Harvester Company v. Meinhardt*, (1880 N. Y.) 60 How. Prac. (N.Y.) 168, (an excellent decision); *Interborough Rapid Transit Co. v. Lavin*, (1928) 247 N. Y. 65, 159 N. E. 863; *O'Keefe v. Local 463*, (1938) 277 N. Y. 300, 308, 14 N. E. (2d) 77, ("This court has frequently sustained the right of labor unions to interfere by lawful means between an employer and his employees who are not members of the union where the purpose of such interference is solely to advance the interest of the members of the union. We have not been oblivious of the consequent hardship imposed, at times, upon individual employers or employees, but for hardship to the individual resulting from action reasonably calculated to achieve a lawful end by lawful means the courts can give no redress . . ."); *Iron Molders' Union v. Greenwald Co.*, (1906) 4 Ohio N. P. (N.S.) 161, 16 Ohio Dec. 678, (as long as no contract is violated); *Bomes v. Providence Local, No. 223*, (1931) 51 R. I. 499, 155 Atl. 581; *Gassaway v. Borderland Coal Corp.*, (C.C.A. 7th Circ. 1921) 278 Fed. 56; *L. L. Coryell & Son v. Petroleum Workers Union*, (D. Minn. 1936) 19 F. Supp. 749, (decided on basis of Norris-La Guardia Act). Cf., however, *Moore v. Cooks', Waiters', etc., Union No. 402*, (1919) 39 Cal. App. 538, 179 Pac. 417. See also, *McMichael v. Atlanta Envelope Co.*, (1921) 151 Ga. 776, 108 S. E. 226, (the court expressed concern lest the employees join the union in such large numbers as would force the employer to consent to the unionizing of its plants or would render it impossible to continue the operation of its business); *Nusbaum v. Retail Clerks' International Protective Ass'n*, (1922) 227 Ill. App. 206; *Machine & Iron Co. v. Willard*, (1922) 242 Mass. 566, 136 N. E. 629, (the court held it unlawful to persuade employees under contract). But see, *Kraemer Hosiery Co. v. American Fed. of F. F. H. W.*, (1931) 305 Pa. St. 206, 157 Atl. 588, (dissenting opinion of Maxey, J.)

⁷⁷*Keuffel & Esser v. International Ass'n of Machinists*, (1922) 93 N. J. Eq. 429, 116 Atl. 9, (cf., the dissenting opinion); *Mills v. United States Printing Co.*, (1904) 99 App. Div. 605, 91 N. Y. S. 185, 187; *Union Pacific R. Co. v. Reuf*, (D. Neb. 1902) 120 Fed. 102; *American Steel Foundries v.*

the strikers or outside union organizers may try their hands at persuasion as often as they think necessary and may even visit the homes or places of business of the men they are trying to convince of the validity of their cause.⁷⁸ It has been well said that

“fair, vigorous and repeated argument is legitimate. Repeated, for what fails to convince today may succeed on rehearing tomorrow, even in a supreme court. . . . Human nature is everywhere alike, and every man is or ought to be earnest, enthusiastic, and fearless in his own, if good, cause.”⁷⁹

Strikers and union organizers, so long as they do not trespass upon the property of the employer and so long as they do not resort to conscious fraudulent statements, ought to be allowed to exercise their persuasive powers upon patrons, employees and the general public alike. There can be no real harm in permitting a free discussion even though repeated many times. The harm is in stifling argument, as this often leads those suppressed into undesirable channels to achieve their ends.

Tied up with the question of persuasion is the matter of the use of publicity both by strikers and by outside unions. The courts have treated this subject in much the same manner as they have treated the question of persuasion. The problem is essentially the same and, therefore, the same rule that applies to persuasion should apply here.⁸⁰

Tri-City Central Trades Council, (1921) 257 U. S. 184, 42 Sup. Ct. 72, 66 L. Ed. 189. See also, *Allis-Chalmers Co. v. Iron Molders' Union No. 125*, (E.D. Wis. 1906) 150 Fed. 155, 162.

⁷⁸*Great Northern Ry. Co. v. Local*, (D. Mont. 1922) 283 F. 557.

⁷⁹*Great Northern Ry. Co. v. Local*, (D. Mont. 1922) 283 F. 557, 563.

⁸⁰*Truax v. Bisbee Local No. 380*, (1918) 19 Ariz. 379, 389, 171 Pac. 121; *Jones v. State*, (1926) 170 Ark. 863, 281 S. W. 663; *J. F. Parkinson Co. v. Bldg. Trades Council*, (1908) 154 Cal. 581, 98 Pac. 1027, (contains a discussion of the use of the word “unfair.”); cf., *Moore v. Cooks', Waiters'*, No. 31, (1935) 2 Cal. (2d) 312, 41 Pac. (2d) 314, (type of publicity used was held unlawful); *Paramount Enterprises v. Mitchell*, (1932) 104 Fla. 407, 140 So. 328; *Robison v. Hotel & Restaurant Employees Local No. 782*, (1922) 35 Idaho 418, 207 Pac. 132; *American Cigar Co. v. Berger*, (1921) 221 Ill. App. 332, (publicity used was held an act in contempt of the court's injunctive order); *Vulcan Detinning Co. v. St. Clair*, (1924) 315 Ill. 40, 145 N. E. 657, (publicity used was held lawful); *Schuster v. International Ass'n of Machinists*, (1937) 293 Ill. App. 177, 193, 194, 12 N. E. (2d) 50, (contains an excellent statement); *Ellis v. Journeyman Barbers'* (1922) 194 Iowa 1179, 191 N. W. 111; *My Maryland Lodge v. Adt.*, (1905) 100 Md. 238, 59 Atl. 721; *Martineau v. Foley*, (1918) 231 Mass. 220, 120 N. E. 445, (in which the publication of false statements by the union about the employer was deprecated by the court); *Beck v. Teamsters' Protective Union*, (1898) 118 Mich. 497, 77 N. W. 13; *Steffes v. Motion Picture Machine Operators' Union*, (1917) 136 Minn. 200, 161 N. W. 524, (the court discusses conditions under which the use of the word “unfair” is lawful and when it is unlawful); *Ex parte Heffron*, (1914) 179 Mo. App. 639, 657, 162 S. W. 652;

THE CLOSED SHOP

The struggle for the "closed shop," so-called, has received varied treatment at the hands of the courts. There are two phases to the problem. One of these is the attempt to unionize the business of an individual employer without any relation to the rest of the industry of which this business may be a part. The other phase is the attempt to unionize one or more shops in the same industry as a part of a plan to unionize an entire industry in the same locality or in a larger area. Some courts have made a distinction between the two situations, holding the first a lawful purpose and the second unlawful. A clear statement of this position is found in *Four Plating Co. v. Mako*, in which the court lays down the principle that

"a distinction must be drawn between a closed shop in a single factory, or group of factories, and a closed shop in substantially an entire industry throughout a considerable area. And in the latter case there is the further distinction between a closed shop sought by a union as a protective measure, and one sought in order to create a monopoly of labor. By the great weight of authority, the last case is held to be contrary to public policy. As to the question of a closed shop in substantially an entire industry, based on motives intrinsically self-protective, the authorities are conflicting. But the decisions are almost unanimous that a closed shop in a single factory is consonant with public policy and lawful."⁸¹

Lindsay & Co. v. Montana Fed. of Labor, (1908) 37 Mont. 264, 276, 96 Pac. 127; *Iverson v. Dilno*, (1911) 44 Mont. 270, 111 Pac. 719, (use of "unfair" upheld); *Thomson Machinery Co. v. Brown*, (1918) 89 N. J. Eq. 238, 108 Atl. 116; *Perfect Laundry Co. v. Marsh*, (1936) 120 N. J. Eq. 508, 186 Atl. 470; *Federal Hats v. Golden*, (1928) 223 App. Div. 701, 226 N. Y. S. 747; *Nann v. Raimist*, (1931) 255 N. Y. 307, 317, 174 N. E. 690; *A. S. Beck Shoe Corp. v. Johnson*, (1934) 153 Misc. Rep. 363, 365, 274 N. Y. S. 946, ("False and misleading statements and representations made in the course of peaceful picketing will likewise be enjoined"); *McCormick v. Local Union*, (1911) 13 Ohio C. C. (N.S.) 545, 32 Ohio C. C. 165, (type of publicity used was held bad); *Driggs Dairy Farms v. Milk Drivers', etc.*, *Union No. 361*, (1935) 49 Ohio App. 303, 197 N. E. 250, (it was held that a union could not publicize a violation by an employer of section 7 (a) of the N. I. R. A., that that was the province of the public authorities); cf., *Bernstein v. Cleaners & Dyers Ass'n*, (1934) 31 Ohio N. P. (N.S.) 433; *Bomes v. Providence Local, No. 223*, (1931) 51 R. I. 499, 155 Atl. 581, (dissenting opinion of Hahn, J.); *United Chain Theatres v. Philadelphia Motion Picture M. U. Union*, (E.D. Pa. 1931) 50 F. (2d) 189; *Levering & Garrigues Co. v. Morin*, (C.C.A. 2nd Cir. 1934) 71 F. (2d) 284, (Under the Norris La Guardia Act can give publicity to the facts in the controversy); *Zaat v. Building Trades Council*, (1933) 172 Wash. 445, 20 P. (2d) 589, (Syll. 5: "Publication in union paper that proprietor of plumbing shop was unfair to plumbing union held not actionable where dispute between union and proprietor was pending"); *Kimbel v. Lumber & Saw Mill Workers Union*, (1937) 189 Wash. 416, 65 P. (2d) 1066.

⁸¹(1937) 122 N. J. Eq. 298, 300, 194 Atl. 53. *Connors v. Connolly*, (1913) 86 Conn. 641, 86 Atl. 600, (held that unionization of an entire indus-

The distinction here made by the court is based on whether or not a monopoly would be created by a recognition of the demand of the union. A number of jurisdictions have, however, refused to make any such distinction. They hold that in any case a demand for a closed shop is unlawful because its fulfillment would affect the freedom of other individuals to pursue their lawful trades or businesses without interference.⁸²

In the case of a demand for a closed shop in an entire industry or in an entire locality, the argument that such a shop would prevent a nonunion workman or a member of a rival union from obtaining employment in that industry, has some validity.⁸³ When the demand concerns only a single factory and the rest of the industry is not unionized, it seems difficult to understand how a monopoly will result. The argument seems based upon an ostensible desire to prevent an effective trade union movement, and

try of any considerable proportions in the community is bad); *Baldwin Lumber Co. v. Local No. 560*, (1920) 91 N. J. Eq. 240, 109 Atl. 147, (an attempt to unionize an entire industry in a county was held bad); *Jordan's Wearing Apparel v. Retail Sales C. Union*, (N. J. 1937) 193 Atl. 806, (a demand for a closed shop in one plant was held unlawful); see also, *Canter Sample Furniture House v. Retail Furniture E. L. No. 109*, (1937) 122 N. J. Eq. 575, 591, 579, 196 Atl. 210; *Polk v. Cleveland Ry. Co.*, (1925) 20 Ohio App. 317, 321, 151 N. E. 808. Cf., *Exchange Bakery & Restaurant, Inc. v. Rifkin*, (1927) 245 N. Y. 260, 263, 157 N. E. 130.

⁸²*Sarros v. Nouris*, (1927) 15 Del. Ch. 391, 138 Atl. 607; *Keith Theatre v. Vachon*, (1936) 134 Me. 392, 187 Atl. 692; *Bausch Machine Tool Co. v. Hill*, (1918) 231 Mass. 30, 120 N. E. 188; cf., however, *Armstrong Cork & Insulation Co. v. Walsh*, (1931) 276 Mass. 263, 177 N. E. 2; *Roraback v. Motion Picture Machine Operators' Union*, (1918) 140 Minn. 431, 163 N. W. 766, (an attempt to prevent the owner of a one employee business from working is unlawful); *Hoban v. Dempsey*, (1914) 217 Mass. 166, 104 N. E. 717, (a strike or other compulsion exercised for the purpose of obtaining a closed shop is unlawful but a voluntary and unforced agreement for a closed shop is valid; cf., however, *Zaat v. Building Trades Council*, (1933) 172 Wash. 445, 20 P. (2d) 589; *Wasilewski v. Bakers' Union, Local No. 64*, (1935) 118 N. J. Eq. 349, 179 Atl. 284; *International Ticket Co. v. Wendrich*, (1937) 122 N. J. Eq. 222, 193 Atl. 808; cf., *Bayonne Textile Corp. v. American Fed. of S. Workers* (1934), 116 N. J. Eq. 146, 157, 172 Atl. 551; *Four Plating Co. v. Mako*, (1937) 122 N. J. Eq. 298, 301, 194 Atl. 53, (the court does not quite agree with the reasoning in the *Hoban Case*, supra, with reference to the so-called compulsion of the employer. "Complainant argues that while an employer may, of his own free will, employ only union men, and while he may voluntarily enter into a contract with the union to that end, yet the union cannot 'compel' him to do so. Of course not. Neither can it compel him to raise wages or shorten hours, and enter into any contract whatever. What is meant by 'compel'? . . . A labor union offers an employer alternatives—higher wages, shorter hours, and a closed shop, or a strike. He weighs the situation and chooses; in a legal sense, he is not compelled.") See also, *Freed & Co. v. Doe*, (1935) 154 Misc. Rep. 644, 649, 278 N. Y. S. 68, (held that a closed shop demand made upon an employer of salespeople is unlawful).

⁸³*Connors v. Connolly*, (1913) 86 Conn. 641, 86 Atl. 600. Cf., *Williams v. Quill*, (1938) 277 N. Y. 1, 9, 12 N. E. (2d) 547; see also, *O'Keefe v. Local 463*, (1938) 277 N. Y. 300, 14 N. E. (2d) 77.

the monopoly contention does not ring true in view of the usual set of facts in this type of case.

The same diversity of opinion and the same reasoning which has been noted in connection with attempts by unions to obtain a closed shop also has been applied to agreements between employers and unions providing for a closed shop.⁸⁴ There has been a widespread misunderstanding of the reasons why unions find it almost imperative to seek a closed shop.

The primary purpose of a trade union is the economic advancement of its members. Therefore, its efforts naturally are bent toward this goal. It is obvious that a shop in which the employees are partly union and partly nonunion is of little benefit to the union. Such a situation permits the employer gradually to replace the union employees with nonunion employees should he find it to his benefit to do so. Such a division of strength makes it a comparatively simple matter to sap the economic strength of the union employees. The advantage is decidedly with the employer. In a word, a shop in which the employees are both union and nonunion is an open shop, with all of the advantages for the employer and all of the disadvantages for the employees that an open shop usually connotes. The end result can only mean defeat and disintegration for the union. This is even more true in the case of an entire industry throughout the country or of an entire industry in a particular locality. One nonunion or open shop employer in an industry which is otherwise unionized can speedily demoralize that industry and destroy the union. While the closed shop employers are bound by wage and hour agree-

⁸⁴In the following cases closed shop contracts between employer and union have been held illegal: *Lehigh Structural Steel Co. v. Atlantic Smelting & Refining Works*, (1920) 92 N. J. Eq. 131, 111 Atl. 376; *Polk v. Cleveland Ry. Co.*, (1925) 20 Ohio App. 317, 151 N. E. 808, (the contract was held unlawful because it resulted in a monopoly).

In the following cases closed shop contracts between employer and union have been held valid: *Connors v. Connolly*, (1913) 86 Conn. 641, 86 Atl. 600, (the court indicates that if the question were before it it would probably hold the contract valid if it did not affect a large sector of an industry or an entire locality); *Tracy v. Osborne*, (1917) 226 Mass. 25, 114 N. E. 959; cf., *New England Wood Heel Co. v. Nolan*, (1929) 268 Mass. 191, 167 N. E. 323; *Smith v. Bowen*, (1919) 232 Mass. 106, 121 N. E. 814, (a strike to enforce a closed shop agreement was held legal but a strike in pursuance of a closed shop demand without any such agreement was held illegal); *Williams v. Quill*, (1938) 277 N. Y. 1, 12 N. E. (2d) 547; *Local Branch v. Solt*, (1918) 8 Ohio App. 437, 28 Ohio C. C. 501; *Powers v. Journeymen Bricklayers' Union No. 3*, (1914) 130 Tenn. 643, 172 S. W. 284; *National Fireproofing Co. v. Mason*, (C.C.A. 2d Cir. 1909), 169 Fed. 259, 264; *M. & M. Wood Working Co., Inc. v. Plywood & Veneer Workers*, (D. Or. 1938) 23 F. Supp. 11.

ments with the union, the open shop employer may, because of his superior bargaining power over his unorganized employees, force down their wages and increase the number of working hours until he is in a position to undersell the closed shop establishments. Such a situation cannot long exist. Eventually the union employers will rebel at the loss of business, and an effort will be made either to force the union to reduce the standards attained, or to oust it. Clearly a union which desires to justify itself must sooner or later seek a closed shop. Experience indicates that no union ever has successfully maintained itself over a long period of time against the competition of nonunion or open shop employees.⁸⁵

The argument sometimes is advanced that to permit a closed shop is to permit the union to dominate and dictate the policies

⁸⁵*Scofes v. Helmar*, (1933) 205 Ind. 596, 187 N. E. 662; *Ellis v. Journeyman Barbers'*, (1922) 194 Iowa 1179, 191 N. W. 111, (here is an example of a situation which might easily lead to the destruction of the union involved because other barber shops might be forced to discard union employees and rules in order to compete with the complainant); see, *Moore Drop Forging Co. v. McCarthy*, (1923) 243 Mass. 554, 137 N. E. 919, (a good example of what can happen to a union where conditions are such as to sap its effectiveness); *Interborough Rapid Transit Co. v. Lavin*, (1928) 247 N. Y. 65, 79, 159 N. E. 863; see, *Albro J. Newton Co. v. Erickson*, (1911) 70 Misc. Rep. 291, 127 N. Y. S. 949, (in which the point here made is well illustrated but the court went off on a tangent caused by an over-stressing of the rights of property); *Goldfinger v. Feintuch*, (1937) 276 N. Y. 281, 286, 11 N. E. (2d) 910, ("Where a manufacturer pays less than union wages, both it and the retailers who sell its products are in a position to undersell competitors who pay the higher scale and this may result in unfair reduction of the wages of union members"); *Foundry Co. v. Molders' Union*, (1917) 20 Ohio N. P. (N.S.) 161, 175, 28 Ohio Dec. N. P. 605; *Fuke v. Schwartz*, (1931) 28 Ohio N. P. (N.S.) 407, 410; *Geo. B. Wallace Co. v. International Ass'n* (1936) 155 Or. 652, 63 P. (2d) 1090. Cf., the following cases: *International Organization v. Red Jacket C. C. & C. Co.*, (C.C.A. 4th Cir. 1927) 18 F. (2d) 839; *Duplex Co. v. Deering*, (1921) 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349; *Foundries v. Tri-City Central Trades Council*, (1921) 257 U. S. 184, 42 Sup. Ct. 72, 66 L. Ed. 189; *Alco-Zander Co. v. Amalgamated Clothing Workers*, (E.D. Pa. 1929) 35 F. (2d) 203. In each of these cases it is quite obvious that the union was being placed in a dangerously precarious position because of nonunion competition, yet the courts prevented action by the unions to rectify the situation. Why? See, *Folsom v. Lewis*, (1911) 208 Mass. 336, 338, 94 N. E. 316, ("Strengthening the forces of a labor union to put it in a better condition to enforce its claims in controversies that may afterwards arise with employers, is not enough to justify an attack upon the business of an employer by inducing his employees to strike.")

In the following cases the closed shop demand was held lawful: *Kemp v. Division No. 241*, (1912) 255 Ill. 213, 99 N. E. 389; *International Pocketbook Workers' Union v. Orlove*, (1930) 158 Md. 496, 148 Atl. 826; *Williams v. Quill*, (1938) 277 N. Y. 1, 7, 12 N. E. (2d) 547; *Harper v. Local Union No. 520*, (Tex. Civ. App. 1932) 48 S. W. (2d) 1033; *Allis-Chalmers Co. v. Iron Molders' Union No. 125*, (E.D. Wis. 1906) 150 Fed. 155; *Gill Engraving Co. v. Doerr*, (S.D. N.Y. 1914) 214 Fed. 111.

which the employer must follow in conducting his business.⁸⁶ It is also said to be an unwarranted interference with the employer's right, sometimes called inalienable, sometimes natural, and sometimes constitutional, to conduct his business without interference.⁸⁷ Some courts have held that a closed shop interferes with the employer's right to the free flow of labor.⁸⁸ These arguments have no foundation in fact, and no reported case indicates sufficient facts upon which any court has been justified in making such assertions.

In many of the cases in which a closed shop is demanded or a closed shop contract is entered into, nonunion workmen find themselves facing the loss of their jobs, except in those instances where the union is willing or the contract provides that they may join the union within a specified period of time. The courts have been divided by two conflicting points of view with the more liberal approach slowly gaining the ascendancy. The older and conservative view is that, although men have a right to organize into labor unions, they have no right to insist that others must do so. It is held that the refusal of any man to join the union should not result in the loss of his right to labor. The view expressed by these courts has also been maintained even though the nonunion employees are given an opportunity to join the union.⁸⁹

⁸⁶State v. Glidden, (1887) 55 Conn. 46, 8 Atl. 890; Sarras v. Nouris, (1927) 15 Del. Ch. 391, 138 Atl. 607; Canter Sample Furniture House v. Retail Furniture E. L. No. 109, (1937) 122 N. J. Eq. 575, 196 Atl. 210; Commonwealth v. Curran, (1869) 3 Pittsburgh Rep. (Pa.) 143; In re, Higgins, (N.D. Tex., 1886) 27 Fed. 443; United States v. Weber, (W.D. Va. 1902) 114 Fed. 950; Everett Waddey Co. v. Richmond Typographical Union, (1906) 105 Va. 188, 53 S. E. 273. Contra: J. F. Parkinson Co. v. Bldg. Trades Council, (1908) 154 Cal. 581, 98 Pac. 1027. See also, Empire Theatre Co. v. Cloke, (1917) 53 Mont. 183, 163 Pac. 107, (the court presents a wholesome discussion of this contention and indicates its weakness and invalidity as a contention.)

⁸⁷Canter Sample Furniture House v. Retail Furniture, etc., Local No. 109, (1927) 122 N. J. Eq. 575, 196 Atl. 210.

⁸⁸Jersey City Printing Co. v. Cassidy, (1902) 63 N. J. Eq. 759, 53 Atl. 230; see also, Booth & Brother v. Burgess, (1906) 72 N. J. Eq. 181, 194, 65 Atl. 226; cf., Iron Molders' Union v. Allis-Chalmers Co., (C.C.A. 7th Cir. 1908) 166 Fed. 45, 49.

⁸⁹Robison v. Hotel & Restaurant Employees, Local No. 782, (1922) 35 Idaho 418, 207 Pac. 132; Sutton v. Workmeister, (1911) 164 Ill. App. 105; Keith Theatre v. Vachon, (1936) 134 Me. 392, 187 Atl. 692; United Shoe Machinery Corp. v. Fitzgerald, (1921) 237 Mass. 537, 130 N. E. 86; Stuyvesant Lunch & Bakery Corp. v. Reiner, (1920) 110 Misc. Rep. 357, 181 N. Y. S. 212, (this case is probably no longer the law in New York but it serves to illustrate the point); The Dayton Manufacturing Co. v. The Metal Polishers, etc., Union, (1901) 8 Ohio N. P. 574, 11 Ohio Dec. N. P. 643; see also, Tobin v. Shapiro, (Pa. 1938). Labor and Unemployment Insurance Service, Prentice-Hall, Inc., p. 19583; Donnelly Garment Co. v. International Ladies' Garment Workers, (W.D. Mo. 1937) 21 F. Supp. 807; Crump v. Commonwealth, (1888) 84 Va. 927, 6 S. E. 620, (this case in-

The courts which support this contention have held that an attempt to obtain a closed shop is an illegal conspiracy.⁹⁰ The liberal and better view is that if the demand is not for the sole purpose of preventing nonunion employees from working, and if the employment of the nonunion employees is terminable at will, neither the employer nor the nonunion employees have a cause of action against the union either because of the demand for a closed shop or because the employer has acceded to the demand. The situation is treated as a case of legitimate competition between the union and nonunion workmen.⁹¹ Thus, where the employees of

indicates the dangers of this position. It can easily be perverted into a club against trade unionism). See, however, *McNally v. Reynolds*, (W.D. Wash. 1934) 7 F. Supp. 112. See also, *American Furniture Co. v. I. B. of T. C. & H. of A.*, (1936) 222 Wis. 338, 370, 268 N. W. 250, (the court, in discussing the Wisconsin Labor Code, said: "The law plainly protects not the unorganized individuals constituting the employees, but the right of employees to act in groups or associations. It deals with the collective effort of employees to better their conditions, and it is only their activities in this direction that are brought within the protection of the statute. The right of employees not to organize and not to name bargaining agents is neither fostered nor protected. Where the employees have neither organized and named their bargaining representatives nor taken any steps so to organize, we see nothing in the act which prohibits the employer selecting their bargaining agent by contract with a labor union which is not subject to his domination. Such a step promotes rather than defeats the purpose of the code.")

⁹⁰*Moore v. Cooks', Waiters' & Waitresses' Union No. 402*, (1917) 39 Cal. App. 538, 179 Pac. 417; *Sutton v. Workmeister*, (1911) 164 Ill. App. 105; *Mayo v. Dean*, (C.C.A. 5th Cir. 1936) 82 F. (2d) 554. Contra: *J. F. Parkinson Co. v. Building Trades Council*, (1908) 154 Cal. 581, 98 Pac. 1027; *George J. Grant Construction Co. v. St. Paul Bldg. Trades Council*, (1917) 136 Minn. 167, 161 N. W. 520.

⁹¹*Harmon v. United Mine Workers*, (1924) 166 Ark. 255, 266 S. W. 84; *Greenwood v. Building Trades Council*, (1925) 71 Cal. App. 159, 233 Pac. 823; *Cohn & Roth Electric Co. v. Bricklayers', etc., Local Union No. 1*, (1917) 92 Conn. 161, 101 A. 659; *Kemp v. Division No. 241*, (1912) 255 Ill. App. 213, 99 N. E. 389; *Clemitt v. Watson*, (1895) 14 Ind. App. 38, 42 N. E. 367; *Minasian v. Osborne*, (1911) 210 Mass. 250, 96 N. E. 1036; *Gray v. Building Trades Council*, (1903) 91 Minn. 171, 97 N. W. 663; *Construction Co. v. St. Paul Building Trades Council*, (1917) 136 Minn. 167, 161 N. W. 520; cf., *Roraback v. Motion Picture Machine Operators' Union*, (1918) 140 Minn. 481, 486, 168 N. W. 766; *State v. Employers of Labor*, (1918) 102 Neb. 768, 169 N. W. 717; *Cyrus Currier & Sons v. International Molders' Union*, (1921) 93 N. J. Eq. 61, 115 Atl. 66; *Williams v. Quill*, (1938) 277 N. Y. 1, 12 N. E. (2d) 547; *O'Keefe v. Local 463*, (1938) 277 N. Y. 300, 14 N. E. (2d) 77; *Parker v. The Bricklayers' Union No. 1*, (1889) 21 Ohio Law Bull. 223, 10 Ohio Dec. Rep. 458; *Graves v. McNulty*, (1912) 13 Ohio N. P. (N.S.) 110, 22 Ohio Dec. N. P. 425; *Duplex Co. v. Deering*, (1921) 254 U. S. 443, 480, 41 Sup. Ct. 172, 65 L. Ed. 349, (dissenting opinion, Brandeis, J.); *Levering & Garrigues Co. v. Morrin*, (C.C.A. 2d Cir. 1934) 71 F. (2d) 284. See also, *Picket v. Walsh*, (1906) 192 Mass. 572, 582, 78 N. E. 753, ("... it is not legal even where he wishes to do so, for an employer to agree with a union to discharge a non-union workman for an arbitrary cause at the request of the union... A fortiori a labor union cannot by a strike refuse to work with another workman for an arbitrary cause"); *Davis v. United Portable Hoisting Engineers*, (1898) 28 App. Div. 396, 51 N. Y. S. 180; see also, *People v. McFarlin*,

an establishment are both union and nonunion, it has been held that the union employees may lawfully refuse to work with their co-employees because they are objectionable to them, provided their refusal does not violate their contracts with their employer, and the employer has been held to be justified in discharging the objectionable employees under these circumstances. The ground for the objection by the union employees need not be stated. The discharged employees are without recourse at law or in equity unless a contract has been breached by their discharge.⁹²

Since trade unions, being voluntary associations, may refuse admission to membership without liability to the individual so refused, it can be argued with some cogency that they would not need to offer membership to nonunion employees, and still not incur any liability to the nonunion workmen who may be discharged. The difficulty is that many courts would be prone to construe such a situation as indicating that the real purpose of the union was that of depriving the nonunion workmen of their means of livelihood rather than that of seeking to better the economic position of the union members, and that, therefore, the action of the union was unlawful. The fact that an offer is made by the union to admit the nonunion employees to union membership has been held by these courts to indicate that the purpose of the union is justifiable because it is seeking the betterment of its members.⁹³ The distinction does not seem to be warranted. In

(1904) 43 Misc. Rep. 591, 89 N. Y. S. 527. Contra: *Berry v. Donovan*, (1905) 188 Mass. 353, 74 N. E. 603; *The State v. Donaldson*, (1867) 32 N. J. L. 151; *Kealey v. Faulkner*, (1908) 7 Ohio N. P. (N.S.) 49, 18 Ohio Dec. N. P. 498.

⁹²See Notes 23, 75, 91, *supra*.

⁹³*Schuster v. International Ass'n of Machinists*, (1937) 293 Ill. App. 177, 200, 12 N. E. (2d) 50; *Show v. Wheeler*, (1873) 113 Mass. 179, 186, ("... the right of the members to instruct whom they choose in the mysteries of their trade cannot be denied"); *Shinsky v. O'Neil*, (1919) 232 Mass. 99, 121 N. E. 790; *Mayer v. Journeymen Stone-Cutters' Ass'n*, (1890) 47 N. J. Eq. 519, 20 Atl. 492, (a trade union may require such qualifications for membership and such formalities of election as it chooses); *Cameron v. International Alliance*, (1935) 118 N. J. Eq. 11, 176 Atl. 692, (a trade union may restrict its membership); *Mills v. United States Printing Co.*, (1904) 99 App. Div. 605, 613, 91 N. Y. S. 185; cf., *Park v. Hotel, etc. Employees*, (1919) 22 Ohio N. P. (N.S.) 257, 30 Ohio Dec. N. P. 64; *Miller v. Ruehl*, (1938) 166 Misc. Rep. 479, 2 N. Y. S. (2d) 394; *Longshore Printing & Publishing Co. v. Howell*, (1894) 26 Or. 527, 38 Pac. 547; *Sheehan v. Levy*, (Tex. Civ. App. 1919) 215 S. W. 229; cf., however, *Greenwood v. Building Trades Council*, (1925) 71 Cal. App. 159, 172, 233 Pac. 823. But see, *Sutton v. Workmeister*, (1911) 164 Ill. App. 105; *Fairbanks v. McDonald*, (1914) 219 Mass. 291, 106 N. E. 1000; *Kealey v. Faulkner*, (1908) 7 Ohio N. P. (N.S.) 49, 18 Ohio Dec. N. P. 498.

Where a union member fails to pay his dues and is dropped from union membership as a result, it has been held that the union may attempt to com-

the vast majority of these cases, the purpose of the demand or the contract is to strengthen the position of the union, which can then advance the economic position of its members. If unions may refuse admission to their membership rolls, they should be privileged to do so under any circumstances, not even excepting the situation now under consideration. To hold otherwise is to read into the purpose of a union motives which do not exist. It is a rare case in which a union's purpose can truly be said to be, primarily, injury to an individual in his trade or business, and, secondarily, the betterment of its own members.

An analogous situation exists when a union intent upon forcing an employer into a closed shop agreement has ordered its members not to work on the same job with nonunion workmen, or not to work with materials fabricated or delivered by nonunion workmen. The best examples occur most often in the building construction industry, in which union workmen have threatened to stop or have stopped working because a sub-contractor employs nonunion mechanics or because some of the materials to be incorporated into the building were made or handled by nonunion workmen. The division of opinion in the reported decisions is sharp. Such threats to strike or such strikes have been enjoined as interfering with the free flow of labor to the employer, as attempting to create a monopoly in the labor market unlawfully depriving the nonunion workman of his constitutional right of liberty and property, as an illegal conspiracy, as an interference with interstate commerce, as a boycott, and many other equally heinous offenses.⁹⁴ However, a number of courts have held that a threat to strike or a strike for such a purpose is within the bounds of lawful action. The steps taken or threatened to be taken are clearly within the realm of labor competition, and for the obvious purpose of bettering the condition and bargaining power of the members of the union.⁹⁵ The means and methods

pel the closed shop employer to discharge that employee for that reason. See, *McCormick v. Local Union*, (1911) 13 Ohio C. C. (N.S.) 545, 32 Ohio C. C. 165.

That an employer does not require an employee to join a company union as a condition of obtaining employment is sufficient ground to deny relief to an outside union whose members had been employed and discharged to make way for a contract with a company controlled union. See, *Sherman v. Abeles*, (1934) 265 N. Y. 383, 193 N. E. 241.

⁹⁴*Blandford v. Duthie*, (1925) 147 Md. 388, 128 Atl. 138; *Armstrong Cork & Insulation Co. v. Walsh*, (1931) 276 Mass. 263, 177 N. E. 2. *Contra*: *Meir v. Spear*, (1910) 96 Ark. 618, 132 S. W. 988; *J. F. Parkinson Co. v. Building Trades Council*, (1908) 154 Cal. 581, 98 P. 1027.

⁹⁵*Meir v. Spear*, (1910) 96 Ark. 618, 132 S. W. 988; *J. F. Parkinson Co. v. Building Trades Council*, (1908) 154 Cal. 581, 98 Pac. 1027; *Kemp*

used in conducting such a strike should, however, meet the same requirements as in a strike for any other lawful purpose. Violence, coercion and intimidation must not be among the means adopted.⁹⁶ The limitation against the violation of existing contracts between the nonunion employees and their employers also has been applied to this situation, even by those courts which hold the action under consideration lawful.⁹⁷

As a general thing, trade union regulations and rules provide that the members may not work with nonunion workmen or on materials made or handled by nonunion workmen. The executive heads are, usually, given the authority to order a strike when such a situation is found to exist and remains unremedied. A few courts have extended the strong arm of the injunction either to prevent the ordering of such a strike or to prevent its continuance if called. The reasoning behind such an exercise of the injunctive power is indefensible, and is clearly a meddling with the internal regulations of the union, which are, in themselves, quite within the realm of lawful action. When a man joins the union he consents to be governed by its rules and regulations. In obeying the call of the union official to cease working, he is only doing what he voluntarily agreed to do when he joined the union. Thus it is not quite logical to say that he has been coerced into striking. Yet these courts hold that the calling of such a strike in accordance with the regulations of the union is in the exercise of a coercive and intimidating influence upon the members of the union, and, therefore, illegal and enjoinderable.⁹⁸

v. Division No. 241, (1912) 255 Ill. 313, 99 N. E. 389; Ryan v. Hayes, (1922) 243 Mass. 168, 137 N. E. 344; Mayer v. Journeymen Stone-Cutters' Ass'n, (1890) 47 N. J. Eq. 519, 531, 20 Atl. 492; Jersey City Printing Co. v. Cassidy, (1902) 63 N. J. Eq. 759, 53 Atl. 230; Bossert v. Dhuy, (1917) 221 N. Y. 342, 117 N. E. 582; Iron Molders' Union v. Allis-Chalmers Co., (C.C.A. 7th Cir. 1908) 166 Fed. 45. Contra: Purvis v. Local No. 500, (1906) 214 Pa. St. 348, 63 Atl. 585; Aeolian Co. v. Fischer, (C.C.A. 2d Cir. 1930) 40 F. (2d) 189; cf., Levering & Garrigues Co. v. Morrin, (C.C.A. 2d Cir., 1934) 71 F. (2d) 284.

The same right was allowed to employers in *Atkins v. Fletcher Co.*, (1903) 65 N. J. Eq. 658, 55 Atl. 1074.

⁹⁶*J. F. Parkinson Co. v. Building Trades Council*, (1908) 154 Cal. 581, 98 Pac. 1027; *People v. Harris*, (Colo. 1937). *Labor and Unemployment Insurance Service, Prentice-Hall, Inc.*, p. 19551.

⁹⁷*Commonwealth v. Hunt*, (1842) 4 Metc. (Mass.) 111. Cf., *Church Shoe Co. v. Turner*, (1926) 218 Mo. App. 516, 279 S. W. 232, (it was held lawful for a union to attempt to persuade employees to leave their employ in violation of a contract between the union to which the employees belonged and the employer.)

⁹⁸*Lehigh Structural Steel Co. v. Atlantic Smelting & Refining Works*, (1920) 92 N. J. Eq. 131, 111 Atl. 376; *Yates Hotel Co. v. Meyers*, (1922) 195 N. Y. S. 558. See also, *Journeymen v. Master Horseshoers*, (1912) 13 Ohio N. P. (N.S.) 297, 23 Ohio Dec. N. P. 338, (an employers' association,

"PUBLIC INTEREST" EMPLOYERS

There are two other fact situations which, although they come within the same classification, should be mentioned specially. These are the situations in which common carriers in interstate commerce and receivers of insolvent businesses are concerned. In the former the federal courts, before which this problem has been presented almost exclusively, have held that the union employees may run afoul of the interstate commerce act in exercising their right to strike or in refusing to work with nonunion employees or carry goods handled by nonunion workmen. It is argued that men who enter the service of such an employer do so with the knowledge of the great obligations which these carriers are bound to execute and that they, as employees, are bound to see that these obligations are met.⁹⁹ More recently it has been held that if the union gives a reasonable notice of the intention to strike, it can exercise that right.¹⁰⁰ The real question, however, is how effective can that strike be made? If it were effective enough to diminish the supply of labor to the point of impairing carrier movements, the courts would probably frown upon it even today as an interference with the paramount rights of the public, regardless of whether the methods pursued were peaceable or not.

in accordance with its rules, ordered a lockout of union employees under pain of expulsion from the association if the order was not obeyed. The court enjoined the enforcement of the order.) *Contra*: *Meir v. Spear*, (1910) 96 Ark. 618, 132 S. W. 988; *People v. Harris*, (Colo. 1938). *Labor and Unemployment Insurance Service*, Prentice-Hall, Inc., p. 19551; *Seymour Ruff & Sons v. Bricklayers', etc., Union*, (1933) 163 Md. 687, 164 Atl. 752; *New Jersey Printing Co. v. Local No. 26*, (1924) 96 N. J. Eq. 632, 126 Atl. 399; note also the language in *Cameron v. International Alliance*, (1936) 119 N. J. Eq. 577, 585, 183 Atl. 157; *Bossert v. Dhuy*, (1917) 221 N. Y. 342, 117 N. E. 582; see also, *Lundoff-Bicknell Co. v. Smith*, (1927) 24 Ohio App. 294, 156 N. E. 243; *National Fireproofing Co. v. Mason Builders' Ass'n*, (C.C.A. 2d Cir. 1909) 169 Fed. 259.

⁹⁹*New York Lumber Trade Association v. Lacey*, (1935) 154 Misc. Rep. 747, 277 N. Y. S. 519; *Toledo, etc., Ry. Co. v. Pennsylvania Co.*, (N.D. Ohio, 1893) 54 Fed. 730, 746; *Farmers' Loan & Trust Co. v. Northern Pacific R. Co.*, (E.D. Wis. 1894) 60 Fed. 803, (the court reasons in terms of the mentality that conceived the English Statutes of Laborers); cf., *Wabash R. Co. v. Hannahan*, (E.D. Mo. 1903) 121 Fed. 562; *Southern California Ry. Co. v. Rutherford*, (S.D. Cal. 1894) 62 Fed. 796; *Montgomery v. Pacific Electric Ry. Co.*, (C.C.A. 9th Cir. 1923) 293 Fed. 680; cf., also, *Foss v. Portland Terminal Co.*, (C.C.A. 1st Cir. 1923) 287 Fed. 33, (in this case the court refused an injunction against a strike even though the strike would be a breach of an agreement entered into under the Transportation Act of 1920 upon the ground that the Clayton Act, section 20, forbade the injunction); *Duplex Co. v. Deering*, (1921) 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349; but see, *M. & M. Wood Working Co. v. Plywood & Veneer Workers*, (D. Or. 1938) 23 F. Supp. 11, 16.

¹⁰⁰*Farmers' Loan & Trust Co. v. Northern Pacific R. Co.*, (E.D. Wis. 1894) 60 Fed. 803.

Although the Railway Labor Act, as amended, provides machinery for the peaceable settlement of railway labor disputes, it does not take away the right to strike in the event that an agreement is not reached under it. Yet most of the questions which plagued the courts before the act still remain to be solved, especially the question of how far the employees may go toward making their strike effective.

Undoubtedly employees of hospitals, of telephone, water, gas and electric companies, and of railway, mining and similar industries, are in a position to cause considerably more harm to the general public by an effective strike than are the employees of other industries. But the harm caused is a matter of degree, and the fact that the public is more likely to be affected in one case than another is small reason to deny to these employees the same rights which are conceded to employees in other industries. To deny them the right to strike after arbitration has failed, would be to make a sham of their right of collective bargaining. To deprive them of the means of making the strike effective would be, in effect, to deprive them of the right to strike. However, one limitation should be placed upon the right to strike in what we may call the essential service industries; namely, that a reasonable notice be given of the time when it is proposed to commence the strike. More than this should not be demanded.¹⁰¹

Perhaps at this point it would be well to discuss briefly the position of government employees in connection with the right to organize, to strike, and to take other similar action. Undoubtedly, such employees should be allowed to organize freely. But it is not quite so clear that the right to strike under any circumstances and under all conditions should not be circumscribed. The position of government employees may be compared to that

¹⁰¹*Jewish Hospital of Brooklyn v. Doe*, (1937) 252 App. Div. 581, 300 N. Y. S. 1111; *Foss v. Portland Terminal Co.*, (C.C.A. 1st Cir. 1923) 287 Fed. 33. The courts will probably always find means of preventing a strike in an essential service industry from becoming too effective on the ground of the injury to the public which may occur by reason of a long drawn out struggle between employer and employee. See *Burgess Bros. Co. v. Stewart*, (1921) 114 Misc. Rep. 673, 187 N. Y. S. 873; *Stephens v. Ohio State Telephone Co.*, (N.D. Ohio, 1917) 240 Fed. 759.

See also, *Driver v. Smith*, (1918) 89 N. J. Eq. 339, 345, 104 Atl. 717, ("No support . . . can be found . . . for the proposition in an action strictly between individuals, the court will or can deny to a party legal or equitable relief to which he is clearly entitled, merely because the effect of the granting of such relief will be to embarrass the party against whom the relief is granted in the performance of war work. So long as the courts are open the rights of parties must be determined by the existing law"); cf., *Rosenwasser Bros. v. Pepper*, (1918) 104 Misc. Rep. 457, 172 N. Y. S. 310.

of employees in the essential service industries, although this comparison is not altogether apt. The right to strike should not be denied to these workers for the obvious reason that such a denial could be enforced only with considerable difficulty, if at all, and for the further reason that to deny them this right would be to relegate them to a status incompatible with the prevailing ideas and ideals of industrial democracy. Nevertheless, if we are to avoid the possibility of chaos, which may readily result when the government of any political subdivision ceases to function or has its functioning seriously impaired because of a strike of its employees, it would appear to be the better policy to provide legislation setting up machinery for arbitration of whatever disputes may arise. Such legislation should be so drawn as to allow both for a speedy determination of such disputes and for a board of arbitrators on which labor would be adequately represented. In the event of the failure of arbitration, then the employees should be permitted to strike after giving reasonable notice of their intention to do so. The same means and methods in the conduct of their strike should be allowed these employees as are permitted to striking employees of ordinary business houses.

In those cases in which an operating receiver of an insolvent business has been concerned, the courts seldom have failed to issue an injunction against the actions or proposed actions of the employees. Although the courts have recognized that the employees of a business operated by a receiver have a right to strike, somehow or other these employees never have seemed to be able to conduct themselves or their strikes in such a manner or to have such purposes as would meet the approval of the court.¹⁰² It is a strange commentary upon the processes of the judicial mind.

COMPETING UNIONS

Several interesting problems are raised by contests between unions competing for the right to represent the workers in a particular plant or industry. The most usual situation is one in which one union has obtained a closed shop contract with the employer, and the rival union, by picketing the employer's plant and using placards and other means of publicity, attempts to bring enough pressure to bear on the employees to leave their

¹⁰²In *re, Higgins*, (N.D. Tex. 1886) 27 Fed. 443; *Arthur v. Oakes*, (C.C.A. 7th Cir. 1894) 63 Fed. 310; *United States v. Weber*, (W.D. Va. 1902) 114 Fed. 950; *Birmingham Trust & Savings Co. v. Ry. Co.*, (N.D. Ga. 1921) 271 Fed. 743.

union and join the rival union, and upon the employer to break his contract with the rival. If the contract were one directly with each individual employee, the great majority of the courts, as we have already seen, would unhesitatingly condemn such action upon the part of the rival union as an attempt to cause the breach of a contract and would stamp the actions of the picketers as unlawful. But the contract here is with the union, and the courts generally permit the picketing if unaccompanied by fraudulent misstatements or violence, even though it may result in a breach of the contract between the employer and the union of his employees.¹⁰³ It is difficult to observe any reason for the distinction which the courts make. The contention on the part of the employer that his business is being damaged as a result of the picketing and that as an innocent party in the contest between the two unions he ought to be protected, is often not sufficient to cause the court to act in his behalf.¹⁰⁴ The result does not seem just except in a case in which the employer has entered into a contract with one union as against another, considering it the lesser of two evils, and has forced a majority of his employees to join the union of his, the employer's, choice, or leave his employ. In any other situation where both unions are outside unions, one union ought not to be permitted to attempt, by means of the picket line and other forms of publicity, to cause a breach of the contract relation existing between the employer and the other union. To permit such a result lessens the value of such contracts and will eventually make them meaningless.¹⁰⁵

¹⁰³J. H. & S. Theatres v. Fay, (1932) 260 N. Y. 315, 183 N. E. 509; De Agostina v. Holmden, (1935) 157 Misc. Rep. 819, 285 N. Y. S. 909. Cf., Church Shoe Co. v. Turner, (1926) 218 Mo. App. 516, 528, 279 S. W. 232; see, Trommer v. Brotherhood of Brewery Workers, (1938) 167 Misc. Rep. 197, 199, 3 N. Y. S. (2d) 782, (The court distinguished the case upon the ground that the quarrel was not between rival unions but between two factions within one union and, therefore, "The principle that 'resulting injury is incidental, and must be endured' by an innocent party who finds himself between two quarreling labor organizations is not applicable. . . ." The picketing was enjoined.)

¹⁰⁴N. & R. Theaters, Inc. v. Basson, (1925) 127 Misc. Rep. 271, 215 N. Y. S. 157; Stillwell Theatre, Inc. v. Kaplan, (1932) 259 N. Y. 405, 182 N. E. 62, (note also the dissenting opinion). But see, Plant v. Woods, (1900) 176 Mass. 492, 57 N. E. 1011. See also, Graves v. McNulty, (1912) 13 Ohio N. P. (N.S.) 110, 22 Ohio Dec. N. P. 425.

¹⁰⁵Wolchak v. Wiseman, (1932) 145 Misc. Rep. 268, 259 N. Y. S. 225. The point of view represented by this case is perhaps no longer the view of the New York courts, but there is some validity to its claim. See, Buy-Wise Markets v. Winokur, (1938) 167 Misc. Rep. 235, 2 N. Y. S. (2d) 854; Erdman v. Mitchell, (1903) 207 Pa. St. 79, 56 Atl. 327. See also, Peninsular and Occidental Steamship Co. v. National Labor Relations Board, (C.C.A. 5th Cir. 1938) 98 F. (2d) 411.

INJUNCTIONS

The favorite legal weapon of the employer in resolving his differences with his employees or with outside unions has been the injunction, and the courts have not been slow to respond. The application of the injunctive processes of equity is a product of the nineteenth century. Countless strikes have been successfully broken by the issuance of injunctions so sweeping in their terms as to leave the defendants with no recourse except to go back to work upon the employer's terms, or to seek other employment, or to discontinue their efforts to unionize the employer's business if the defendants happen to be an outside union.¹⁰⁶

Prior to the Norris-La Guardia Act, and even now in those states which have not adopted similar legislation, the familiar procedure was for the employer to sue for a temporary restraining order, using as his principal, and in many cases his sole, evidence, affidavits which were sometimes answered by counter-affidavits. As evidence, these affidavits possess small merit. In many cases the deponents are professional strikebreakers and private guards, whose business it is to see that the affidavits are strong enough to gain the end sought. Truth is a minor consideration. Long before the Norris Act, courts were beginning

¹⁰⁶Local Union No. 313 v. Stathakis, (1918) 135 Ark. 86, 205 S. W. 450; Moore v. Cooks', Waiters' and Waitresses' Union, No. 402, (1919) 39 Cal. App. 538, 541, 179 Pac. 417, (in which the court uses the customary preface to a strike-breaking injunction); Levy & Devaney v. International Pocketbook W. Union, (1932) 114 Conn. 319, 158 Atl. 795; Illinois Malleable Iron Co. v. Michalek, (1917) 279 Ill. 221, 116 N. E. 714; Shaughnessey v. Jordan, (1916) 184 Ind. 499, 111 N. E. 622; Ellis v. Journeyman Barbers', (1922) 194 Iowa 1179, 191 N. W. 111; United Shoe Machinery Corp. v. Fitzgerald, (1921) 237 Mass. 537, 130 N. E. 86; Jensen v. St. Paul Motion Picture Machine Operators' Local Union, (1935) 194 Minn. 58, 259 N. W. 811; Grimes v. Durnin, (1921) 80 N. H. 145, 114 Atl. 273; Connett v. United Hatters of North America, (1909) 76 N. J. Eq. 202, 74 Atl. 188; Thomson Machinery Co. v. Brown, (1918) 89 N. J. Eq. 238, 108 Atl. 116; Yates Hotel Co. v. Meyers, (1922) 195 N. Y. S. 558; see also, Hellman v. Salesmen's Ass'n, (1919) 23 Ohio N. P. (N.S.) 177, (this is not a strike case but it serves to illustrate the point); Crouch v. Central Labor Council, (1930) 134 Or. 612, 293 Pac. 729; Bomes v. Providence Local No. 223, (1931) 51 R. I. 499, 506, 155 Atl. 581, (but see the dissenting opinion of Hahn J.); Charleston Dry Dock & Machine Co. v. O'Rourke, (E.D. S.C. 1921) 274 Fed. 811; Bedford Co. v. Stone Cutters' Ass'n, (1927) 274 U. S. 37, 47 Sup. Ct. 522, 71 L. Ed. 916; cf., (dissent by Brandeis, J.); St. Germain v. Bakery & Confectionery Workers' Union, (1917) 97 Wash. 282, 166 Pac. 665; Kitchen & Co. v. Local Union, (1922) 91 W. Va. 65, 112 S. E. 198. See, the dissenting opinion in A. R. Barnes & Co. v. Chicago Typographical Union No. 16, (1908) 232 Ill. 424, 438, 83 N. E. 940, ("It amounts to nothing to assert that laborers may organize for the purpose of bettering their condition in life while denying to them the right to do anything as an organization except those acts which could be as well done without organization.")

to rebel, and a growing minority were casting doubtful eyes upon the entire procedure.¹⁰⁷ Aside from the abuse mentioned, there is the further question as to whether or not a court of equity should step in when it has not been definitely shown that the local police authorities were unable or unwilling to cope with the situation. The question of keeping the peace where a strike or labor dispute exists is essentially a police job, and not the duty of a court of equity.¹⁰⁸ It is safe to say that the Norris-La Guardia Act did little more than codify the attitude of the more liberal

¹⁰⁷*Gevas v. Greek Restaurant Workers' Club*, (1926) 99 N. J. Eq. 770, 134 Atl. 309; *Evening Times Printing & Publishing Co. v. American Newspaper Guild*, (1938) 124 N. J. Eq. 71, 199 Atl. 599; *Pre'Catelan, Inc. v. International F. & W.*, (1921) 114 Misc. Rep. 662, 188 N. Y. S. 29; *Altman v. Schlesinger*, (1923) 204 App. Div. 513, 198 N. Y. S. 128; *Eagle Glass & Mfg. Co. v. Rowe*, (1917) 245 U. S. 275, 38 Sup. Ct. 80, 62 L. Ed. 286; *United States v. Weirton Steel Co.*, (D. Del. 1934) 7 F. Supp. 255, 264, ("A preliminary injunction should not be awarded on ex parte affidavits unless in a clear case." This in the face of the Norris-La-Guardia Act enacted in 1932); *Great Northern Ry. Co. v. Local*, (D. Mont. 1922) 283 Fed. 557. But see, *Master Weavers' Institute v. Associated S. Workers' Local*, (1934) 116 N. J. Eq. 502, 174 Atl. 437. *Great Northern Ry. Co. v. Brosseau*, (D. N. D. 1923) 286 Fed. 414, (contains an excellent indictment of the practice of granting preliminary injunctions upon affidavits in strike cases.)

¹⁰⁸*Segenfeld v. Friedman*, (1922) 117 Misc. Rep. 731, 732, 193 N. Y. S. 128, ("While a court of equity will always use its powers to prevent the infliction of irremediable damages, there should not be imposed upon it the ordinary performance of police duty. . . . A court of equity is not a police station.") *Mauker v. Bakers', etc., International Union*, (1927) 129 Misc. Rep. 516, 221 N. Y. S. 106; *Statler Co. v. Employees' Alliance*, (1914) 19 Ohio N. P. (N.S.) 375, 378, 27 Ohio Dec. N. P. 178; cf., *Fulforth Co. v. Garment Workers*, (1913) 15 Ohio N. P. (N.S.) 353, 27 Ohio Dec. N. P. 675; *Lipoff v. United Food Workers' Industrial Union*, (Pa. 1938), *Labor and Unemployment Ins. Service, Prentice-Hall, Inc.*, 19561, 19564; *Knapp-Monarch Co. v. Anderson*, (E.D. Ill. 1934) 7 F. Supp. 332, (decided on the basis of the Norris-La-Guardia Act; *Newton v. Laclede Steel Co.*, (C.C.A. 7th Cir. 1935) 80 F. (2d) 636, (this case was decided after the adoption of the Norris-La-Guardia Act); *Heintz Mfg. Co. v. Local No. 515*, (E.D. Pa. 1937) 20 F. Supp. 116; *American Steel & Wire Co. v. Wire Drawers', etc., Unions*, (N.D. Ohio 1898) 90 Fed. 598. See also, *Great Northern Ry. Co. v. Brosseau*, (D. N.D. 1923) 286 Fed. 414, 418, ("The difference in the civil life habits of England and the United States results in widely different effects from the same statute (the court points out that section 20 of the Clayton Act and section 2 of the English Trades Dispute Act of 1906 are alike) in the two countries. In Great Britain strikers and the new employees are a part of the common life of the community. They mingle freely with one another. The opportunities for peaceful persuasion are a part of the daily intercourse. There the private armed detective is unknown . . . in the rare cases in which they (the police) are called out to repress riots in connection with strikes, use nothing but their hand arms. In such a field the right of peaceful persuasion is natural and easy. It results sometimes in violent words, occasionally in violent acts with fists, and more rarely with bricks. The policemen, however, are quite equal to coping with such a situation. Guilty parties are promptly arrested, tried, and, if found guilty, promptly punished. The writ of injunction in strike cases has been unknown in England during the period when it has attained such universal use with us.")

courts. The effectiveness of the Act, as we shall see, depends in no small measure upon the attitude of the courts toward the view it represents.

By the great weight of authority it is held that the basis for the exercise of the injunctive powers of a court of equity in labor disputes is the actual or threatened interference with the property rights of the complainant.¹⁰⁹ This insistence by courts of equity upon safeguarding the rights of property as against the social, economic and moral rights of the individual is a strange commentary upon the failure of courts of equity to adapt equity jurisprudence to the prevailing world of realities. Out of this exaggerated attempt to maintain the inviolability of property rights at all costs has come the definition of the labor of a working man as property and of a man's trade or business as property.¹¹⁰

¹⁰⁹In *re Wood*, (1924) 194 Cal. 49, 227 Pac. 908; *Economy Cleaners v. Green*, (Del. 1936) 184 Atl. 225; *Mears Slayton Lumber Co. v. District Council*, (1910) 156 Ill. App. 327; *Campbell v. Motion Picture Machine Operators' Union*, (1922) 151 Minn. 220, 186 N. W. 781; *Interborough Rapid Transit Co. v. Lavin*, (1928) 247 N. Y. 65, 159 N. E. 863; *Riggs v. Cincinnati Waiters Alliance Local*, (1898) 5 Ohio N. P. 386, 8 Ohio Dec. N. P. 565; *Fulforth Co. v. Garment Workers*, (1913) 15 Ohio N. P. (N.S.) 353, 27 Ohio Dec. N. P. 675; cf., *Wills v. Restaurant Employees*, (1927) 26 Ohio N. P. (N.S.) 435, 437; *Bledsoe v. Wesley*, (Tex. Civ. App. 1929) 22 S. W. (2d) 718, (not a labor relations case); *Gompers v. Buck's Stove & Range Co.*, (1911) 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797; *Gassaway v. Borderland Coal Corp.*, (C.C.A., 7th Cir. 1921) 278 Fed. 56; *Commercial Bindery & Print Co. v. Tacoma Typographical Union No. 170*, (1915) 85 Wash. 234, 147 Pac. 1143.

It is a strange commentary upon the limitations which have been foisted upon equity jurisprudence "that a court of equity is without jurisdiction to protect by injunction mere personal rights," but does not lack jurisdiction to protect property rights. *James R. Kirby Post No. 50 v. American Legion*, (1927) 258 Mass. 434, 155 N. E. 462. But see, *Brace Bros. v. Evans*, (1888) 5 Pa. Co. Ct. 163, 167; cf., *Truax v. Corrigan*, (1921) 257 U. S. 312, 368, 374, 42 Sup. Ct. 124, 66 L. Ed. 254, ("... the law of property was not appropriate for dealing with the forces beneath social unrest; that in this vast struggle it was unwise to throw the power of the state on one side or the other according to principles deduced from that law; that the problem of the control and conduct of industry demanded a solution of its own; and that, pending the ascertainment of new principles to govern industry; it was wiser for the state not to interfere in industrial struggles by the issuance of an injunction. . . . Nor is a state obliged to protect all property rights by injunction merely because it protects some, even if the attending circumstances are in some respects similar. . . . Instances are numerous where protection to property by way of injunction has been refused solely on the ground that serious public inconvenience would result from restraining the act complained of." Dissenting opinion, Brandeis, J.) See also, *West v. Chastian*, (Ga. 1938) 198 S. E. 736, (the court holds that an injunction should not issue to prevent the consummation of a bare threat which, if followed up by an overt act, will work irreparable injury. But this is not a labor relations case. Would the court have come to the same conclusion if a labor dispute had been involved?)

¹¹⁰*Bogni v. Perotti*, (1916) 224 Mass. 152, 154, 112 N. E. 853; *Baldwin v. Escanaba Liquor Dealers' Ass'n*, (1911) 165 Mich. 98, 130 N. W. 214;

The result of this attitude has been scores of injunctions, both temporary and permanent, in which the restraints imposed have been so broad as to prevent any action upon the part of those affected, whether that action is lawful or not.¹¹¹ The amount of evidence deemed necessary to obtain a temporary restraining order has varied, depending upon the particular court, but in many instances an injunction has been granted upon what can almost be termed a lack of evidence. The courts have been too much influenced by the fact that the employer-complainant has a large capital investment at stake. They have given too little attention to the fact that the employees have their entire immediate future at stake. The result has been that the rights of an employer to conduct his business as he pleases, to a free flow of labor, and to have no one interfere with his business, especially when the intruder so-called happens to be an employee or an outside trade union, have been built up into a veritable Verdun against the attempt of the workingman to make some progress in the contest for more equal bargaining powers. It has taken the combined

Gray v. Building Trades Council, (1903) 91 Minn. 171, 97 N. W. 663; Feller v. Local 144, (1937) 121 N. J. Eq. 452, 453, 191 Atl. 111; cf., the dissenting opinion in Keuffel & Esser v. International Ass'n of Machinists, (1922) 93 N. J. Eq. 429, 116 Atl. 9; International Ticket Co. v. Wendrich, (1937) 122 N. J. Eq. 222; Exchange Bakery & Restaurant, Inc., (1927) 245 N. Y. 260, 265, 157 N. E. 130; Parker v. The Bricklayers' Union No. 1, (1889) 21 Ohio Law Bull. 223, 10 Ohio Dec. Rep. 458; Hoster Brewing Co. v. Giblon, (1903) 1 Ohio N. P. (N.S.) 377, 379, 14 Ohio Dec. N. P. 305; Park v. Hotel, etc., Employees, (1919) 22 Ohio N. P. (N.S.) 257, 30 Ohio Dec. N. P. 64; Moreland Theatres Corp. v. Portland Moving Picture, etc., Union, (1932) 140 Or. 35, 12 P. (2d) 333; Erdman v. Mitchell, (1903) 207 Pa. St. 79, 91, 56 Atl. 327; Goldfield Consolidated Mines Co. v. Goldfield Miners Union No. 220, (D. Nev. 1908) 159 Fed. 500, 515; Duplex Co. v. Deering, (1921) 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349; Cole v. Atlanta Terminal Co., (N.D. Ga. 1936) 15 F. Supp. 131, 132, ("The right given by the act (Railway Labor Act) to employees to negotiate by freely chosen representatives was held to be in the nature of a property right"); Railway Employees' Cooperative Ass'n v. Ry. Co., (D. Ga. 1938) 22 F. Supp. 510, (the Railway Labor Act, as amended, creates a property right in the employees, the interference with which may be enjoined); State v. Stewart, (1887) 59 Vt. 273, 289, 9 Atl. 559; St. Germain v. Bakery & Confectionery Workers' Union, (1917) 97 Wash. 282, 166 Pac. 665. If the right to labor is a property right, and therefore amendable to protection by a court of equity, it is difficult to reconcile such a view with that expressed in Great Northern Ry. Co. v. Local G. F. L. of I. A. of M., (D. Mont. 1922) 283 Fed. 557, 569, ("Society has not yet progressed to insure work, or to recognize a substantial interest in a job had. . . ." Contra: Robison v. Hotel & Restaurant Employees Local No. 782, (1922) 35 Idaho 418, 207 Pac. 132; Aberon Bakery Co. v. Raimist, (1931) 141 Misc. Rep. 774, 776, 254 N. Y. S. 38, ("Since labor is performed by human beings, it is not an article of commerce separate and apart from the laborer who performs it"); see also, Clayton Act, section 6, 38 Stat at L. 731.

¹¹¹See cases in note 106, supra.

assaults of the few progressive courts and of legislation to lower the barriers even a little.

The injunction is a harsh remedy. "The interference of a court of equity in labor disputes either against employer or laborer, should be exercised sparingly and with caution."¹¹² It is difficult to lay down exact rules which a court of equity may follow in arriving at a just conclusion. However, the following general rules should be adhered to if some degree of moderation is to be exercised by the courts. Surmise and suspicion are not enough upon which to base an injunction. The injunctive process should not be allowed to deteriorate into a means of coercing employees and breaking strikes with which the court does not happen to be in sympathy. It should not be used to restrain orderly picketing where it is exercised in good faith.¹¹³ Neither should the courts visit the deprivations of unknown individuals upon the strikers without strong proof that the unknown persons are both connected with and their actions approved and sanctioned by the strikers.¹¹⁴ Injunctions *pendente lite* should not be granted if the relief would be the same as that ultimately granted if the complainant succeeds at the trial and where the complainant's right to an injunction is doubtful.¹¹⁵ No temporary

¹¹²Moran v. Lasette, (1927) 221 App. Div. 118, 121, 223 N. Y. S. 283.

¹¹³International Pocketbook Workers' Union v. Orlove, (1930) 158 Md. 496, 148 Atl. 826, (an injunction cannot be founded on a supposition); Segenfeld v. Friedman, (1922) 117 Misc. Rep. 731, 193 N. Y. S. 128, (a court of equity should not enjoin orderly picketing); La Rose v. Possehl, (1935) 156 Misc. Rep. 476, 477, 282 N. Y. S. 332; McCormick v. Loan Union, (1911) 13 Ohio C. C. (N.S.) 545, 554, 32 Ohio C. C. 165, (the court states the problem very well); Lundoff-Bicknell Co. v. Smith, (1927) 24 Ohio App. 294, 304, 156 N. E. 243.

¹¹⁴Machinery Co. v. Toohey, (1931) 114 Misc. Rep. 185, 186 N. Y. S. 95; J. H. & S. Theatres v. Fay, (1932) 260 N. Y. 315, 183 N. E. 509; Cinderella Theater Co. v. Sign Writers' Local Union, (E.D. Mich. 1934) 6 F. Supp. 164. See also, Thomas Russell & Sons v. Stampers, etc., Union, (1907) 57 Misc. Rep. 96, 102, 107 N. Y. S. 303; Morton v. Brotherhood, (1912) 13 Ohio N. P. (N.S.) 311, 23 Ohio Dec. N. P. 222; cf., Southern California Iron & Steel Co. v. Amalgamated Ass'n, (1921) 186 Cal. 604, 200 Pac. 1. See also, Diamond Block Coal Co. v. United Mine Workers, (1920) 188 Ky. 477, 222 S. W. 1079, (the court held that the injunction should issue not against the union but against the guilty members of the union who were the parties to the enjoined action.)

¹¹⁵Roraback v. Motion Picture Machine Operators' Union, (1918) 140 Minn. 481, 168 N. W. 766; Baldwin Lumber Co. v. Local No. 560, (1920) 91 N. J. Eq. 240, 244, 109 Atl. 147; Cohen v. United Garment Workers of America, (1901) 35 Misc. Rep. 748, 72 N. Y. S. 341; Butterick Publishing Co. v. Typographical Union No. 6, (1906) 50 Misc. Rep. 1, 100 N. Y. S. 292; Brace Bros. v. Evans, (1888) 5 Pa. Co. Ct. 163, 166; McNally v. Reynolds, (W.D. Wash. 1934) 7 F. Supp. 112; United States v. Republic Oil Refining Co., (D. N.J. 1934) 75 F. (2d) 897, (not a labor case.) See, however, White v. Coeur D'Alene Big Creek Mining Co., (1936) 56 Idaho 282, 55 P. (2d) 720; My Maryland Lodge v. Adt, (1905) 100 Md. 238, 59

injunction ought to issue if the evidence is disputed; even on a hearing for a permanent injunction, the evidence should be clear, certain and convincing.¹¹⁶

Furthermore, the threatened injury should not be too remote and speculative. Courts should be wary of issuing temporary injunctions in labor disputes merely to preserve the status quo because, even when an injunction is carefully worded, its effect is to destroy the status quo. An injunction should never be issued with the thought in mind that even if it enjoins actions in which the defendants are no longer indulging, it can do no harm because it only enjoins unlawful actions.¹¹⁷ The reason for the issuance of an injunction is to prevent an injury which threatens irreparable damage when there is no adequate remedy at law to compensate for the expected damage. If the defendants are not

Atl. 721; *Baltic Mining Co. v. Houghton*, Circuit Judge, (1913) 177 Mich. 632, 144 N. W. 209. But cf., *Emporia Loan & Investment Co. v. Dailey*, (1935) 141 Kan. 845, 44 P. (2d) 288.

Suttin v. Unity Button Works, Inc., (1932) 144 Misc. Rep. 784, 785, 258 N. Y. S. 863; *Houston Funeral Home v. Boe*, (Tex. Civ. App. 1934) 78 S. W. (2d) 1091. To the same effect as *Houston Funeral Home v. Boe*, supra, see, *Independent Workers of Clayton Mark & Co. v. Beman*, (N.D. Ill. 1936) 13 F. Supp. 627; *Westmoreland Coal Co. v. Rothensies*, (E.D. Pa. 1935) 13 F. Supp. 321.

¹¹⁶*Bayonne Textile Corp. v. American Fed. of S. Workers*, (1934) 116 N. J. Eq. 146, 172 Atl. 551; *Decorative Stone Co. v. Bldg. Trades Council*, (C.C.A. 2nd Cir. 1926) 13 F. (2d) 123; *United States v. Weirton Steel Co.*, (D. Del. 1934) 7 F. Supp. 255. But see, *My Maryland Lodge v. Adt*, (1905) 100 Md. 238, 59 Atl. 721; *Evening Times Printing & Publishing Co. v. American Newspaper Guild*, (1938) 124 N. J. Eq. 71, 199 Atl. 599; *United Traction Co. v. Droogan*, (1921) 115 Misc. Rep. 672, 189 N. Y. S. 39.

¹¹⁷*General Leather Products Co., Inc. v. Luggage & T. M. Union*, (1936) 119 N. J. Eq. 432, 433, 183 Atl. 165, ("Does the abandonment of the strike constitute a defense? . . . An injunction is a preventative remedy; not a punishment for past wrongs. An injunction will be denied when it appears, even at final hearing that a change in conditions pending the suit renders an injunction unnecessary to protect complainant"); *Reynolds v. Everett*, (1894) 144 N. Y. 189, 39 N. E. 72; see also, *Ladner v. Siegel*, (1930) 298 Pa. 487, 148 Atl. 699; *Commercial Bindery & Print Co. v. Tacoma Typographical Union No. 170*, (1915) 85 Wash. 234, 174 Pac. 1143. Cf., however, *Piano and Organ Workers v. Piano and Organ Supply Co.*, (1906) 124 Ill. App. 353, (a temporary injunction was made permanent although the troubles which brought about the issuance of the temporary order were wholly over); *Church Shoe Co. v. Turner*, (1926) 218 Mo. App. 516, 279 S. W. 232; *Martin v. McFall*, (1903) 65 N. J. Eq. 91, 92, 55 Atl. 465, ("I cannot say that complainant is in no danger of being injured. Besides, if McFall and his agents, etc., do not intend to do the things forbidden by the restraining order, then the order will do them no harm"); *J. H. & S. Theatres v. Fay*, (1932) 260 N. Y. 315, 319, 183 N. E. 509, ("In spite of evidence that long before the case came to trial the defendant had ceased to employ these canvassers, the court was not bound to accept belated repentance or belated caution as a sufficient guaranty that the plaintiff's business would not be injured in similar fashion in the future. It might, in its discretion, grant protection by an injunction broad enough to achieve that purpose.")

threatening any act, or have discontinued the threat to do the act, which it is alleged will cause irreparable damage, an injunction ought not to issue, because the court's authority is based upon the proof that the act is threatened. A restraining order should be molded to fit the particular situation before the court and should go no further than the proofs require.¹¹⁸ For the court to go further than this is to lay itself open to the charge that it is indulging in strikebreaking. The use of general and vague terms and broad restraints is an improper exercise of the injunctive power. Injunctions in labor disputes are generally addressed to workmen. The terms used should, therefore, be so clear and definite as to leave no room for doubt.¹¹⁹

Where the end sought or the means used by the strikers or outside union are unlawful, and the damage has already been done at the time the injunction is sued for, the proper remedy is at law for damages. The injunction is a protective and preventative remedy and not a compensatory remedy.¹²⁰ To issue an injunction in such a situation is to use the injunctive process to punish, and not to prevent and protect. An injunction should never issue, unless two factors coincide: the probability that certain acts will occur, and their wrongfulness.¹²¹ In those cases where the dam-

¹¹⁸*International Pocketbook Workers' Union v. Orlove*, (1930) 158 Md. 496, 148 Atl. 826; *Walton Lunch Co. v. Kearney*, (1920) 236 Mass. 310, 128 N. E. 429; *Ex parte Heffron*, (1914) 179 Mo. App. 639, 162 S. W. 652; *Master Weavers' Institute v. Associated S. Workers' Local*, (1934) 116 N. J. Eq. 502, 174 Atl. 437; *Exchange Bakery & Restaurant, Inc. v. Rifkin*, (1927) 245 N. Y. 260, 268, 157 N. E. 130; *J. H. & S. Theatres v. Fay*, (1932) 260 N. Y. 315, 321, 183 N. E. 509; *Wise Shoe Co. v. Lowenthal*, (1935) 266 N. Y. 264, 194 N. E. 749; *Kraemer Hosiery Co. v. American Fed. of F. F. H. W.*, (1931) 305 Pa. St. 206, 157 Atl. 588, (see the concurring opinion of Kephart, J.); *Gasaway v. Borderland Coal Corp.*, (C.C.A. 7th Cir. 1921) 278 F. 56, 62.

¹¹⁹*Roesch Enamel Range Co. v. Carbine*, (1928) 247 Ill. App. 248, 249, ("An injunction should be so worded that the party enjoined may know from a reading of the order what he is restrained from doing"); *International Pocketbook Workers' Union v. Orlove*, (1930) 158 Md. 496, 148 Atl. 826; *Evening Times Printing & Publishing Co. v. American Newspaper Guild*, (1938) 124 N. J. Eq. 71, 199 Atl. 599; *Great Northern Ry. Co. v. Brosseau*, (D. N.D. 1923) 286 Fed. 414, 415, ("Injunctions are addressed to laymen. They ought to be so brief and plain that laymen can understand them. They ought to be framed in the fewest possible words. The order should not express the bias or violence of a party to such a controversy or his attorney.")

¹²⁰*Exchange Bakery & Restaurant, Inc. v. Rifkin*, (1927) 245 N. Y. 260, 157 N. E. 130; *Bledsoe v. Wesley*, (Tex. Civ. App. 1929) 22 S. W. (2d) 718, (not a labor case); *McFarland Co. v. O'Brien*, (N.D. Ohio, 1925) 6 F. (2d) 1016, 1018.

¹²¹*Central Cotton Garment Manufacturers Ass'n v. International Ladies' Garment Workers Union*, (1935) 280 Ill. App. 168, 180; *Armstrong Cork & Insulation Co. v. Walsh*, (1931) 276 Mass. 263, 177 N. E. 2; *Rissler v. Plumbers' Local No. 326*, (1931) 109 N. J. Eq. 91, 156 Atl. 498; *Reynolds*

age has already been done one of these two factors is absent.

A court of equity should not act to enjoin the commission of a crime or a libel as such. Although the courts generally have enjoined acts which are also crimes when property rights are endangered, such matters are more properly within the function of the local police authorities, and unless it is clearly shown that they either cannot control the situation or will not act, a court of equity should not intervene. This is the position adopted by the Norris-La Guardia Act and several of the more progressive courts, and is eminently to be preferred.¹²²

v. Everett, (1894) 144 N. Y. 189, 39 N. E. 72; Interborough Rapid Transit Co. v. Lavin, (1928) 247 N. Y. 65, 159 N. E. 863; De Agostina v. Holmden, (1935) 157 Misc. Rep. 819, 285 N. Y. S. 909; Rhodes Bros. Co. v. Musicians P. U. Local No. 198, (1915) 37 R. I. 281, 92 Atl. 641.

There is some doubt as to the propriety of the action taken by the court in *Hotel & Railroad News Co. v. Leventhal*, (1922) 243 Mass. 317, 322, 137 N. E. 534; *Mode Novelty Co. v. Taylor*, (1937) 122 N. J. Eq. 593, 195 Atl. 819, (the court issued an injunction upon the spurious argument that as the employer had succeeded in filling the places formerly occupied by the strikers the strike was terminated and it was unnecessary to consider the merits of the dispute and that as picketing is a concomitant of a strike and the strike was terminated, the picketing would be enjoined); *Goldfield Consolidated Mines Co. v. Goldfield M. U. No. 220*, (D. Nev. 1908) 159 Fed. 500. See also, *Consolidated Coal & Coke Co. v. Beale*, (S.D. Ohio 1922) 282 Fed. 934, (it was held that after an injunction had issued, the court would not order deputy marshals to guard the property of the complainant in anticipation of future threatened violations of the injunction.)

Levering & Garrigues Co. v. Morrin, (C.C.A. 2d Cir. 1934) 71 F. (2d) 284, (Syll. 3: "Power to grant injunction is not an inherent attribute of jurisdiction over a subject so as to render void a statute withholding power to grant injunction"); *Shell Oil Co. v. Stiffler*, (1935) 87 Utah 176, 48 P. (2d) 503, (the granting or refusing of either a temporary or permanent injunction rests in the discretion of the court, especially where the case is doubtful.) See also, *Nann v. Raimist*, (1931) 255 N. Y. 307, 174 N. E. 690; *Christenson v. Nielson*, (1936) 88 Utah 336, 54 P. (2d) 430.

¹²²*Lietzman v. Radio Broadcasting Station W. C. F. L.*, (1935) 282 Ill. App. 203; *Garside v. Hollywood*, (1914) 88 Misc. Rep. 311, 313, 150 N. Y. S. 647; *McCormick v. Local Union*, (1911) 13 Ohio C. C. (N.S.) 545, 554, 32 Ohio C. C. 165, ("If some of the courts which have issued injunctions in labor troubles were inquired of as to the source of their power to go to the lengths they have gone in some cases in restraining, by injunction, breaches of the peace and violations of the criminal law generally, they might be compelled to answer 'we got it by accretion—by the gradual wearing away of the power of the executive branch of the government as aided by the regular criminal courts, and a corresponding increase in power, by accretion, on the part of courts of equity, to substitute the injunction for the neglect of duty on the part of executive officers and in the place of jury trials in the regular criminal courts'"); *Morton v. Brotherhood*, (1912) 13 Ohio N. P. (N.S.) 311, 23 Ohio Dec. N. P. 222; *Coeur D'Alene Consolidated & Mining Co. v. Miners' Union*, (D. Idaho, 1892) 51 Fed. 260; *Gill Engraving Co. v. Doerr*, (S.D. N.Y. 1914) 214 Fed. 111. See also, *Vulcan Detinning Co. v. St. Clair*, (1924) 315 Ill. 40, 145 N. E. 657. Cf., *Jones v. E. Van Winkle Gin & Machine Works*, (1908) 131 Ga. 336, 62 S. E. 236; *In re Wood*, (1924) 194 Cal. 49, 55, 227 Pac. 908. See also, *Beck v. Teamsters' Protective Union*, (1898) 118 Mich. 497, 77 N. W. 13; *Hoster Brewing Co. v. Giblon*, (1903) 1 Ohio N. P. (N.S.) 377, 14 Ohio

The reason for all of these precautions is plain. The moral effect of an injunction upon the community cannot be underestimated. It gives the impression that the strikers have violated the law. Nothing will more quickly dissipate whatever good will the community may have towards the strikers than such an impression.¹²³

"... when men attempt to assert what they claim to be their rights in good faith, in a decent, orderly way, without resort to violence and within the law, their interests are as sacred as those of the plaintiff, and a court of equity should see to it that they are not improperly interfered with by the writ of injunction."¹²⁴

It is generally held that an injunction reaches all who are named parties to the action whether or not these parties have been served with process or summons, whether or not they have entered

Dec. N. P. 305. But see, *Truax v. Corrigan*, (1921) 257 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254.

¹²³*Searle Mfg. Co. v. Terry*, (1905) 56 Misc. Rep. 265, 106 N. Y. S. 438; *Machinery Co. v. Toohey*, (1921) 114 Misc. Rep. 185, 196, 186 N. Y. S. 95, ("Many publicists and some jurists have taken the position that injunctions ought never to issue in labor disputes. . . . I should not want to go quite to that length. Lawlessness and violence ought, perhaps, in an extreme case, to be restrained by injunction; but the courts should not carelessly cast the weight of their mandates into the strife between employers and employees. . . . In an evenly balanced, bitter, long-drawn out labor struggle, an edict of the court, leveled at the strikers, shakes the morale of the workingmen. This is not the purpose of an injunction, although it is frequently, and perhaps generally, the purpose of the employer, who seeks it. The function of an injunctive order in a labor dispute is to restrain lawlessness, when there is lawlessness, and when this is likely to cause irreparable damage. When there is no lawlessness, and no proper grounds to apprehend it, there should be no injunction. The courts do not take sides in this ceaseless struggle between capital and labor. They stand indifferent. They intervene only when the law is trampled upon. They interpose the arm of authority only to restrain those who invade the rights of others. . . . The moral effect of an injunctive order in such cases is tremendous. At once it gives the impression in the community that the strikers have violated the law. The court seems to have taken a hand in the struggle. This is the laymen's view. The injunction, thus shaping public opinion, is often decisive. . . . In exercising its discretion the court cannot shut its eyes to this aspect of the case or ignore the far-reaching psychic effect of its mandate"); *Kirmse v. Adler*, (1933) 311 Pa. 78, 83, 166 Atl. 566. See also, *Vulcan Detinning Co. v. St. Clair*, (1924) 315 Ill. 40, 44, 145 N. E. 657; *Reardon, Inc. v. Caton*, (1919) 189 App. Div. 501, 178 N. Y. S. 713; *Geo. B. Wallace Co. v. International Ass'n*, (1936) 155 Or. 652, 668, 63 P. (2d) 1090; *Barker Painting Co. v. Brotherhood of Painters*, (C.C.A. 3d Cir. 1926) 15 F. (2d) 16.

In a number of instances courts have granted an injunction against a labor union on the ground that an action for damages at law might prove unprofitable because of the pecuniary weakness of the union. But see, *Truax v. Bisbee Local No. 380*, (1918) 19 Ariz. 379, 393, 171 Pac. 121; *Lindsay & Co. v. Montana Fed. of Labor*, (1908) 37 Mont. 264, 276, 96 Pac. 127.

¹²⁴*Reardon, Inc. v. Caton*, (1919) 189 App. Div. 501, 511, 178 N. Y. S. 713.

an appearance, and whether or not they have answered. The decree also binds all who have notice of it whether or not they are parties to the action in which the decree was issued. Thus one does not have to be a party to the action to be in contempt of court for violating the injunctive order. All that is necessary is that the violator know that there is such an order; this knowledge is sufficient to bring him within the scope of its restraints.¹²⁵ There have been a number of attempts to attack injunctive orders collaterally, especially in proceedings for contempt of such an order, but such collateral attacks never have been permitted. It is the universal rule that the proper method of attacking a restraining order is by an appeal from the order. In other words, the question must be raised directly and not collaterally.¹²⁶

Very often the question arises as to whether a trade union can be considered an entity for the purpose of service of process upon it and whether it can be enjoined as a party to a labor dispute. Unincorporated trade union associations are not generally considered entities separate and apart from their members for any purpose except when so declared by statute.¹²⁷ A union, there-

¹²⁵Mears, Slayton Lumber Co. v. District Council, (1910) 156 Ill. App. 327; Fansteel Metallurgical Corp. v. Lodge 66, (1938) 295 Ill. App. 323, 14 N. E. (2d) 991; Borden's Farm Products Co. Inc. v. Sterbinsky, (1922) 117 Misc. Rep. 585, 588, 192 N. Y. S. 757; American Steel & Wire Co. v. Wire Drawers', etc., Unions, (N.D. Ohio 1898) 90 Fed. 598; Forrest v. United States, (C.C.A. 9th Cir. 1922) 277 Fed. 873; Bittner v. West Virginia-Pittsburgh Coal Co., (C.C.A. 4th Cir. 1926) 15 F. (2d) 652, (Syll. 2: "Officers of labor unions are not bound by decree of injunction issued twelve years previously against their predecessors in office and determining rights of parties as of that time.")

¹²⁶Armstrong v. Superior Court of California, (1916) 173 Cal. 341, 159 Pac. 1176; Lyon & Healy v. Piano, O. & M. I. W. International Union, (1919) 289 Ill. 176, 124 N. E. 443; Shaughnessey v. Jordan, (1916) 185 Ind. 499, 111 N. E. 622; Vilter Mfg. Co. v. Humphrey, (1907) 132 Wis. 587, 112 N. W. 1095. For an excellent study of the whole problem of the use of the injunction in labor disputes see, Frankfurter and Greene, The Labor Injunction (1930).

¹²⁷Carpenters' Union v. Citizens' Committee, (1928) 333 Ill. 225, 164 N. E. 393; Karges Furniture Co. v. Amalgamated W. L. Union, (1905) 165 Ind. 421, 75 N. E. 877; Diamond Block Coal Co. v. United Mine Workers, (1920) 188 Ky. 477, 222 S. W. 1079; Picket v. Walsh, (1906) 192 Mass. 572, 78 N. E. 753; Citizens' Co. v. Asheville Typographical Union, (1924) 187 N. C. 42, 121 S. E. 31; Statler Co. v. Employers' Alliance, (1914) 19 Ohio N. P. (N.S.) 375, 27 Ohio Dec. N. P. 178; Powers v. Journeymen Bricklayers' Union No. 3, (1914) 130 Tenn. 643, 172 S. W. 284; Allis-Chalmers Co. v. Iron Molders' Union No. 125, (E.D. Wis. 1906) 150 Fed. 155; American Fed. of Labor v. Buck's Stove & Range Co., (1909) 33 App. D. C. 83; West v. Baltimore & Ohio RR. Co., (1927) 103 W. Va. 417, 137 S. E. 654. But see, Tannenbaum v. Hofbauer, (1931) 142 Misc. Rep. 120, 121, 253 N. Y. S. 90, ("A labor union is a legal entity"); Christian v. International Ass'n of Machinists, (E.D. Ky. 1925) 7 F. (2d) 481; Dean v. International Longshoremen's Ass'n, (W.D. La. 1936) 17 F. Supp. 748.

fore, not being a proper party to an action except by virtue of a statute, cannot be held subject to a restraining order, nor can it be held in contempt of such an order. The opposite result is reached, however, where, by statute, trade union associations are either recognized as entities separate and apart from their members or where the power is granted to the association to sue in its own name or be sued by the association name.¹²⁸

¹²⁸*Karges Furniture Co. v. Amalgamated W. L. Union*, (1905) 165 Ind. 421, 75 N. E. 877; *Diamond Block Coal Co. v. United Mine Workers*, (1920) 188 Ky. 477, 222 S. W. 1079; cf., *Unkovich v. New York Central R. Co.*, (1933) 114 N. J. Eq. 448, 168 Atl. 867, (unincorporated trade union suable in its established name in equity without the necessity of a statute); *Statler Co. v. Employees' Alliance*, (1914) 19 Ohio N. P. (N.S.) 375, 27 Ohio Dec. N. P. 178, (the union cannot be sued in its accustomed name but under section 11257 of the General Code, if a sufficient number of the members of the union have been served with summons so as to be fairly represented, the cause made against those served and before the court will bind them and the other members of the union); *West v. Baltimore & Ohio R.R. Co.*, (1927) 103 W. Va. 417, 137 S. E. 654; but see, *St. Germain v. Bakery & Confectionery Workers' Union*, (1917) 97 Wash. 282, 166 Pac. 665, (it was held that a judgment may be rendered against an unincorporated union as such, even though there was no permitting statute, where some of its members were present and defended the action, and the membership was so large as to preclude summoning all the members—cf., the dissenting opinion.)

Armstrong v. Superior Court, (1916) 173 Cal. 341, 159 Pac. 1176; *O'Jay Spread Co. v. Hicks*, (1938) 185 Ga. 507, 195 S. E. 564; *Karges Furniture Co. v. Amalgamated W. L. Union*, (1905) 165 Ind. 421, 75 N. E. 877; *Wilson v. Airline Coal Co.*, (1933) 215 Iowa 855, 246 N. W. 753; *St. Paul Typothetae v. St. Paul Bookbinders' Union*, (1905) 94 Minn. 351, 102 N. W. 725; *Elk Laundry Co. v. A. F. of L., General Drivers Union*, (Minn. 1937), *Labor and Unemployment Insurance Service*, Prentice-Hall, Inc., p. 19550. *Varnado v. Whitney*, (1933) 166 Miss. 663, 147 So. 479 (The union was here held suable in its association name although there was no statute which expressly changed the common law rule with regard to the suability in their own names of unincorporated associations. There was, however, a statute which recognized the legal entity of such an association, granted it rights, and imposed liabilities on it and this statute, the court held, impliedly authorized unions to sue and be sued in their association name); *Aalco Laundry & Cleaning Co. v. Laundry, etc., Local*, (Mo. App. 1938) 113 S. W. (2d) 1081, (a statute in which the word "corporation" is used as including all associations having any power or privileges not possessed by individuals or partnerships does not apply to a trades union and the union is, therefore, not a suable entity within the meaning of the statute); cf., *Syz v. Milk Wagon Drivers' Union*, (Mo. App. 1930) 24 S. W. (2d) 1080; cf., also, *Wiehtuechter v. Miller*, (1918) 276 Mo. 322, 208 S. W. 39; *Hagan v. Bricklayers, etc.*, Union No. 28, (1932) 143 Misc. Rep. 591, 256 N. Y. S. 898, (on the question of service of summons); *United Mine Workers v. Coronado Co.*, (1921) 259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975, (unincorporated labor unions are recognized as distinct entities by numerous acts of Congress, and are suable as such in the federal courts upon process served on their principal officers and their strike funds are subject to execution); *Gaunt v. Lloyds America of San Antonio*, (W.D. Tex. 1935) 11 F. Supp. 787; *Trustees of Wisconsin State Fed. of Labor v. Simplex Shoe Mfg. Co.*, (1933) 215 Wis. 623, 256 N. W. 56.

Christian v. International Ass'n of Machinists, (E.D. Ky. 1925) 7 Fed. (2d) 481, (an individual member of a union is not such a representative of the union as to allow service of process upon him to be sufficient to subject

The reports are filled with actions for contempt of injunctive orders. Although it is a well established principle that the power to punish for contempt of a restraining order should be used "sparingly and with great caution and deliberation," the courts have honored the rule more in its breach than in its observance.¹²⁹ Some courts have held the officers of a union liable for contempt of a restraining order where the actual violation of the order has been committed by the rank and file members of the union, on the ground that the officers did not prevent the violation when they could have done so especially where, although the violators were under their control, they refrained from using, in good faith, the necessary means of preventing the acts which were deemed violations.¹³⁰

The difficulty with this reasoning is, first, the determination of what is good faith, and, second, punishment by the court for what can be considered, at best, only an indirect contempt. If the officers of the union assent to and ratify the acts of those who violate the order or take part in those acts, there can be no doubt that they should be subject to contempt proceedings. They should not, however, be required to exercise the functions of a policing officer and have their actions judged by the court's view of what it may consider good faith. Such a rule is to be condemned for its vagueness and its far-reaching implications. There have also been a number of decisions holding that a union engaged in conducting a strike is responsible for all of the lawlessness arising out of the strike if such lawlessness could have been avoided by reasonable discipline upon the members by publicly counselling that peaceful means alone be used, by protesting against and disavowing law-

another member not so served to a personal judgment); *McNally v. Reynolds*, (W.D. Wash. 1934) 7 F. Supp. 112, (labor union held qualified to act as representative of the employees for collective bargaining purposes with employer where statute provided that the word "person" extends to partnerships and corporations, and, therefore, includes labor unions); *Singleton v. Order of Ry. Conductors of America*, (S.D. Ill. 1935) 9 F. Supp. 417, (service of process on secretary and treasurer of a local of an international union held insufficient to confer jurisdiction in damage action against the international union); *Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Mfg. Co.*, (Wis. 1934) 256 N. W. 56, (under the Wisconsin Labor Code, a local union was held a proper party plaintiff to a complaint against the employer of its members alleging that the employer was interfering with the attempt of those employees to organize.) See also, Warren, *Corporate Advantages Without Incorporation* (1929).

¹²⁹*Phillips S. & T. P. Co. v. Amalgamated Ass'n*, (S.D. Ohio, 1913) 208 Fed. 335, 338. It has been held that a contempt can be shown by circumstantial evidence, *United States v. Taliaferro*, (W.D. Va. 1922) 290 Fed. 214.

¹³⁰*Phillips S. & T. P. Co. v. Amalgamated Ass'n*, (S.D. Ohio, 1913) 208 Fed. 335.

lessness, by taking such measures as may be at hand to assist in preventing or punishing such lawlessness, and by doing all these things unequivocally and in good faith. The same rule has been applied to hold the union's officers liable also.¹³¹ The rule may have some validity if it is clear that the lawlessness is caused by the strikers with the knowledge and consent of the union, or its officers, or if those acts have been ratified by the union, or its officers, but lacking such evidence, it should have no application. Courts sometimes fail to make this distinction.¹³²

¹³¹Kroger Grocery & Baking Co. v. Retail Clerks', (E.D. Mo. 1918) 250 Fed. 890; Cyrus Currier & Sons v. International Molders' Union, (1921) 93 N. J. Eq. 61, 115 Atl. 66, (the unlawful acts of the financial secretary of an unincorporated union in persuading complainants' employees to enter the union, and thereby break their contract of employment, and in using violence and intimidation in so doing, were charged to the union, and it was enjoined.)

¹³²Local Union No. 313 v. Stathakis, (1918) 135 Ark. 86, 205 S. W. 450; Parkinson Co. v. Building Trades Council, (1908) 154 Cal. 581, 98 Pac. 1027; Franklin Union No. 4 v. People, (1906) 220 Ill. 355, 77 N. E. 176, (the court failed to make the distinction between unlawful acts ordered or ratified by the union and its officers and those acts committed on the sole initiative of some of the members of the union; but see the dissenting opinion in which the distinction is made); Karges Furniture Co. v. Amalgamated W. L. Union, (1905) 165 Ind. 425, 430, 77 N. E. 877; Scofes v. Helmar, (1933) 205 Ind. 596, 187 N. E. 662; Bayonne Textile Corp. v. American Fed. of S. Workers, (1934) 116 N. J. Eq. 146, 172 Atl. 551; Michaels v. Hillman, (1920) 112 Misc. Rep. 395, 183 N. Y. S. 195, (liability for unlawful conduct of a strike may extend to a union but not to the individual members who were not specially connected with the unlawful acts); Tannenbaum v. Hofbauer, (1931) 142 Misc. Rep. 120, 121, 253 N. Y. S. 90; Paylay Hats, Inc. v. Zaritsky, (1934) 151 Misc. Rep. 569, 271 N. Y. S. 786; Perkins, Campbell & Co. v. Rogg, (1892) 28 Ohio Law Bull. 32, 11 Ohio Dec. Rep. 585, (contains a good statement); cf., Mace v. Carpenters & Joiners, (1933) 31 Ohio N. P. (N.S.) 17, 24; Morton v. Brotherhood, (1912) 13 Ohio N. P. (N.S.) 311, 23 Ohio Dec. N. P. 222, (the court refused to enjoin the union because of the acts of its members); cf., The Dayton Manufacturing Co. v. The Metal Polishers, etc., Union, (1901) 8 Ohio N. P. 574, 11 Ohio Dec. N. P. 643; Park v. Hotel, etc., Employees, (1919) 22 Ohio N. P. (N.S.) 257, 286, 30 Ohio Dec. N. P. 64; Goldfield Consolidated Mines Co. v. Goldfield Miners' Union No. 220, (D. Nev. 1908) 159 Fed. 500, (See Syll. 11 for a good statement); United Mine Workers v. Coronado Co., (1921) 259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975, (contains a good statement with reference to the liability of the national union body for local union activities); see also, Coronado Co. v. United Mine Workers, (1925) 268 U. S. 295, 45 Sup. Ct. 551, 69 L. Ed. 963; Aluminum Castings Co. v. Local No. 84, (W.D. N.Y. 1912) 197 Fed. 221, (union will not be enjoined because of unlawful acts of its individual members which neither the officers nor strike committee of the union directed or approved, unless those acts were committed in carrying out the orders of the union or its committees.)

See also, Clarkson v. Laiblan, (1919) 202 Mo. App. 682, 216 S. W. 1029, (The officers and members of a labor union are bound by the acts of the business agent of the union when he acts within the scope of his authority as such business agent); Allis-Chalmers Co. v. Iron Molders' Union No. 125, (E.D. Wis. 1906) 150 Fed. 155, 184, ("Being members of the picketing combination, the act of any one picket is technically the act of all, but this will not make them liable to more than a nominal fine"); Lawlor v. Loewe, (C.C.A. 2d Cir. 1911) 187 Fed. 522.

No court has more clearly stated the considerations which should govern in this situation than did the court in *Great Northern Railway Co. v. Brosseau*.¹³³ In discussing the problem, the court said,

"Why should wrongs and crimes, whether done by hotheads in the union or by vicious outsiders, who claim to be their friends, be seized upon as an index of the character of the union or its officers? Why not deal with such wrongs and crimes as we do in other fields of life? Why not treat them as the acts of those who do them, or aid and abet such doers? Why . . . impute their misdeeds to the striking union and its officers by a presumption which belies the known facts as well as the policy which common sense would dictate to the union and its officers as the only course for them to pursue? Just legal administration can give but one answer to these questions."¹³⁴

TERMINATION OF A STRIKE

When is a strike terminated? The question usually arises in a situation in which a strike has been in existence for an extended period and the employer is desirous of putting an end to the accompanying picketing and publicity. The answer to the question assumes an even larger importance in those jurisdictions in which picketing is held to be a concomitant of a strike, so that if the strike is terminated the picketing must also end. A number of courts have held that a strike is terminated when the places of the strikers have been filled with competent men, and the employer's business is operating in a normal manner and to a normal extent. Does this mean that the labor dispute can be terminated by a decision of the employer that it no longer affects him because he has succeeded in employing as many fill-in workers as he desires? It is a curious doctrine that places the economic disposition of his striking workers into the hands of the employer. Neither the mere lapse of time nor the success of the employer in the filling of the places of the striking employees should be the decisive factors in the determination of this question. Lapse of time does not dissolve a labor dispute and, by no stretch of the imagination, should the employer be given the right to decide when the dispute shall end. So much power in the hands of the employer means destruction of whatever rights workmen may now possess. The better view would seem to be that a strike is necessarily terminated only when the employer and the strikers come to an agreement, or when the striking em-

¹³³(D. N.D. 1923) 286 Fed. 414.

¹³⁴Ibid, p. 423. Cf., *Phillips S. & T. P. Co. v. Amalgamated Ass'n*, (S.D. Ohio 1913) 298 Fed. 335, 337.

ployees abandon the strike, or when the business of the employer is permanently discontinued. This latter does not mean that the employer may close his plant for a short period and then reopen it with strikebreakers and claim that the labor dispute has terminated, nor does it mean that a change in ownership of the business will terminate the strike. To hold otherwise would be to open the doors to a fraud upon the rights of the strikers, and would indicate a complete misunderstanding of the nature of a labor dispute which is a dispute concerning the conditions and terms of employment. It is apparent that the issues of terms and conditions of employment remain, regardless of who may, at the moment, be the employer or owner of the plant.¹³⁵

COERCION AND INTIMIDATION

One of the most frequently quoted statements found in the reported cases is that strikers and pickets may not use violence, coercion or intimidation in their conduct of a strike. Such conduct has been held to outlaw a strike which has been lawfully begun. A number of injunctions, both temporary and permanent, have been issued on the ground that the strikers or pickets, as the case may be, have indulged in acts conducive to violence, coercion or intimidation.¹³⁶ It is interesting to examine what the courts have held constitutes violence, coercion and intimidation.

Picketing has been held to be synonymous with violence if conducted with "misleading signs, false statements and publicity, veiled threats by words and acts and insidious propaganda."¹³⁷ Unless the court means that such words and acts can lead to violence, the statement is incredibly naive, and yet many courts have affirmed this position.¹³⁸ The assumption that such words or acts may lead to violence, and that the strike, therefore, should be enjoined, is unwarranted. Misleading signs, false statements and the like, are most unlikely in and of themselves to cause violence. If violence appears, it is for reasons more provoking. It is suggested that perhaps the reason behind decisions like these

¹³⁵Moore Drop Forging Co. v. McCarthy, (1923) 243 Mass. 554, 137 N. E. 919; Mode Novelty Co. v. Taylor, (1937) 122 N. J. Eq. 593, 195 Atl. 819; Yates Hotel Co. v. Meyers, (1922) 195 N. Y. S. 558; Moreland Theatres Corp. v. Portland Moving Picture, etc., Union, (1932) 140 Or. 35, 12 Pac. (2d) 333; Carter v. Fortney, (N.D. W. Va. 1909) 170 Fed. 463; Dail-Overland Co. v. Willys-Overland, Inc., (N.D. Ohio, 1919) 263 Fed. 171.

¹³⁶See Note 34, *supra*.

¹³⁷Esco Operating Corp. v. Kaplan, (1932) 144 Misc. Rep. 646, 650, 258 N. Y. S. 303.

¹³⁸Ellis v. Journeyman Barbers', (1922) 194 Iowa 1179, 191 N. W. 111.

is, in many cases, the fact that the court is more concerned because the employer is losing business because of the strike, is having difficulty in replacing his striking employees or in keeping employees at work, than it is with the underlying purpose of the strike. That this is so is indicated by such statements as that appearing in *Wilner v. Bless*, in which the court said that "the purpose of the dissemination of the false or misleading information, was to injure plaintiff's business and so to coerce him to employ members of the defendant's local only. . . ."¹³⁹ The court seems to ignore the fact that even if the information is false and misleading, the primary purpose of the union is to win the dispute. Damage to and coercion, so-called, of the employer, if they occur, are incidental. It should be borne in mind that the dissemination of the information is not the purpose.

It has been said that a test of whether coercion or intimidation exists is, "Were the acts of the pickets, and those aiding them, reasonably calculated to constrain, overcome the will, destroy freedom of action, coerce the volition, by putting the workmen in fear of injury by violent means?"¹⁴⁰ As is the case with most tests, to state it is relatively simple, but to apply it is proportionately difficult. Who is to determine whether the acts were reasonably calculated to constrain and coerce? How and by what means is this to be determined? Furthermore, at what point may it be said that the will is overcome, or that volition is overcome? Can it be said that if the methods adopted by the strikers prove effective, the chances are that they are coercive? A number of decisions seem to point this conclusion.

A number of courts have held that to constitute intimidation it is not necessary that there should be any direct threat—an intimidating attitude upon the part of strikers or pickets is sufficient.¹⁴¹ How are we to determine when an attitude is intimidating? Who is to make that determination? Certainly, an attitude

¹³⁹ (1926) 243 N. Y. 544, 544, 154 N. E. 598.

¹⁴⁰ (E.D. Wis. 1906) 150 Fed. 155, 179.

¹⁴¹ *Levy & Devaney v. International Pocketbook Workers Union*, (1932) 114 Conn. 319, 158 Atl. 795; *Carpenters' Union v. Citizens' Committee*, (1928) 333 Ill. 225, 247, 164 N. E. 393; *Beck v. Teamsters' Protective Union*, (1898) 118 Mich. 497, 77 N. W. 13; *Parker v. The Bricklayers' Union No. 1*, (1889) 21 Ohio Law Bull. 223, 10 Ohio Dec. Rep. 458; *Blumauer v. Portland Moving Picture Machine Operators' Union*, (1933) 141 Or. 399, 17 P. (2d) 1115; cf., *Geo. B. Wallace Co. v. International Ass'n*, (1936) 155 Or. 652, 63 P. (2d) 1090; *Brace Bros. v. Evans*, (1888) 5 Pa. Co. Ct. 163, ("The use of the word 'boycott' is in itself a threat"); *American Fed. of Labor v. Buck's Stove & Range Co.*, (1909) 33 App. D. C. 83.

that is intimidating to one may not be so to another. Some courts have attempted to solve this dilemma, by adopting the standard of the timid man.¹⁴² This would seem to indicate that almost any act may be intimidating. Many courts have held that violence is not necessarily an attribute of intimidation or coercion. One may be intimidated, they say, even if the acts of the strikers or pickets are outwardly perfectly peaceful, even though not a word is uttered. Placards and circulars and the mere physical number of those picketing, persistent efforts by strikers to convince others of the justness of their cause, the calling of harsh names, have, under this view, been held to cause sufficient coercion upon which to base a decree for an injunction.¹⁴³ Strangely enough,

¹⁴²*International Pocketbook Workers' Union v. Orlove*, (1930) 158 Md. 496, 148 Atl. 826, (female workers involved); *Searle Mfg. Co. v. Terry*, (1905) 56 Misc. Rep. 265, 106 N. Y. S. 438, (timid person test used); *Yablonowitz v. Korn*, (1923) 205 App. Div. 440, 199 N. Y. S. 769, (female customers involved); *Seattle Brewing & Malting Co. v. Hansen*, (N.D. Cal. 1905) 144 Fed. 1011, (timid person); *Kolley v. Robinson*, (C.C.A. 8th Cir. 1911) 187 Fed. 415, (timid person); *King v. Weiss & Lesh Mfg. Co.*, (C.C.A. 6th Cir. 1920) 266 Fed. 257, (distinction of race stressed).

¹⁴³*Local Union No. 313 v. Stathakis*, (1918) 135 Ark. 86, 205 S. W. 450; *Southern California Iron & Steel Co. v. Amalgamated Ass'n*, (1921) 186 Cal. 604, 200 Pac. 1; *Lisse v. Local Union*, (1935) 2 Cal. (2d) 312, 41 P. (2d) 314; *Levy & Devaney v. International Pocketbook Workers' Union*, (1932) 114 Conn. 319, 158 Atl. 795; *Jones v. E. Van Winkle Gin & Machine Works*, (1908) 131 Ga. 336, 62 S. E. 236; *Robison v. Hotel & Restaurant Employees, Local No. 782*, (1922) 35 Idaho 418, 207 Pac. 132, (the mere stationing of pickets in front of or near the complainant's place of business was held intimidating); *Karges Furniture Co. v. Amalgamated W. L. Union*, (1905) 165 Ind. 421, 75 N. E. 877; cf., *Dehan v. Hotel & Restaurant Employees*, (La. App. 1935) 159 So. 637, (Under the Louisiana Anti-Injunction Act, the handing to passersby on the street of circulars and the placing of a sign near the employer's place of business was held to be not intimidating); *Sherry v. Perkins*, (1888) 147 Mass. 212, 17 N. E. 307, (this case is an excellent illustration of the rule); *Densten Hair Co. v. United Leather Workers*, (1921) 237 Mass. 199, 129 N. E. 450; *Steffes v. Motion Picture Machine Operators' Union*, (1917) 136 Minn. 200, 161 N. W. 524; *Barr v. Essex Trades Council* (1894), 53 N. J. Eq. 101, 30 A. 881; *A. Fink & Son v. Butchers Union No. 422*, (1915) 84 N. J. Eq. 638, 95 Atl. 182, (a fantastic decision); *Gevas v. Greek Restaurant Workers' Club*, (1926) 99 N. J. Eq. 770, 134 Atl. 309, (this case is a good illustration of the lengths to which some courts will go in finding intimidation); *Blakely Laundry Co. v. Cleaners' & Dyers' Union Local*, (1933) 11 N. J. Misc. 915, 169 Atl. 451, (picketing is intimidation); *Wilner v. Bless*, (1926) 245 N. Y. 544, 154 N. E. 598, (false circulars and signs considered coercive); *Esco Operating Corp. v. Kaplan*, (1932) 144 Misc. Rep. 646, 650, 258 N. Y. S. 303; *Goldfinger v. Feintuch*, (1937) 276 N. Y. 281, 11 N. E. (2d) 910; *Hoster Brewing Co. v. Giblon*, (1903) 1 Ohio N. P. (N.S.) 377, 14 Ohio Dec. N. P. 305; *Crouch v. Central Labor Council*, (1930) 134 Or. 612, 293 Pac. 729, (a single female picket bearing a placard held intimidating); *Webb v. Cooks', Waiters' & Waitresses' Union No. 748*, (Tex. Civ. App. 1938) 205 S. W. 465; *Kolley v. Robinson*, (C.C.A. 8th Cir. 1911) 187 Fed. 415; *Kroger Grocery & Baking Co. v. Retail Clerks'*, (E.D. Mo. 1918) 250 Fed. 890, (the reasoning in this case reaches the stage of absurdity); *Knapp-Monarch Co. v. Anderson*, (E.D. Ill. 1934) 7 F. Supp. 332, (Syll. 7: "Nor-

rarely has it been held intimidation or coercion on the part of an employer to lock out his employees, to blacklist them, to force them to sign individual nonunion contracts as a condition of continued employment, or to force the establishment of a company controlled and financed union.¹⁴⁴

ris Anti-Injunction Act was not intended to deprive federal courts of jurisprudence to restrain, if necessary, picketing of coercive, intimidating character"); *Crump v. Commonwealth*, (1888) 84 Va. 927, 6 S. E. 620.

See, *International Pocketbook Workers' Union v. Orlove*, (1930) 158 Md. 496, 509, 148 Atl. 826, ("Difficulty arises, of course, in drawing a line between coercion and mere persuasion. And the zeal of pickets is always likely to carry them too far, whatever the line. . . . The court, upon a showing of excesses being committed in particular cases, can adapt its orders to the particular needs shown."). See also, dissenting opinion of Holmes, J., in *Vegeahn v. Guntner*, (1896) 167 Mass. 92, 105, 44 N. E. 1077; *Hughes v. Kansas City Motion Picture Operators' Union Local No. 170*, (1920) 282 Mo. 304, 221 S. W. 95, (this case is a good example of how the same facts may be differently interpreted and colored by the judges' personal economic philosophies—see the majority and minority opinions.).

Cl., the decision in *Empire Theatre Co. v. Cloke*, (1917) 53 Mont. 183, 193, 163 P. 107, (in which the court beautifully points out the fallacies in the decisions on this question). See also, *Four Plating Co. v. Mako*, (1937) 122 N. J. Eq. 298, 194 Atl. 53, (contains an able discussion on the question of compulsion); but see, *Evening Times Printing & Publishing Co. v. American Newspaper Guild*, (1937) 122 N. J. Eq. 545, 195 Atl. 378, (a threat of a secondary boycott was held to constitute coercion and intimidation); *Wasserstein v. Beim*, (1937) 163 Misc. Rep. 160, 294 N. Y. S. 439, 441; *Foundry Co. v. Molders' Union*, (1917) 20 Ohio N. P. (N.S.) 161, 28 Ohio Dec. N. P. 605, (contains an excellent discussion on this issue); *Heitkemper v. Central Labor Council*, (1920) 99 Or. 1, 192 Pac. 765, (the dissenting opinion presents the question clearly and well); *Geo. B. Wallace Co. v. International Ass'n*, (1936) 155 Or. 652, 662, 63 P. (2d) 1090; *Kirmse v. Adler*, (1933) 311 Pa. St. 78, 166 Atl. 566. See *People v. Harris*, (Colo. 1937) *Labor and Unemployment Insurance Service*, Prentice-Hall, Inc., p. 19551.

¹⁴⁴*Cornellier v. Haverhill Shoe Manufacturers' Ass'n*, (1915) 221 Mass. 554, 559, 109 N. E. 643, ("A combination to blacklist is the counter weapon to a combination to boycott, and is open to similar legal objections, when directed against persons with whom those combining have no trade dispute, or when the concerted action coerces the individual members, by implied threats or otherwise, to withhold employment from those whom ordinarily they would employ"); *State v. Daniels*, (1912) 118 Minn. 155, 161, 136 N. W. 584, (This case presents an excellent statement of the issue but there is room for doubt as to whether the court reached a proper conclusion. The court indicates that the employee would have to voice some objection to the action of the employer in requiring that he agree not to join a union as a condition of continued employment. How many employees will be foolhardy enough to voice or even intimate an objection, especially when his situation is such that: "As a rule, his daily wage is needed for the daily wants of himself and family, and nothing is left for the morrow. To sustain life he must needs obtain or retain employment on whatever terms it may be offered"); *Sinsheimer v. United Garment Workers*, (1894) 77 Hun. 215, 28 N. Y. S. 321; *La Rose v. Possehl*, (1935) 156 Misc. Rep. 476, 282 N. Y. S. 332; see the dissenting opinion of Wanamaker, J., Jackson, Chief of Police v. Berger, (1915) 92 Ohio St. 130, 149, 110 N. E. 732; *State v. Stewart*, (1887) 59 Vt. 273, 9 Atl. 559; *Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Mfg. Co.*, (1934) 215 Wis. 623, 256 N. W. 56, (Wisconsin Labor Code held to prevent coercion and interference by the

It is an impossible task to attempt to state a rule by which it can be determined what acts or words of men or organizations are sufficiently intimidating or coercive to cause a court of equity to exercise its injunctive powers. All that can be said properly is that the evidence should indicate a more or less continuous series of violent acts, or a very strong probability of violence in the immediate future as the result of words or acts, which violence cannot be controlled by the local police authorities or which they refuse to control. Mass picketing in and of itself should never be held to constitute intimidation. The number of pickets should be diminished by court order only if they actually obstruct ingress and egress to the business picketed or interfere with the reasonable use by other citizens of the streets. To go further than this is to facilitate into the consideration of these cases the admission to those elements which unconsciously and sometimes consciously allow the court to substitute its social and economic views for those of the litigants. Justice cannot even be approximated under such conditions.

CONSPIRACY

The use of the doctrine of conspiracy has been widespread in industrial controversies. A large number of cases involving labor disputes have turned upon whether or not the striking employees or the outside union have entered into an unlawful con-

employer with the efforts of his employees to choose their own representatives for collective bargaining purposes.)

Callan v. Exposition Cotton Mills, (1919) 149 Ga. 119, 99 S. E. 300, (It is not intimidation or coercion when an employer requires his employees to refrain from organizing as a condition of continued employment—it is merely good business practice. But it is a conspiracy and coercion of the employer if an outside union tries to organize the employees); Willner v. Silverman, (1909) 109 Md. 341, 71 Atl. 962, (the blacklisting of discharged employees by a combination of employers was not considered to constitute intimidation or coercion of those employees); In re, Opinion of Justices, (1929) 267 Mass. 607, 166 N. E. 401, (It is not intimidation or coercion of prospective employees for the employer to require that as a condition of their employment they must purchase stock in the employer's business); Bradley v. Pierson, (1892) 148 Pa. St. 502, 24 Atl. 65; Borderland Coal Corp. v. International United Mine Workers, (D. Ind. 1921) 275 Fed. 871, (for an employer to eject employees who have joined a union from their company owned homes in order to destroy an attempt to unionize the employer's business is not coercion but for the union to send food and clothing to these people is a part of an unlawful conspiracy); Nolan v. Farmington Shoe-Mfg. Co., (D. Mass. 1928) 25 F. (2d) 906. Cf., Virginia Ry. Co. v. System Federation No. 40, (C.C.A. 4th Cir. 1936) 84 F. (2d) 641, (aff'd 300 U. S. 515, 57 Sup. Ct. 592, 81 L. Ed. 789 (1937)). Also see, Coppage v. Kansas, (1915) 236 U. S. 1, 15, 35 Sup. Ct. 240, 59 L. Ed. 441, ("We do not mean to say, therefore, that a state may not properly exert its police power to prevent coercion on the part of employers towards employees, or vice versa.")

spiracy to gain their ends. The term has been loosely used and much unsound reasoning has been the result. A conspiracy is generally defined as "a combination of two or more persons by some concerted action to accomplish a criminal or unlawful purpose or to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means."¹⁴⁵ It is apparent that the determination of what is an unlawful purpose or what are unlawful means, gives a broad field of action to the court in arriving at a decision. The test is entirely too vague.

Almost every action by strikers or by an outside union has, at one time or another, been held an unlawful conspiracy. The doctrine has had its principal use as a preventative of possible injury to the property rights of the employer. The courts have not been overly reluctant to label the actions of strikers a conspiracy whenever it was apparent that the strike was proving effective. All too frequently, courts have declared that the combination of strikers was formed to injure the plaintiff's business and is, therefore, an illegal conspiracy which should be enjoined.¹⁴⁶ A survey

¹⁴⁵Hellman v. Salesmen's Ass'n, (1919) 23 Ohio N. P. (N.S.) 177, 180. See also, Meir v. Speer, (1910) 96 Ark. 618, 132 S. W. 988. (In this case it was held that if the purpose of the unions' action and the means adopted to obtain that purpose are both lawful, the result is neither a conspiracy nor a boycott); Parkinson Co. v. Building Trades Council, (1908) 154 Cal. 581, 98 Pac. 1027; Jetton-Dekle Lumber Co. v. Mather, (1907) 53 Fla. 969, 43 So. 590; Franklin Union, No. 4 v. People, (1906) 220 Ill. 355, 376, 77 N. E. 176; Karges Furniture Co. v. Amalgamated W. L. Union, (1905) 165 Ind. 421, 75 N. E. 877; New England Cement Gun Co. v. McGivern, (1914) 218 Mass. 198, 203, 105 N. E. 885; Lindsay & Co. v. Montana Fed. of Labor, (1908) 37 Mont. 264, 96 Pac. 127; Reform Club of Masons v. Laborers' Union Protective Society, (1899) 29 Misc. Rep. 247, 60 N. Y. S. 388, (refusal of members of one union to work with members of another does not amount to a conspiracy); Albro J. Newton Co. v. Erickson, (1911) 70 Misc. Rep. 291, 126 N. Y. S. 949; Longshore Printing & Publishing Co. v. Howell, (1894) 26 Or. 527, 38 Pac. 547; Bausbach v. Reiff, (1914) 244 Pa. St. 559, 91 Atl. 224; American Fed. of Labor v. Buck's Stove & Range Co., (1909) 33 App. D. C. 83; Alaska S. S. Co. v. International Longshoremen's Association, (W.D. Wash. 1916) 236 Fed. 964.

International Organization v. Red Jacket C. C. & C. Co., (C.C.A. 4th Cir. 1927) 18 F. (2d) 839, (an attempt to unionize a coal mine was held a conspiracy to restrain and interfere with interstate commerce—such a result would no longer be possible in view of the Wagner Act.) See also, United Leather Workers v. Herkert, (1924) 265 U. S. 457, 44 Sup. Ct. 623, 68 L. Ed. 1104; Levering & Garrigues Co. v. Morrin, (1933) 289 U. S. 103, 53 Sup. Ct. 549, 77 L. Ed. 1062; United States v. Railway Employees' Department, American Federation of Labor, (N.D. Ill. 1922) 283 Fed. 479, (section 20, of the Clayton Act, does not prohibit an injunction against an unlawful conspiracy.)

¹⁴⁶Ellis v. Journeyman Barbers', (1922) 194 Iowa 1179, 191 N. W. 111; Plant v. Woods, (1900) 176 Mass. 492, 57 N. E. 1011; Gray v. Building Trades Council, (1903) 91 Minn. 171, 97 N. W. 663; A. Fink & Son v. Butchers' Union, (1915) 84 N. J. Eq. 638, 95 Atl. 182, (this case is worth reading if for no other reason than as an exposition of the strong prejudices

of all of the thousands of strikes in the last fifty years would indicate beyond doubt that in the overwhelming majority of instances the concert of action on the part of striking employees or of members of an outside union was for the primary purpose of what they believed would better their own condition. There are few instances in which the primary purpose of the employees was to injure their employer's business. In fact the instances are so rare as not to be worthy of consideration.

We come then to a consideration of the second part of the test of a conspiracy, "to accomplish a purpose; not in itself criminal or unlawful, by criminal or unlawful means." Here again when we examine the reported decisions we find that almost every means adopted by striking employees or an outside union has, at one time or another, been held unlawful. Thus it has been held unlawful for an outside union to picket a nonunion employer because his method of doing business is such as to destroy all the gains which the union has made in the way of shorter working hours.¹⁴⁷ It has been held an unlawful act to picket an employer who refuses to renew a closed shop contract.¹⁴⁸ There are a number of other instances of the same type.¹⁴⁹

Strangely enough, although it is an enjoyable conspiracy if the actions of the workmen tend to injure or damage the employer's property or business, it has been held not to be a conspiracy for employers to combine to destroy a union.¹⁵⁰

The whole doctrine of conspiracy as it is applied to labor disputes is in need of reconsideration. Its use should definitely be

which rule some courts); *National Fireproofing Co. v. Mason Builders' Ass'n*, (C.C.A. 2d Cir. 1909) 169 Fed. 259, 265. Cf., *Lindsay & Co. v. Montana & Co. v. Montana Fed. of Labor*, (1908) 37 Mont. 264, 96 P. 127.

¹⁴⁷*Hellman v. Salesmen's Ass'n*, (1919) 23 Ohio N. P. (N.S.) 177. In, *Moore v. Cooks', Waiters' & Waitresses', Union No. 402*, (1919) 39 Cal. App. 538, 179 Pac. 417, (picketing for the purpose of obtaining a closed shop was held to be an unlawful conspiracy.)

¹⁴⁸*Cooks', etc., Local Union v. Papageorge*, (Tex. Civ. App. 1921) 230 S. W. 1086, 149. *Moropoulos v. C. H. & O. B. Fuller Co.*, (1921) 186 Cal. 679, 200 P. 601; *Karges Furniture Co. v. Amalgamated W. L. Union*, (1905) 165 Ind. 421, 75 N. E. 877; *Commonwealth v. Hunt*, (1942) 4 Metc. (Mass.) 111; *Hellman v. Salesmen's Ass'n*, (1919) 23 Ohio N. P. (N.S.) 177; *Wachowski v. Lutz*, (1924) 184 Wis. 584, 201 N. W. 234.

¹⁵⁰*Boyer v. Western Union Telegraph Co.*, (E.D. Mo. 1903); *Kitchen & Co. v. Local Union No. 141*, (1922) 91 W. Va. 65, 112 S. E. 108, (an extraordinary decision). See also, *Nolan v. Farmington Shoe-Mfg. Co.*, (D. Mass. 1928) 25 F. (2d) 906, (in this case although it was denied the purpose of the employer was to materially affect the union, but the court held this was lawful); cf., *Carpenters' Union v. Citizens' Committee*, (1928) 333 Ill. 225, 164 N. E. 393, (it was held that for third parties to compel or induce the employer to boycott and refuse to employ members of the union was an illegal conspiracy.)

restricted to those cases in which it is clear that the primary and perhaps sole purpose of the act is to injure, and in which the means adopted in the attempt to gain the end sought are violent or will, in all probability, lead to violence. This must not be confused with actions adopted by the workers to make their strike effective which are certain to injure the employer incidentally.¹⁵¹

¹⁵¹Meir v. Speer, (1910) 96 Ark. 618, 132 S. W. 998; Robison v. Hotel & Restaurant Employees, Local No. 782, (1922) 35 Idaho 418, 207 Pac. 132; Kemp v. Division No. 241, (1912) 255 Ill. 213, 99 N. E. 389; Vegelah v. Guntner, (1896) 167 Mass. 108, 44 N. E. 1077, (see the dissenting opinion of Holmes, J., for a lucid discussion of this question); Berry v. Donovan, (1905) 188 Mass. 353, 74 N. E. 603, (in this case the court stated the correct rule but applied it incorrectly; cf., the dissenting opinion of Holmes, J.); Campbell v. Motion Picture Machine Operators' Union, (1922) 151 Minn. 220, 186 N. W. 781, (the court seems to have failed to make the distinction); Hughes v. Kansas City Motion Picture Machine Operators' Local No. 170, (1920) 282 Mo. 304, 221 S. W. 95, (the court failed to make the proper distinction; cf., the dissenting opinion); Empire Theatre Co. v. Cloke, (1917) 53 Mont. 183, 163 Pac. 107; New York Central Iron Works Co. v. Breman, (1907) 105 N. Y. S. 865, (this case is a good example of confusion in the court's mind between incidental injury caused in furthering a definite goal of self-betterment and injury caused for injury's sake); Kirmse v. Adler, (1933) 311 Pa. St. 78, 85, 166 Atl. 566; cf., Jefferson & Indiana Coal Co. v. Marks, (1927) 287 Pa. St. 171, 134 Atl. 430; Levering & Garrigues Co. v. Morrin, (1933) 289 U. S. 103, 107, 53 Sup. Ct. 549, 77 L. Ed. 1062.

Schwarz v. International Ladies' Garment Workers' Union, (1910) 68 Misc. Rep. 528, 534, 124 N. Y. S. 968, (illustrates a vicious doctrine that has found widespread acceptance in labor controversies, "The purpose to be considered is its immediate, not its ulterior, purpose. . . ." The doctrine permits a court too much leeway); Grandview Dairy, Inc. v. O'Leary, (1936) 158 Misc. Rep. 791, 285 N. Y. S. 841, (the court held that the defendant union's real purpose in trying to unionize the complainant's business was to destroy the business because the union was not making a simultaneous attempt to unionize all of the dairies in the community. The fallacy here is that the better part of wisdom would dictate that a drive to unionize one plant at a time would be easier and hold more chance of ultimate success. It is often sheer folly to attempt to unionize an entire industry at one fell swoop. The recent unionization of the automobile industry is a good example of the step by step plan of unionizing an entire industry. The court's view seems to be either all or none—this is an unjustifiable and an unfair treatment of the union and its members); cf., Overseas Storage Co. v. Chlopsek, (1924) 209 App. Div. 834, 204 N. Y. S. 845; Webb v. Cooks', Waiters', and Waitresses' Union No. 748, (Tex. Civ. App. 1918) 205 S. W. 465, (the court confuses the means of attaining the objective with the objective); National Fireproof Co. v. Mason Builders' Ass'n, (C.C.A. 2d Cir. 1909) 169 Fed. 259, 265, ("It is not enough to establish illegality in an agreement between certain persons to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interests of the parties is not rendered illegal by the fact that it may incidentally injure third persons. Conversely, an agreement entered into for the primary purpose of injuring another is not rendered legal by the fact that it may incidentally benefit the parties. As a general rule it may be stated that, when the chief object of a combination is to injure or oppress third persons, it is a conspiracy; but that when such injury or oppression is merely incidental to the carrying out of lawful purpose, it is not a conspiracy. . . ." The statement of the rule is a simple matter—but how apply it? Who is to determine when the damage is incidental and when it is the primary purpose?)

There is a vast difference between a primary purpose for a lawful end, in the accomplishment of which injury occurs to another, and a primary purpose of injury to another. In addition, there must be no confusion between the adoption of peaceful means in the furtherance of a lawful purpose which will probably cause a loss of business to the employer, and the adoption of means which are violent or will, in all probability, lead to violence. The former should receive the sanction of an enlightened court, the latter should receive its censure. What is a lawful purpose has in the past rested upon what, in the court's opinion, is a lawful purpose. Any purpose should be held lawful which the employees, or outside union, in good faith, believe to be for the betterment of their terms and conditions of employment. The determination of good faith should not be difficult. The words and acts of the strikers or outside union, and the surrounding circumstances, can be used as fairly adequate guides.

BOYCOTTS

The problem of the boycott, primary and secondary, like the problem of conspiracy, has had a large place in the field of labor litigation. Many courts make no distinction between primary and secondary boycotts and hold all boycotts illegal.¹⁵² Other courts have made a distinction and have held primary boycotts valid under certain circumstances and secondary boycotts illegal under any circumstances, while still other courts have held both primary and secondary boycotts lawful under certain conditions.¹⁵³

It is apparent that personal views will enter largely in the determination and often to the detriment of the worker as the recorded decisions indicate.)

¹⁵²*Ellis v. Journeyman Barbers*, (1922) 194 Iowa 1179, 191 N. W. 111; *Olympia Operating Co. v. Costello*, (1932) 278 Mass. 125, 130, 179 N. E. 804; *Baldwin v. Escanaba Liquor Dealers' Ass'n*, (1911) 165 Mich. 98, 130 N. W. 214; *Gray v. Building Trades Council*, (1903) 91 Minn. 171, 97 N. W. 663; *Hughes v. Kansas City Motion Picture Machine Operators' Union Local No. 170*, (1920) 282 Mo. 304, 221 S. W. 95; *A. Fink & Son v. Butchers' Union No. 422*, (1915) 84 N. J. Eq. 638, 95 Atl. 182, (primary boycott held unlawful); cf., *Perfect Laundry Co. v. March*, (1926) 120 N. J. Eq. 508, 186 Atl. 470, (primary boycott held lawful); *Greenfield v. Central Labor Council*, (1922) 104 Or. 235, 207 Pac. 168, (primary boycott illegal—there have been decisions on this point since the recent enactment of modern labor legislation in the state and the position taken by the court is probably no longer valid); *Sheehan v. Levy*, (Tex. Civ. App. 1919) 215 S. W. 229.

¹⁵³To the effect that a primary boycott is lawful and a secondary boycott unlawful, see: *Robison v. Hotel & Restaurant Employees Local No. 782*, (1922) 35 Idaho 418, 207 Pac. 132, (primary boycott held lawful); *Wilson v. Hey*; (1908) 232 Ill. 389, 83 N. E. 928, (threat of a secondary boycott held unlawful); *Blandford v. Duthie*, (1925) 147 Md. 388, 128 Atl. 138, (a secondary boycott held unlawful); cf., *International Pocketbook Workers' Union v. Orlove*, (1930) 158 Md. 496, 148 Atl. 826, (a threat to attempt

The reasoning employed by the courts in both conspiracy and boycott cases has an underlying unity. They have employed both doctrines primarily to protect and safeguard business and property rights from damage.¹⁵⁴ They are often considered together be-

a secondary boycott is not unlawful); *Plant v. Woods*, (1900) 176 Mass. 492, 57 N. E. 1011, (see the dissenting opinion of Holmes, J., in which he declares the boycott lawful); *New England Cement Gun Co. v. McGivern*, (1914) 218 Mass. 198, 105 N. E. 885, (secondary boycott unlawful); *Lohse Patent Door Co. v. Fuelle*, (1908) 215 Mo. 421, 114 S. W. 997, (secondary boycott held an unlawful conspiracy); *Evening Times Printing & Publishing Co. v. American Newspaper Guild*, (1938) 124 N. J. Eq. 71, 199 Atl. 599; *McCormick v. Local Union*, (1911) 13 Ohio C. C. (N.S.) 545, 32 Ohio C. C. 165, (primary boycott lawful); *Packing Co. v. Butchers' Union*, (1916) 18 Ohio N. P. (N.S.) 457, 30 Ohio Dec. N. P. 438, (secondary boycott unlawful); see, however, *Brown & Son v. Mine Workers*, (1925) 25 Ohio N. P. (N.S.) 485, (a primary boycott held illegal); cf., *Wiley v. Retail Clerks' Union*, (1934) 32 Ohio N. P. (N.S.) 257; *Clark Lunch Co. v. Waiters' Local*, (1926) 22 Ohio App. 265, 271, 154 N. E. 362; *Wills v. Restaurant Employees*, (1927) 26 Ohio N. P. (N.S.) 435, (a primary boycott held unlawful where the conflict was one of white workmen against colored workmen); *Beckerman v. Bakery Union*, (1931) 28 Ohio N. P. (N.S.) 550, (secondary boycott held illegal); *McAllister v. Building Trades Council*, (1938) 12 Ohio Opinions 179, (the court approves a particular type of secondary boycott); *Lawlor v. Loewe*, (C.C.A. 2d Cir. 1911) 187 Fed. 522, (threat of a secondary boycott held unlawful); *United Chain Theatres v. Philadelphia Moving Picture Machine Operators' Union*, (E.D. Pa. 1913) 50 F. (2d) 189, (primary boycott held lawful but secondary boycott held unlawful); *Pacific Typesetting Co. v. International Typographical Union*, (1923) 125 Wash. 273, 283, 216 Pac. 358; *Parker Paint & Wall Paper Co. v. Local Union No. 813*, (1921) 87 W. Va. 631, 105 S. E. 911, (secondary boycott unlawful); *Senn v. Tile Layers Protective Union Local No. 5*, (1936) 222 Wis. 383, 268 N. W. 270.

To the effect that both primary and secondary boycotts are lawful, see: *Union Labor Hospital Ass'n v. Vance Redwood Lumber Co.*, (1910) 159 Cal. 551, 112 Pac. 886, (In this case we have the strange situation of an employer threatening his employees with discharge if they continue to patronize a certain storekeeper. The action of the employer was held lawful); *Lisse v. Local Union*, (1935) 2 Cal. (2d) 312, 41 P. (2d) 314; *Empire Theatre Co. v. Cloke*, (1917) 53 Mont. 183, 163 Pac. 107; *Manhattan Steam Bakery v. Schindler*, (1937) 250 App. Div. 467, 294 N. Y. S. 783; contra: *Commercial House & Window Cleaning Co. v. Awerkin*, (1930) 138 Misc. Rep. 512, 240 N. Y. S. 797; see also, *Foster v. Retail Clerks' International Protective Ass'n*, (1902) 39 Misc. Rep. 48, 78 N. Y. S. 860, (a primary boycott is lawful); *Grandview Dairy, Inc. v. O'Leary*, (1936) 158 Misc. Rep. 791, 285 N. Y. S. 841; cf., *Goldfinger v. Feintuch*, (1937) 276 N. Y. 281, 286, 11 N. E. (2d) 910; cf., also, *Schlang v. Ladies' Waist Makers' Union*, (1910) 67 Misc. Rep. 221, 124 N. Y. S. 289.

Loewe v. California State Fed. of Labor, (N.D. Cal. 1911) 189 Fed. 714, (the court held that it was no defense to a suit to restrain a boycott that the defendants acted in accordance with the rules of their trade union.)

¹⁵⁴*Lietzman Radio Broadcasting Station W. C. F. L.*, (1935) 282 Ill. 203; *Ellis v. Journeyman Barbers*, (1922) 194 Iowa 1179, 191 N. W. 111; *Bull v. International Alliance*, (1925) 119 Kan. 713, 241 Pac. 459; *My Maryland Lodge v. Adt*, (1905) 100 Md. 238, 59 Atl. 721; *Martineau v. Foley*, (1918) 231 Mass. 220, 120 N. E. 445; *Baldwin v. Escanaba Liquor Dealers' Ass'n*, (1911) 165 Mich. 98, 130 N. W. 214; *Gray v. Building Trades Council*, (1903) 91 Minn. 171, 182, 97 N. W. 663; *New York Central Iron Works Co. v. Breman*, (1907) 105 N. Y. S. 865; *Foundry Co. v. Molders' Union*, (1917) 20 Ohio N. P. (N.S.) 161, 28 Ohio Dec. N. P. 605;

cause in many cases the principal contention of the complainant is that the striking employees of the outside union have undertaken a conspiracy to boycott him.

A primary boycott exists when a combination of persons refuses to purchase another's merchandise or to employ his services and attempts to persuade others to do likewise. A secondary boycott has been defined as the existence of a

"combination of several persons for the purpose of causing loss to plaintiffs by causing others, against their will, to withdraw from these plaintiffs their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him."¹⁵⁵

The distinction which many courts have attempted to make

Purvis v. Local No. 500, (1906) 214 Pa. 348, 63 Atl. 585. But see, Willner v. Silverman, (1909) 109 Md. 341, 355, 71 Atl. 962.

Truax v. Corrigan, (1921) 257 U. S. 312, 342, 42 Sup. Ct. 124, 66 L. Ed. 254, (see the dissenting opinion of Mr. Justice Holmes: "By calling a business 'property' you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed. An established business no doubt may have pecuniary value and commonly is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct and like other conduct is subject to substantial modification according to time and circumstances both in itself and in regard to what shall justify doing it a harm. I cannot understand the notion that it would be unconstitutional to authorize boycotts and the like in aid of the employees' or employers' interest by statute when the same result has been reached constitutionally without statute by courts. . . .")

¹⁵⁵Packing Co. v. Butchers' Union, (1916) 18 Ohio N. P. (N.S.) 457, 460, 30 Ohio Dec. N. P. 438. For other definitions of a secondary boycott see, Meir v. Speer, (1910) 96 Ark. 618, 132 S. W. 988; Pierce v. Stablemen's Union, (1909) 156 Cal. 70, 103 Pac. 324; Paramount Enterprises v. Mitchell, (1932) 104 Fla. 407, 140 So. 328; Lietzman v. Radio Broadcasting Station W. C. F. L., (1935) 282 Ill. App. 203; Ellis v. Journeyman Barbers, (1922) 104 Iowa 1179, 191 N. W. 111; My Maryland Lodge v. Adt, (1905) 100 Md. 238, 59 Atl. 721; Gray v. Building Trades Council, (1903) 91 Minn. 171, 97 N. W. 663; Toledo, etc., Ry. Co. v. Pennsylvania Co., (N.D. Ohio, 1893) 54 Fed. 730; Truax v. Corrigan, (1921) 257 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254.

Blumenthal v. Feintuch, (1934) 153 Misc. Rep. 40, 273 N. Y. S. 660, (it was held that trade union placards appealing to the public not to buy certain foods but which did not mention the names of the customers of the manufacturer of the foods and no effort to intimidate or injure the manufacturer's customers did not constitute an illegal secondary boycott even though by coincidence the complainant was the only manufacturer of such products); Engelmeyer v. Simon, (1933) 148 Misc. Rep. 621, 265 N. Y. S. 636, (picketing of places of business of some of the complainant's customers, and bearing placards which requested sympathizers to purchase bread with the union label on it was held not to amount to a secondary boycott).

For definitions of a primary boycott see, Pierce v. Stablemen's Union, (1909) 156 Cal. 70, 103 Pac. 324; Lindsay & Co. v. Montana Fed. of Labor, (1908) 37 Mont. 264, 272, 96 Pac. 127; Mills v. United States Printing Co., (1904) 99 App. Div. 605, 91 N. Y. S. 185.

between what is a lawful and what is an unlawful primary boycott is based upon the primary purpose of the boycott. These courts contend that if the primary purpose is to do irreparable injury to the complainant, the boycott is illegal; but, if the primary purpose is to better the conditions of the boycotters as laborers, and not to do irreparable injury, the boycott is lawful even though incidental damage results.¹⁵⁶ Once again the question presents itself: What standards are to be used to determine when the primary purpose is to do irreparable damage and when the damage is only incidental to the lawful primary purpose? This difficulty is by no means imaginary. The end result has been that in those jurisdictions in which the above mentioned rule prevails there is no certainty as to when a set of actions may be enjoined as an unlawful boycott and when they may be upheld as lawful. The decision, therefore, rests, for the most part, with the personal predilections of the court. It is obvious that if the court happens to have a broad social philosophy the acts will be sustained as in the lawful exercise of their rights by the workers and the damage will be only incidental and *damnum absque injuria*. If, however, the court should happen to be of a conservative turn of mind, the primary purpose is apt to be declared to be to cause injury to the employer and the acts restrained as unlawful. This is evidently not a satisfactory situation.

Obviously, workmen and trade unions will consistently adopt such means as, in their opinion, are effective to gain their ends. The primary purpose in most strikes by employees or attempts by an outside union to unionize the business of a particular employer, is to better the conditions of the workers. It is not logical to suppose that employees or unions would sacrifice the security of everyday work or the funds and energies of the union, as the case may be, in order to satisfy a whim to injure the employer.¹⁵⁷ Unless the employer is affected, the strikers might as well abandon their efforts and seek other fields of endeavor. It is quite unlikely to suppose that one who refuses to accede to the demands of another will change his mind merely out of the goodness of his heart. Men are more willing to discuss terms of settlement when their pocketbooks are affected. This is true in all other fields of life

¹⁵⁶*Rosen v. United Shoe & Leather Workers' Union*, (1926) 287 Ill. App. Div. 49, 4 N. E. (2d) 507; *Overseas Storage Co. v. Chlopsek*, (1924) 209 App. Div. 834, 204 N. Y. S. 845. For a fine statement which cuts clear through to the heart of the problem, see, *Lindsay & Co. v. Montana Fed. of Labor*, (1908) 37 Mont. 264, 96 Pac. 127.

¹⁵⁷*Reardon, Inc. v. Caton*, (1919) 189 App. Div. 501, 178 N. Y. S. 713.

—why should it not be true in the field of labor relations? To avoid facing the very real problem posed is not to solve it. Because the means employed is effective or because the loss is great, does this make the primary purpose unlawful, or, if lawful, does it make the means unlawful?

The affirmative answer given by many of the courts to this question is obviously a screen behind which lies the real reason.¹⁵⁸ Witness the argument expressed in *Packing Co. v. Butchers' Union*, which clearly is not the moving reason for the result reached by the court:¹⁵⁹

“The method employed is thoroughly un-American and contrary to the spirit of our Constitution and Bill of Rights, which grants unto every man a free and unrestricted opportunity to enter into the limitless field of lawful trade and business. . . .”¹⁶⁰

It is apparent that the court is merely sparring with the real problem; because an act may be un-American does not necessarily make it unlawful. Furthermore, who is to determine what acts are un-American, and upon what basis is this determination to be made? The constitution and the bill of rights were drawn by immigrants or the sons of immigrants. However, some courts have been courageous enough to give the real reason behind their decisions—namely, that they have no particular personal desire to see the strike succeed. In *Martin v. McFall*, the court held that the acts

¹⁵⁸*Truax v. Corrigan*, (1918) 20 Ariz. 7, 176 Pac. 570, (reversed in, *Truax v. Corrigan*, (1921) 257 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254, on the ground that statute involved was unconstitutional but the chances are that a similar statute would be upheld today); cf., *State v. Glidden*, (1887) 55 Conn. 46, 8 Atl. 890, (in which the court held that if the boycott did not seriously affect the employer it was not criminal but if it meant ruin to him, then it was criminal); *McMichael v. Atlanta Envelope Co.*, (1921) 151 Ga. 776, 108 S. E. 226, (the actions adopted by the outside union were proving effective and were, therefore, enjoined as intimidating and coercive); *Robison v. Hotel & Restaurant Employees Local No. 782*, (1922) 35 Idaho 418, 429, 207 Pac. 132; cf., *Nusbaum v. Retail Clerks' International Protective Ass'n*, (1922) 227 Ill. App. 206; *Karges Furniture Co. v. Amalgamated W. L. Union*, (1905) 165 Ind. 421, 431, 75 N. E. 877; *Picket v. Walsh*, (1906) 192 Mass. 572, 581, 78 N. E. 753; *Martin v. McFall*, (1903) 65 N. J. Eq. 91, 85 Atl. 465, (the court recognizes the principle but refuses to adhere to it); *Heitkemper v. Central Labor Council*, (1920) 99 Or. 1, 192 Pac. 765, (see the dissenting opinion for a fine presentation of the problem.)

On the question of the effectiveness of strikers' actions, see, *Allis-Chalmers Co. v. Iron Molders' Union*, (E.D. Wis. 1906) 150 Fed. 155, 171; *Hellman v. Salesmen's Ass'n*, (1919) 23 Ohio N. P. (N.S.) 177, (the picketing was apparently effective and the court enjoined it even though the ultimate purpose of the pickets was good. The court, in its effort to safeguard property rights, confused incidental damages with the purpose); *Longshore Printing & Publishing Co. v. Howell*, (1894) 26 Or. 527, 38 Pac. 547, (confusion here of incidental damage and purpose.)

¹⁵⁹(1916) 18 Ohio N. P. (N.S.) 457, 30 Ohio Dec. N. P. 438.

¹⁶⁰*Packing Co. v. Butchers' Union*, (1916) 18 Ohio N. P. (N.S.) 457, 462, 30 Ohio Dec. N. P. 438.

of the defendants constituted an unlawful boycott where they attempted to "induce or compel complainant to adopt a particular mode of doing business by persuading or inducing other persons not to deal with him," because it "is one of the most usual, and in fact almost the only means by which the defendants can enforce their demands, I cannot say that complainant is in no danger of being injured."¹⁶¹

Within the past few years the primary boycott has been more generally accepted by the courts as a legitimate instrument in the conduct of a labor dispute. It is difficult to see why it is not perfectly lawful for a labor union or striking employees to publish the fact that an employer is unfair to labor, and to advise their friends and the public not to patronize such an employer.¹⁶² The very same thing is done many times each day by untold numbers of individuals in social discourse when they advise friends and relatives not to patronize a particular merchant or buy a particular article because either the merchant or the article, or both, do not meet with the approval of the speaker. No one has ever suggested that the giving of such advice is enjoined.¹⁶³

The secondary boycott still bears the imprint of illegality in almost every jurisdiction in this country. Many courts feel that "While direct picketing of an employer permits its customers to decide whether they wish to aid the union or not, intimidation of the customers themselves amounts to a coercion of their judgment; and the law never countenances coercion."¹⁶⁴ Others have held

¹⁶¹(1903) 65 N. J. Eq. 91, 92, 55 Atl. 465.

¹⁶²*Jones v. State*, (1926) 170 Ark. 863, 281 S. W. 663; *Parkinson Co. v. Building Trades Council*, (1908) 154 Cal. 581, 98 Pac. 1027, (the court defines the meaning and implication of the word "unfair"); *Lietzman v. Radio Broadcasting Station W. C. F. L.*, (1935) 282 Ill. App. 203; *Steffes v. Motion Picture Machine Operators' Union*, (1917) 136 Minn. 200, 161 N. W. 524; cf., *Campbell v. Motion Picture Machine Operators' Union*, (1922) 151 Minn. 220, 186 N. W. 781; *Root v. Anderson*, (Mo. App. 1918) 207 S. W. 255; *Lindsay & Co. v. Montana Fed. of Labor*, (1908) 37 Mont. 264, 96 Pac. 127; *Perfect Laundry Co. v. Marsch*, (1936) 120 N. J. Eq. 508, 186 Atl. 470; *Blumenthal v. Feintuch*, (1934) 153 Misc. Rep. 40, 273 N. Y. S. 660; *Kroger Grocery & Baking Co. v. Retail Clerks'*, (E.D. Mo. 1918) 250 Fed. 890. Contra: *Moore v. Cooks' & Waitresses' Union No. 402*, (1919) 39 Cal. App. 538; see also, *People v. Armentrout*, (Cal. 1931) 1 Pac. (2d) 556, (in which an anti-picketing and boycotting ordinance was involved); cf., these cases with *Lisse v. Local Union (1935)* 2 Cal. (2d) 312, 41 P. (2d) 314, in which a secondary boycott was held lawful; *Reynolds v. Davis*, (1908) 198 Mass. 294, 84 N. E. 457.

¹⁶³*Heitkemper v. Central Labor Council*, (1920) 99 Or. 1, 192 Pac. 765, (see the dissenting opinion of Bennett, J.)

¹⁶⁴*Grandview Dairy, Inc. v. O'Leary*, (1936) 158 Misc. Rep. 791, 793, 285 N. Y. S. 841. See also, *Anderson v. Lind Mfg. Co. v. Carpenters' District Council*, (1923) 308 Ill. 488, 139 N. E. 887; *Picket v. Wash*, (1906) 192 Mass. 572, 587, 78 N. E. 753; *Hughes v. Kansas City Motion Picture*

that the secondary boycott raises the question as to whether or not the strikers shall be permitted to destroy the business of a third party in order thereby to gain their contention with their employer.¹⁶⁵ But the principle involved is broader than this. It was well put in *Manhattan Steam Bakery v. Schindler*, where the court held that

“. . . though it be sometimes called a secondary boycott, peaceful picketing in front of the premises of a customer of an employer, with a sign stating that the employer is fairly under the ban of the employees' union, is likewise lawful. There is a definite industrial relation between the sale of plaintiff's products and the aims and objects of defendants' union.”¹⁶⁶

There can be little doubt that one who undertakes to market goods produced by an employer engaged in a dispute with his employees or an outside union is a participant in that dispute. His dealings with the employer are as effective, in their way, as strikebreakers are in theirs in minimizing the effect of a strike. This for the reason that strikes generally remain unsettled until one side or the other feels that it is too costly, pecuniarily, to continue. Strikebreakers have been used many times in the past successfully to break a strike. If the employer can keep the ranks of his employees filled, he is seldom much concerned whether the strike is settled or not. Its effect upon him in that case is usually negligible.¹⁶⁷ So, if he can continue to sell his merchandise or serv-

Operators' Local No. 170, (1920) 282 Mo. 304, 221 S. W. 95; *Goldfinger v. Feintuch*, (1937) 276 N. Y. 281, 11 N. E. (2d) 910; *The Dayton Manufacturing Co. v. The Metal Polishers, etc., Union*, (1901) 8 Ohio N. P. 574, 11 Ohio Dec. N. P. 643. But see, *Empire Theatre Co. v. Cloke*, (1917) 53 Mont. 183, 163 Pac. 107; *Manhattan Steam Bakery v. Schindler*, (1937) 250 App. Div. 467, 468, 294 N. Y. S. 783.

¹⁶⁵*Picket v. Walsh*, (1906) 192 Mass. 572, 78 N. E. 753; *New England Cement Gun Co. v. McGivern*, (1914) 218 Mass. 198, 105 N. E. 885; *Lohse v. Fuelle*, (1908) 215 Mo. 421, 114 S. W. 997; *Goldfinger v. Feintuch*, (1937) 276 N. Y. 281, 11 N. E. (2d) 910; *Packing Co. v. Butchers' Union*, (1916) 18 Ohio N. P. (N.S.) 457, 30 Ohio Dec. N. P. 438; *O'Brien v. Fackenthal*, (C.C.A. 6th Cir. 1925) 5 F. (2d) 389; *Parker Paint & Wall Paper Co. v. Local Union No. 813*, (1921) 87 W. Va. 631, 105 S. E. 911.

¹⁶⁶(1937) 250 App. Div. 467, 468, 294 N. Y. S. 783. See also, *Goldfinger v. Feintuch*, (1937) 276 N. Y. 281, 11 N. E. (2d) 910, in which the court apparently places a limitation upon the right to picket a third party's place of business by holding that it may be done where the retailer, who is being picketed, is in unity of interest with the nonunion manufacturer whose goods the retailer sells. See, *Weil & Co. v. Doe*, (1938) 168 Misc. Rep. 211, 5 N. Y. S. (2d) 559, for a definition and application of the term "unity of interest." See also, *Atlantic Refining Co. v. Cohen*, (Pa. 1938) *Labor and Unemployment Insurance Service*, *Pretice-Hall, Inc.*, p. 19632. Cf., however, *Mitnick v. Furniture Workers' Union*, (1938) 124 N. J. Eq. 147, 200 Atl. 553.

¹⁶⁷*Moore Drop Forging Co. v. McCarthy*, (1923) 243 Mass. 554, 137 N. E. 919; *Mode Novelty Co. v. Taylor*, (1937) 122 N. J. Eq. 593, 195

ice without diminution, the chances of his being willing to discuss a settlement are small. Why? Because the strike has not really affected him—he has gained his point and he has not suffered a loss of business. If a survey were to be made of all of the cases in which an employer has come into court asking for an injunction against his striking employees, or against the importunities of an outside union, it would be noted that in most instances the action was not initiated until the strike became effective, that is, until it was noticeable to the employer that his business was being affected financially. Thus it would seem that as long as a secondary boycott is peaceably conducted it should be sustained as having a direct relation to the dispute between the employer and his employees. Obviously, in this situation as in all of the others, violence, or acts from which violence will in all probability spring, should not be countenanced.

Very often, in the consideration of the conspiracy and boycott questions, the court is met with the argument that since one individual may abstain from trading with the employer, regardless of his motive and without responsibility for any injury to the employer's business by reason of such abstinence, so he may lawfully combine with others to accomplish the same purpose. That is, what one may lawfully do alone he may lawfully combine to do with others. A number of courts have unequivocally denied the validity of this contention. Thus it was held in *State v. Donaldson* that

"In the natural position of things, each man acting as an individual, there would be no coercion; if a single employee should demand the discharge of a co-employee, the employer would retain his freedom, for he could entertain or repeal the requisition without embarrassment to his concerns; but in the presence of a coalition of his employees . . . in most cases, he must submit, under pain of often the most ruinous losses, to the conditions imposed on his necessities."¹⁶⁸

Atl. 819. See also, *Allis-Chalmers Co. v. Iron Molders' Union*, (E.D. Wis. 1906) 150 Fed. 155, 171.

¹⁶⁸(1867) 32 N. J. L. 151, 155. See also, *State v. Glidden*, (1887) 55 Conn. 46, 8 Atl. 890; *Jetton-Dekle Lumber Co. v. Mather*, (1907) 53 Fla. 969, 974, 43 So. 690; *Franklin Union No. 4 v. People*, (1911) 220 Ill. 355, 77 N. E. 176; *Burnham v. Dowd*, (1914) 217 Mass. 351, 358, 104 N. E. 841; cf., the dissenting opinion of Holmes, J., in *Vegeahn v. Guntner*, (1896) 167 Mass. 108, 44 N. E. 1077; *Lohse Patent Door Co. v. Fuelle*, (1908) 215 Mo. 421, 144 S. W. 997; *Barr v. Essex Trades Council*, (1894) 53 N. J. Eq. 101, 30 Atl. 881; cf., *Alfred W. Booth & Brother v. Burgess*, (1906) 72 N. J. Eq. 181, 65 Atl. 226; cf., also, *New Jersey Painting Co. v. Local No. 26*, (1924) 96 N. J. Eq. 632, 126 Atl. 399; *Webb v. Cooks'*, etc., *Union No. 748*, (Tex. Civ. App. 1918) 205 S. W. 465; *Loewe v. California State Federation of Labor*, (N.D. Cal. 1905) 139 Fed. 71; cf., *Union Pacific*

Comment is hardly necessary. It is apparent that this line of argument is well suited to block effective action upon the part of the workers. The more reasonable point of view would seem to be that two or more persons may agree to do together what each one of them may lawfully do alone.¹⁶⁹ It is suggested that any other view leads to a result that is logically unsupportable and out of harmony with the needs and demands of an industrial age in which effective action is not always synonymous with individual action.

CONTRACTS WITH UNIONS

As the principle of collective bargaining gains headway, we find an increasing number of instances in which employer and trade union have found it more satisfactory to negotiate rather complete contracts covering all phases of the terms and conditions of employment. An added impetus has been given to such contracts by the Wagner Act and similar state legislation. The question sometimes arises in the enforcement of these contracts as to whether or not they lack mutuality. It has been uniformly held that such a contract is not unilateral, does not lack mutuality, and is valid.¹⁷⁰

R. Co. v. Reuf, (D. Neb. 1902) 120 Fed. 102, (this case is contra to the Loewe Case, supra.); but see, Bedford Co. v. Stone Cutters' Ass'n, (1927) 274 U. S. 37, 47 Sup. Ct. 522, 71 L. Ed. 916.

¹⁶⁹Meir v. Speer, (1910) 96 Ark. 618, 132 S. W. 988; Kemp v. Division No. 241, (1912) 255 Ill. 213, 223, 99 N. E. 389; Karges Furniture Co. v. Amalgamated W. L. Union, (1905) 165 Ind. 421, 75 N. E. 877. (The difficulty is what test to apply in determining whether the purpose in view is unlawful. There is also a further difficulty—who is to make this determination?); Scott-Stafford Opera House Co. v. Minneapolis Musician's Ass'n, (1912) 118 Minn. 410, 136 N. W. 1092; Lindsay & Co. v. Montana Fed. of Labor, (1908) 37 Mont. 264, 273, 96 Pac. 127; National Protective Ass'n of Steam Fitters v. Cumming, (1902) 170 N. Y. 315, 321, 63 N. E. 369; Rosenwasser Bros. v. Pepper, (1918) 104 Misc. Rep. 457, 172 N. Y. S. 310; cf., however, Exchange Bakery & Restaurant, Inc. v. Rifkin, (1927) 245 N. Y. 260, 157 N. E. 130; McCormick v. Local Union, (1911) 13 Ohio C. C. (N.S.) 545, 32 Ohio C. C. 165; Fulforth Co. v. Garment Workers, (1913) 15 Ohio N. P. (N.S.) 353, 27 Ohio Dec. N. P. 675; but see, Salesmen's Ass'n, (1919) 23 Ohio N. P. (N.S.) 177; Wabash R. Co. v. Hannahan, (E.D. Mo. 1903) 121 Fed. 563; Jensen v. Cooks' & Waiters' Union, (1905) 39 Wash. 531, 81 Pac. 1069.

¹⁷⁰Capra v. Local Lodge No. 273, (1938) 102 Colo. 63, 76 P. (2d) 738; Gregg v. Starks, (1920) 188 Ky. 834, 224 S. W. 459; Mississippi Theatres Corp. v. Hattiesburg Local Union, (1936) 174 Miss. 439, 164 So. 887; Rentschler v. Missouri Pacific R. Co., (1934) 126 Neb. 493, 496, 253 N. W. 694; Goldman v. Cohen, (1928) 222 App. Div. 631, 227 N. Y. S. 311, (contract to employ workers sent by the union as needed by the employer is enforceable but cannot prevent the employer from moving his factory to a comparatively distant location, thereby making it difficult for the union to send workers unless the contract contains a clause forbidding the removal of the factory); see also, Farulla v. Freundlich, Inc., (1934) 152 Misc. Rep. 761, 274 N. Y. S. 228; Leveranz v. Home Brewing Co., (1922) 24 Ohio N. P. (N.S.) 193; Goldstein v. International Ladies' Garment Workers'

"Legislatures and courts recognize the right of labor unions to enter into lawful contracts on behalf of their members with the employer for the purpose of promoting the welfare of their members, and in furtherance thereof such agreements should be clothed with legal sanction and afforded this reciprocal protection in their lawful contractual undertakings."¹⁷¹

The principal reason for approving such contracts is that they tend to promote industrial peace and, therefore, are to be welcomed as an enlightened method of dealing with the difficult problems of labor relations.¹⁷² To hold them invalid would be a calamitous step backward.

It has also been held generally that such contracts may be enforced by individual members of the union, by the union both at law and in equity by an injunction to prevent its breach by the employer, and by the employer both at law and in equity to prevent its breach by the union.¹⁷³

Union, (1938) 328 Pa. St. 385, 196 Atl. 43, (the court granted a negative decree enjoining the employer-defendant from pursuing at any other place than Philadelphia the business which he conducted and which, under the contract between the employer and the union, was to remain in Philadelphia during the life of the contract); *Cross Mountain Coal Co. v. Ault*, (1928) 157 Tenn. 461, 9 S. W. (2d) 692; *Harper v. Local Union*, (Tex. Civ. App. 1932) 48 S. W. (2d) 1033, (an excellent decision.) *Contra*: *Wilson v. Airline Coal Co.*, (1933) 215 Iowa 855, 246 N. W. 753; *Hudson v. C. N. O. & T. P. Ry. Co.*, (1913) 152 Ky. 711, 154 S. W. 47; *Burnetta v. Marceline Coal Co.*, (1904) 180 Mo. 241, 79 S. W. 136.

See also, *W. A. Snow Iron Works v. Chadwick*, (1917) 227 Mass. 382, 390, 116 N. E. 801; *Meltzer v. Kaminer*, (1927) 131 Misc. Rep. 813, 227 N. Y. S. 459, (where there is a contract between a union and an employer for definite period the officers of the union will be enjoined from calling a strike before the expiration of the contract if the reason for the proposed strike is to violate one of the terms of the contract); *Nederlandsch Amer. S. M. v. Stevedores', etc., Society*, (E.D. La. 1920) 265 Fed. 397, (union is responsible to the employer for the action of a number of its members in refusing to work in accordance with the terms of a contract between the union and the employer); *Railroad Co. v. Webb*, (C.C.A. 5th Cir. 1933) 64 F. (2d) 902, 903, (since the enactment of the Wagner Act, this decision is no longer representative of any federal court view but it still represents a point of view held in some state jurisdictions); *West v. Baltimore & Ohio R. Co.*, (1927) 103 W. Va. 417, 422, 137 S. E. 654.

In *World Trading Corp. v. Kolchin*, (1938) 166 Misc. Rep. 854, 2 N. Y. S. (2d) 195, it was held that although a local union changes its name and severs its connection with the parent union and transfers its allegiance to another parent union, it did not thereby become a different entity, and its rights under a contract executed prior to the change of allegiance were not destroyed. Cf., *M. & M. Wood Working Co., Inc. v. Plywood & Veneer Workers*, (D. Or. 1938) 23 F. Supp. 11.

¹⁷¹*Ribner v. Racso Butter & Egg Co.*, (1929) 135 Misc. Rep. 616, 621, 238 N. Y. S. 132.

¹⁷²*Mississippi Theatres Corp. v. Hattiesburg Local Union*, (1936) 174 Miss. 439, 164 So. 887, (an excellent discussion); *Rentschler v. Missouri Pacific R. Co.*, (1934) 126 Neb. 493, 253 N. W. 694; *Leveranz v. Home Brewing Co.*, (1922) 24 Ohio N. P. (N.S.) 193; *Blum & Co. v. Landau*, (1926) 23 Ohio App. 426, 155 N. E. 154.

¹⁷³*Gregg v. Starks*, (1920) 188 Ky. 834, 839, 224 S. W. 459; *Mosshamer*

"INALIENABLE" AND "NATURAL" RIGHTS

Nowhere, with the possible exception of the field of constitutional law, do we find such a widespread use of the metaphysical doctrines of inalienable and natural rights as in the law of labor relations. Time after time, courts have resorted to the use of these doctrines to support their conclusions. The results are not always desirable or justifiable. For example, it has been held many times that "the relation of employer and employee is purely voluntary, resting upon the contract of the parties. Every man has a natural right to hire his services to any one he pleases, or refrain from such hiring. . . ."¹⁷⁴ Just what does a court mean

v. *Wabash Ry. Co.*, (1922) 221 Mich. 407, 191 N. W. 210; *Yazoo & M. V. R. Co. v. Sideboard*, (1931) 161 Miss. 4, 14, 133 So. 669; *Stephenson v. New Orleans & N. E. R. Co.*, (1937) 180 Miss. 147, 177 So. 509, (an action can be maintained by a group of employees as a class to the same extent that the action could be maintained in the name of the union); *Blum & Co. v. Landau*, (1926) 23 Ohio App. 426, 155 N. E. 154; *Harper v. Local Union*, (Tex. Civ. App. 1932) 48 S. W. (2d) 1033; cf., however, *Ry. Co. v. Wilson*, (Tex. Civ. App. 1932) 55 S. W. (2d) 216. Contra: *Wilson v. Airline Coal Co.*, (1933) 215 Iowa 855, 246 N. W. 753; *Hudson & C. N. O. & T. P. Ry. Co.*, (1913) 152 Ky. 711, 154 S. W. 47; cf., *Louisville & Nashville Ry. Co. v. Bryant*, (1936) 263 Ky. 578, 92 S. W. (2d) 749.

See also, *Piercy v. Louisville & Nashville Ry. Co.*, (1923) 198 Ky. 477, 248 S. W. 1042, (a union cannot waive any personal right of a member gained under an agreement between the union and the employer); *Hartley v. Brotherhood of Ry. & S. S. Clerks*, (1938) 283 Mich. 201, 277 N. W. 885, (An agreement between a union and an employer is executed for the benefit of all the members of the union and not for the individual benefit of any particular member. Therefore, such agreement may be modified by the joint action of the union and the employer even though such modification may be disadvantageous to a particular member of the union.)

¹⁷⁴*People v. Chicago, Milwaukee & St. Paul Ry. Co.*, (1923) 306 Ill. 486, 493, 138 N. E. 155. See also, *Hardie-Tynes Mfg. Co. v. Cruse*, (1914) 189 Ala. 66, 66 So. 657; *Cohn v. Roth Electric Co. v. Bricklayers'*, etc., *Local Union No. 1*, (1917) 92 Conn. 161, 101 Atl. 659; *Carpenters' Union v. Citizens' Committee*, (1928) 333 Ill. 225, 238, 164 N. E. 393; *Citizens' Co. v. Asheville Typographical Union*, (1924) 187 N. C. 42, 121 S. E. 31. Cf., *Reardon, Inc. v. Caton*, (1919) 189 App. Div. 501, 178 N. Y. S. 713.

See also the following cases on the question of inalienable, natural, and other metaphysical rights: *L. D. Willcutt & Sons Co. v. Bricklayers' Benevolent & Protective Union No. 3*, (1908) 200 Mass. 110, 85 N. E. 897; *United Shoe Machinery Corp. v. Fitzgerald*, (1921) 237 Mass. 537, 130 N. E. 86; *Olympia Operating Co. v. Costello*, (1932) 278 Mass. 125, 179 N. E. 804; *Roraback v. Motion Picture Machine Operators' Union*, (1918) 140 Minn. 481, 486, 168 N. W. 766; *Hughes v. Kansas City Motion Picture Machine Operators' Local No. 170*, (1920) 282 Mo. 304, 314, 221 S. W. 95; *Jersey City Printing Co. v. Cassidy*, (1902) 63 N. J. Eq. 759, 764, 53 Atl. 230; *Wasilewski v. Bakers' Union, Local No. 64*, (1935) 118 N. J. Eq. 349, 350, 179 Atl. 284; *Canter Sample Furniture House v. Retail Furniture Employees' Local No. 109*, (1937) 122 N. J. Eq. 575, 196 Atl. 210; *Grand Shoe Co. v. Children's Shoe Workers' Union*, (1920) 187 N. Y. S. 886, 889; *Wood Mowing & Reaping Machine Co. v. Toohey*, (1921) 114 Misc. Rep. 185, 186, 186 N. Y. S. 95; *Burgess Brothers Co. v. Stewart*, (1921) 114 Misc. Rep. 673, 677, 187 N. Y. S. 873; *Brandt-Rosen v. Golden*, (1932) 143 Misc. Rep. 867, 868, 256 N. Y. S. 824; *Sherman v. Abeles*, (1934) 265 N. Y.

when it says that a man has a natural right to work or not to work? If he has a natural right to work, what becomes of that right when there is no work? What becomes of it when the employer chooses to lock him out or blacklist him? What value is there to a right not to work unless, when through no fault of his own, the worker finds himself without work, there is another means of support available? Another court has stated that the "right to contract is not a natural right, but it is the first relative right that man has when he becomes a social entity."¹⁷⁵ What is a relative right? Still another court has said that men have the right to enjoy a "free and natural" condition of the labor market, and that the "peculiar element of this perhaps newly recognized right is that it is an interest which one man has in the freedom of another."¹⁷⁶ Again, one may ask, what is the right to a free and natural condition of the labor market? It is a matter of great doubt whether such a condition has ever existed or ever will exist or, if it did exist, whether it would be desirable.¹⁷⁷

These metaphysical doctrines have been erected into effective safeguards for the protection of property as against the social and economic claims of the worker.¹⁷⁸ Time and again they have been

383, 193 N. E. 241; *Kealey v. Faulkner*, (1908) 7 Ohio N. P. (N.S.) 49, 55, 18 Ohio Dec. N. P. 498; *Erdman v. Mitchell*, (1903) 207 Pa. St. 79, 91, 56 Atl. 327; *Ry. Co. v. Griffin*, (1914) 106 Tex. 477, 483, 171 S. W. 703; *Pope Motor Car Co. v. Keegan*, (N.D. Ohio 1906) 150 Fed. 148; *Goldfield Consolidated Mines Co. v. Goldfield Miners Union No. 220*, (D. Nev. 1908) 159 F. 500, 514; *Coppage v. Kansas*, (1915) 236 U. S. 1, 12, 35 Sup. Ct. 240, 59 L. Ed. 441; *Monday Co. v. Automobile, etc.*, Local No. 25, (1920) 171 Wis. 532, 177 N. W. 867.

¹⁷⁵*Brost Pattern Works v. Reid*, (1922) 24 Ohio N. P. (N.S.) 60, 62.

¹⁷⁶*Jersey City Printing Co. v. Cassidy*, (1902) 63 N. J. Eq. 759, 765, 53 Atl. 230.

¹⁷⁷When a court talks in terms of natural rights, inalienable rights, liberty of contract, the right to a free flow of labor, etc., it is placing itself on the side of those who believe that the main function of the state is to intervene as little as possible in the economic life of the people. That is, the court is expressing a wish for a return to the conditions of the negative state. ". . . What is interesting in the thesis is less the question of whether it implies a practical policy than the assumptions upon which it rests. These are, first, that the unfettered competition of private interests will produce a well-ordered society; and, second, that in life as distinct from theory, a competition which begins as unfettered will remain such. Neither assumption conforms to our experience." Laski, *The State In Theory And Practice*, (1935) 27.

¹⁷⁸Conservative historians like McMaster, Ford, or President Wilson, have repeatedly pointed out that the Federal Convention was organized not by democrats like Jefferson, Patrick Henry, or Samuel Adams, who were prominent in the Revolutionary movement, but by the commercial and propertied classes, who were frightened at the excesses of the popular state governments. The Federal Convention, however, agreed not on eternal principles, but on practical compromises. . . ." Cohen, *Law and the Social Order* (1933) 15.

used to break strikes aimed at the amelioration of working conditions. It is no exaggeration to assert that they deal with a world of abstractions and make believe. The arguments which are based upon them lack substance, they are mere images of a shadow existence. An excellent example is *Cooks', etc., Union v. Papageorge*, in which the court very gravely points out that the

"Constitution grants to every man under the protection of the American flag, the right to make contracts for his personal services; free from hindrance or obstruction by his fellow men, and he has the inalienable right to freely use his hands for whom he pleases, upon such terms as he pleases. These rights include both the right to sell and the right to purchase labor, and no law would be upheld that would deprive the laborer and employer of the right to contract with one another."¹⁷⁹

¹⁷⁹(Tex. Civ. App. 1921) 230 S. W. 1086, 1088. See also, *Pierce v. Stablemen's Union Local No. 8760*, (1909) 156 Cal. 70, 103 Pac. 324; *Robison v. Hotel & Restaurant Employees, Local No. 782*, (1922) 35 Idaho 418, 207 Pac. 132; *Carlson v. Carpenter Contractors' Ass'n*, (1922) 305 Ill. 331, 137 N. E. 222; *Atchison, Topeka & Santa Fe Ry. Co. v. Brown*, (1909) 80 Kan. 312, 102 Pac. 459; *Willner v. Silverman*, (1909) 109 Md. 341, 71 Atl. 962; *Mechanics' Foundry & Machine Co. v. Lynch*, (1920) 236 Mass. 504, 128 N. E. 877; *Construction Co. v. St. Paul Building Trades Council*, (1917) 136 Minn. 167, 161 N. W. 520; *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n*, (1899) 59 N. J. Eq. 49, 46 Atl. 208; *Brennan v. United Hatters of North America, Local No. 17*, (1906) 73 N. J. L. 729, 65 Atl. 165, (this right is declared to be inalienable); *Jordan's Wearing Apparel v. Retail Sales Com. Union*, (N. J. 1937) 193 Atl. 806; *Sherman v. Abeles*, (1934) 265 N. Y. 383, 390, 193 N. E. 241; *Mattison v. Ry. Co.*, (1895) 2 Ohio N. P. 276, 3 Ohio Dec. 526, (where an employer discharges an employee and then places him on a blacklist thus preventing him from obtaining employment in the same field of work, such action, on the part of the employer, interferes with the employee's right to seek employment); *Journeyman v. Master Horseshoers*, (1912) 13 Ohio N. P. (N.S.) 297, 23 Ohio Dec. N. P. 338; see also, *Johnson v. Oregon Stevedoring Co.*, (1928) 128 Or. 121, 270 Pac. 772; *Erdman v. Mitchell*, (1903) 207 Pa. St. 79, 56 Atl. 327, (it is questionable whether this decision would be good law today in Pennsylvania in view of the recent labor legislation enacted there); cf., *Ry. Co. v. Griffin*, (1914) 106 Tex. 477, 171 S. W. 703, (a law against blacklisting by employers held invalid); *Langenberg Hat Co. v. United Cloth Hat & Cap Makers*, (E.D. Mo. 1920) 266 Fed. 126; *National Labor Relations Board v. Washington Coach Co.*, (C.C.A. 4th Cir. 1936) 85 Fed. (2d) 990, (the Wagner Act was attacked as denying to the employer the right to hire and discharge at will but it was held that the statute is not an unreasonable restriction of that right), aff'd. *Washington Coach Co. v. National Labor Relations Board*, (1937) 301 U. S. 142, 57 Sup. Ct. 648, 77 L. Ed. 1062; *Appalachian Electric Power Co. v. National Labor Relations Board*, (C.C.A. 4th Cir. 1938) 93 F. (2d) 985, 988, ("The act does not attempt to regulate the employer's control of his business in the employment, promotion, or discharge of employees so long as he does not attempt thereby to interfere with the right of self-organization of the employees or to intimidate or coerce them"); *Associated Press v. National Labor Relations Board*, (1937) 301 U. S. 58, 132, 57 Sup. Ct. 645, 81 L. Ed. 893; cf., *American Furniture Co. v. I. B. of T. C. & H. of A.*, (1936) 222 Wis. 338, 370, 268 N. W. 250, (the Wisconsin Labor Code was under consideration in this case); see also, *Wisconsin Labor Relations Board v. Rueping Leather Co.*, (Wis. 1938) 279 N. W. 673; also, *Norris-La Guardia Act*,

The inalienable right about which the court speaks is a hollow right indeed unless it is so implemented as to allow the employee equal bargaining power with the employer. Unless this is done, we approximate again the stage of our economic development in which the yellow dog contract, company unions, lockouts and blacklists were prevalent. The problems of the relation between employer and employee cannot be solved by learned discussions of inalienable and natural rights. Their solution lies in a recognition of the fact that there is no substance in the so-called right of a worker to use his hands freely for whomever he pleases, upon such terms as he pleases, except as he combines with others to adopt effective means to give value and content to that right. The right to dispose of one's labor and to make agreements with respect to that labor may be both inalienable and natural (though this is open to debate), but that right is a sham unless it can be exercised upon a basis of equality approximate to the employer's so-called inalienable and natural right to employ or discharge at will. Experience has illustrated beyond question that an employer dealing with each employee separately has a decided advantage in the bargaining that takes place. One does not equal one in this case.

Another metaphysical concept which has had a wide usage in labor controversies is the doctrine of freedom or liberty of contract. It is often said that individuals have the right to contract or to refrain from contracting, and the right to a free market.¹⁸⁰ Thus in *Interborough Rapid Transit Co. v. Lavin*, it was held that, "The relations of the plaintiff and its employees are based on consent. Each has freedom of contract."¹⁸¹ This doctrine generally is made use of to sustain the right of employers to make individual contracts with employees, to discharge employees at will, to prevent the introduction of a closed shop, and in other similar situations.¹⁸²

Mch. 23, 1932, C. 90, 47 Stat. at L. 70, Code Title 29, secs. 101-115. Wagner Labor Relations Act, July 5, 1935, C. 372, 49 Stat. at L. 449, Code Title 29, secs. 151-166.

¹⁸⁰L. D. Willcutt & Sons Co. v. Bricklayers' Benevolent Protective Union No. 3, (1908) 200 Mass. 110, 85 N. E. 897; Mechanics' Foundry & Machine Co. v. Lynch, (1920) 236 Mass. 504, 128 N. E. 877.

¹⁸¹(1928) 247 N. Y. 65, 73, 159 N. E. 863.

¹⁸²Union Labor Hospital Ass'n v. Vance Redwood Lumber Co., (1910) 158 Cal. 551, 112 Pac. 886, (as a condition of employment, employer forced employees not to deal with the plaintiff hospital); Jones v. E. Van Winkle Gin & Machine Works, (1908) 131 Ga. 336, 62 S. E. 236; Keith Theatre v. Vachon, (1936) 134 Me. 392, 187 Atl. 692; United Shoe Machinery Corp. v. Fitzgerald, (1921) 237 Mass. 537, 130 N. E. 86; State v. Dalton, (1908) 134 Mo. App. 517, 114 S. W. 1132; Jersey City Printing Co. v. Cassidy,

"The absolute certainty which is one of our legal ideals, an ideal responsible for much that is irritatingly mechanical in our legal system, is demanded chiefly to protect property. And our courts regard the right to contract not as a phase of liberty—a sort of freedom of mental motion and locomotion—but as a phase of property, to be protected as such. A further result is to exaggerate private right at the expense of public interest. . . ."¹⁸³

The whole idea of liberty of contract, which is today treated as a natural and inalienable right, was wholly unknown in our law prior to 1886.¹⁸⁴ Thus we note how ephemeral is our concept of natural and inalienable rights—unknown today, an eternal and sanctified doctrine tomorrow. Freedom of contract has actually almost come to be the exception and not the rule. It has been hedged about by scores of legislative enactments and judicial opinions. It is sheer nonsense to talk of freedom of contract between parties who are not equals in negotiating a contract. Liberty of contract begins with the establishment of equality of position between the parties.¹⁸⁵

The whole doctrine of liberty of contract was considered by the late Wanamaker, J., in a brilliant dissenting opinion in the

(1902) 63 N. J. Eq. 759, 53 Atl. 230; *Interborough Rapid Transit Co. v. Lavin*, (1928) 247 N. Y. 65, 159 N. E. 863; *Brost Pattern Works v. Reid*, (1922) 24 Ohio N. P. (N.S.) 60; *Kraemer Hosiery Co. v. American Fed. of F. F. H. W.*, (1931) 305 Pa. St. 206, 157 Atl. 588; *Ry. Co. v. Griffin*, (1914) 106 Tex. 477, 171 S. W. 703; *Safeway Stores v. Retail Clerk's Union, Local No. 148*, (1935) 184 Wash. 322, 51 Pac. (2d) 372. See also, *Agwilines, Inc. v. National Labor Relations Board*, (C.C.A. 5th Cir. 1936) 87 Fed. (2d) 146, 150, ("The prohibitions against interference by employers with self-organization of employees were not only unknown, they were obnoxious to the common law.")

¹⁸³Pound, *Liberty of Contract*, (1909) 18 Yale L. J. 454, 461.

¹⁸⁴Pound, *Liberty of Contract*, (1909) 18 Yale L. J. 455.

¹⁸⁵*Coppage v. Kansas*, (1915) 236 U. S. 1, 26, 35 Sup. Ct. 240, 59 L. Ed. 441, (see the dissenting opinion of Mr. Justice Holmes. Cf., this with the majority opinion on page 17, which is sheer sophistry.) See also, *Cameron v. International Alliance*, (1935) 118 N. J. Eq. 11, 28, 175 Atl. 692; *Jackson, Chief of Police v. Berger*, (1915) 92 Oh. St. 130, 140, 143, 110 N. E. 732, (dissenting opinion of Wanamaker, J.: "This 'liberty of contract' theory has been severely overworked by our courts. It has become decidedly threadbare. . . . This theory has been invoked to protect almost every infamy that can be put into the form of a contract, and it has chiefly grown up by reason of the favor extended to it by our courts under the mistaken view of the 14th Amendment. The colored man's rights, which were supposed to be the primary consideration of the amendment, have been lost sight of, and the 'soulless' corporations seem to have been the chief beneficiaries. . . . The truth is that the individual workman today, seeking employment in the large corporate industrial and transportation plants, enjoys no such thing as liberty of contract. He enjoys it in law, but not in fact"); *Kraemer Hosiery Co. v. American Fed. of F. F. H. W.*, (1931) 305 Pa. St. 206, 157 Atl. 588, (see the dissenting opinion); *West Coast Hotel Co. v. Parrish*, (1937) 300 U. S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703.

case of *Jackson, Chief of Police, v. Berger*.¹⁸⁶ In discussing the essential weaknesses of the doctrine, he wrote,

"Organization is the keynote of the age. This is true not only in educational, religious and benevolent lines, but especially is it true in every kind and branch of business. Formerly the individual man did the business of the country. Today he does about as much business as the individual dollar does. The individual man has given way, first to the simple partnership, syndicates and the like, all of which have brought about a condition in the business world that has practically eliminated the individual man in individual business and substituted therefor a manager or superintendent, or other officer or agent, with a board of directors, stockholders and millions of capital and credit back of him.

"This being the situation as to capital and business, the workingman years ago began to realize his weakness, inequality and dependence in contracting with the employer for his labor.

". . . The truth is that the individual workman today seeking employment in the large corporate industrial and transportation plants, enjoys no such thing as liberty of contract. He enjoys it in law, but not in fact.

". . . What I mean is that any employer, by the exercise of his power under the so-called right of liberty of contract, may dissolve and destroy any labor union by the withholding of employment, by discharging by coercion those who are now, or hereafter may become members of such lawful labor organization.

"The employer is to have the right to organize without the consent of his workmen, but the workmen are not to enjoy the same right of organization unless they secure the consent of the employer. Is that equal protection of the law?"¹⁸⁷

UNION RULES

A fair number of decisions in labor controversies have turned upon the effect of the internal rules and regulations of trade unions upon third parties. Thus it has been held that if the rules adopted by a union are not aimed at one particular employer and if they do not set up arbitrary discriminations between one individual or corporation and another, they are valid rules and their enforcement will not, in and of itself, be a basis for a suit by any particular employer who may happen to feel the impact of those rules in action.¹⁸⁸ Standing by itself, this statement seems equitable enough and no real complaint can be brought against it. The difficulty is, however, that many jurisdictions have either mis-

¹⁸⁶(1915) 92 Ohio St. 130, 110 N. E. 732.

¹⁸⁷(1915) 92 Ohio St. 130, 140, 143, 110 N. E. 732.

¹⁸⁸*J. F. Parkinson Co. v. Building Trades Council*, (1908) 154 Cal. 581, 98 Pac. 1027; *New Jersey Painting Co. v. Local No. 26*, (1924) 96 N. J. Eq. 632, 126 Atl. 399.

applied it or refused to apply it, with results that are astonishing, to say the least. A good example of the extraordinary reasoning in which many of the courts indulge is found in *Chicago F. of M. v. Musicians' Union of North America*.¹⁸⁹

In this case a musicians' union had a by-law that none of its members should work with other musicians who were nonunion men. One of the members engaged himself to play in an orchestra which was composed of the members of another union which was considered an outlaw union and, therefore, no union at all by the first union; that is, the members of the second union were placed in the same class as nonunion men by the first union. The member was requested by his union to abide by its rules or to suffer the prescribed penalties. The theatre which had employed this member filed an action to enjoin this threatened action by the union. In granting the injunction, the court declared that

"... when the will of the majority of an organized body, in matters involving the rights of outside parties, is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured amongst unorganized individuals by threats and intimidations. A fine imposed upon a member of a voluntary organization for purpose of discipline may be perfectly proper and lawful; but a fine imposed upon such member for the purpose of coercing him into injuring another in person or property . . . would be neither."¹⁹⁰

This argument is not unusual.¹⁹¹ It is, of course, replete with erroneous thinking. The first error is the assumption that labor unions, unlike any of the other collective undertakings of men, do not need to impose fines and penalties for violations of their rules

¹⁸⁹(1908) 139 Ill. App. 65.

¹⁹⁰(1908) 139 Ill. App. 65.

¹⁹¹*L. D. Willcutt & Sons Co. v. Bricklayers' Benevolent & Protective Union No. 3*, (1908) 200 Mass. 110, 123, 85 N. E. 897; cf., dissenting opinion in, *Reynolds v. Davis*, (1908) 198 Mass. 298, 84 N. E. 457; *Purvis v. Local No. 500*, (1906) 214 Pa. St. 348, 63 Atl. 585; *Allis-Chalmers Co. v. Iron Molders' Union No. 125*, (E.D. Wis. 1906) 150 Fed. 155.

In, *Haverhill Strand Theater, Inc. v. Gillen*, (1918) 229 Mass. 413, 118 N. E. 671, (it was held that a union rule which provides that a minimum number of musicians must be employed by any employer of musicians is an illegal rule because it interferes with the employers' right to a free flow of labor); cf., *Scott-Stafford Opera House Co. v. Minneapolis Musicians' Ass'n*, (1912) 118 Minn. 410, 136 N. W. 1092; *Kealey v. Faulkner*, (1908) 7 Ohio N. P. (N.S.) 49, 18 Ohio Dec. N. P. 498, (the rules of the union were held coercive because of their far-reaching effect—the court seems to have been justified in its position); *Journeymen v. Master Horseshoers*, (1912) 13 Ohio N. P. (N.S.) 297, 300, 23 Ohio Dec. N. P. 338, (the enforcement of a rule of an employers' association to expel a member if he refuses to cooperate in a lockout of union employees is an unreasonable and coercive action and may be enjoined at the suit of the union.) But see, *Des Moines Ry. Co. v. Amalgamated Ass'n*, (1927) 204 Iowa 1195, 213 N. W. 264.

and laws, perhaps upon the assumption either that they will never be violated, or that, if violated, punishment will not be necessary. Unfortunately, all collective agencies have discovered that men are often deterred from violating rules because of their unwillingness to incur the imposition of the accompanying fines and penalties. Even the courts themselves have exercised this prerogative in contempt cases. Labor unions, in these instances, are no exception to the general rule. The second error arises with the attempt to find a similarity between the punishment of its members by a union, where these members have voluntarily agreed to abide by its rules and suffer its penalties if they fail to so abide, and the effort of an outsider to impose penalties upon nonunion men for refusing to accept unionization. There is no comparison between these situations. The third error is in speaking of coercion in connection with the act of a union in imposing its penalties upon an erring member. The individual joined the union voluntarily. In becoming a member he agreed to obey the union's rules and regulations and to suffer its fines and penalties if he failed to obey. Where is the coercion? The proper answer is found in such cases as *Bossert v. United Brotherhood, Carpenters & Joiners of America*, in which the court, in referring to this question, said,

"To say that men may organize and refuse to work under certain conditions or upon a certain class of materials, and then compel the organization to keep in membership those who refuse to abide by its purpose, is to destroy the organization. If there be the power of expulsion, there must of necessity be the lesser power to fine according to rule, provided the person desires to retain membership in the organization."¹⁹²

¹⁹²(1912) 77 Misc. Rep. 592, 137 N. Y. S. 321. To the same effect are the following cases: *Jetton-Dekle Lumber Co. v. Mather*, (1907) 53 Fla. 969, 975, 43 So. 590; *Seymour Ruff & Sons v. Bricklayers', etc., Union*, (1932) 163 Md. 687, 164 Atl. 752; *Scott-Stafford Opera House Co. v. Minneapolis Musicians' Ass'n*, (1912) 118 Minn. 410, 136 N. W. 1092, (that a rule of an incorporated union is ultra vires does not give a cause of action to a third party who may be injured by the enforcement of that rule); *Bayer v. Brotherhood of Painters*, (1931) 108 N. J. Eq. 257, 154 Atl. 759; *Bossert v. Dhuy*, (1917) 221 N. Y. 342, 117 N. E. 582; *O'Keefe v. Local 463*, (1938) 277 N. Y. 300, 14 N. E. (2d) 77; *Rhodes Bros. Co. v. Musicians, etc., Local No. 198*, (1915) 37 R. I. 281, 92 Atl. 641; *Wabash R. Co. v. Hannahan*, (E.D. Mo. 1903) 121 Fed. 563; *Barker Painting Co. v. Brotherhood of Painters*, (C.C.A. 3rd Cir. 1926) 15 Fed. (2d) 16, 18; cf., *Hass, Inc. v. Local Union No. 17*, (D. Conn. 1924) 300 Fed. 894; see, however, *Barker Painting Co. v. Brotherhood of Painters*, (D.C. 1927) 23 Fed. (2d) 743; *Zaat v. Building Trades Council*, (1933) 172 Wash. 445, 20 P. (2d) 589. Cf., *Chicago Fed. of Musicians v. Musicians' Union of North America*, (1908) 139 Ill. App. 65, 71; *Cameron v. International Alliance*, (1936) 119 N. J. Eq. 577, 585, 183 Atl. 157.

Saulsberry v. Coopers' International Union, (1912) 147 Ky. 170, 143 S. W. 1018, (when the members of a union acting as a body clothe the

COLLECTIVE BARGAINING

The term "collective bargaining" has achieved a certain prominence these days. The doctrine of collective bargaining has not always been so fashionable. Only a few short decades ago the right of workers to bargain collectively was denied as vigorously as it is today maintained. In these few years it has already become, oddly enough, a "God-given right which formed society and moulded governments."¹⁹³ What is collective bargaining as applied to the field of labor relations? It is merely the right of men to join together for the purpose of joint or collective action with a view to improving their economic situation. It is a recognition by the workers that their strength lies in union, that the norm of our industrial civilization is no longer the individual but the organized group.¹⁹⁴ This has long since been recognized by the world of business—witness the gigantic corporations, the monopolies among our utilities, the holding companies, the national and international cartels, trade associations and the like. This right to join together for bargaining purposes has been and still is being bitterly fought by many employers because they realize that they hold a tremendous advantage when they can deal with their individual employees one by one. No other reason can adequately explain the desperateness with which countless employers have fought and are still fighting legislation which seeks to safeguard the right to bargain collectively. The struggle is by no means concluded.

"LABOR DISPUTES"

Although the Congress of the United States has defined a labor dispute, there still remain large areas in which that definition is, at most, advisory. It would be well, therefore, to see what the courts heretofore have held constitutes a labor dispute. The essentials upon which many courts formerly agreed are that the dispute must be between an employer and his employees, and it

officers of the union with authority to negotiate a new agreement with the employer, it makes no difference that some of the members are satisfied with the existing agreement and do not want a change—the power of the officers to negotiate cannot be abridged except by action of the union as a body); *Loewe v. California State Fed. of Labor*, (N. D. Cal. 1911) 189 Fed. 714, (it is no defense to an action to enjoin a boycott that the defendants acted under the rules of their union.)

¹⁹³*Evening Times Printing & Publishing Co. v. American Newspaper Guild*, (1937) 122 N. J. Eq. 545, 549, 195 Atl. 378.

¹⁹⁴*Cole v. Atlanta Terminal Co.*, (N.D. Ga. 1936) 15 F. Supp. 131, 132; *Railroad Co. v. Webb*, (C.C.A. 5th Cir. 1933) 64 Fed. (2d) 902.

must be in relation to wages, hours and working conditions.¹⁹⁵ During the past few years there has been a growing opinion, now codified in a considerable body of legislation, that this conception of a labor dispute no longer meets the needs of an industrial democracy which has reached the stage of solidification and, therefore, of increasing struggle to obtain a share of the goods and benefits to be distributed. This legislation and a number of courts express the feeling that many controversies which were outlawed by the old definition are essentially valid efforts by workers to better their conditions and that such efforts are entitled to respect.¹⁹⁶

Some of the results of the early conception of what constitutes a labor dispute were: That it was not a labor dispute for unionists to strike because nonunion workmen were employed; that strikers cannot picket a place of business of a customer of their employer because he is not a party to the labor dispute between the strikers and their employer; that it is not a labor dispute when an outside union tries to organize the business of a nonunion employer by picketing and other similar means; that it is not a labor dispute where an employer discharges his union employees and decides to operate the business himself and the union pickets his place of business in an endeavor to have the discharged employees re-employed.¹⁹⁷ These holdings do not

¹⁹⁵See note 15, *supra*. See also, *Simon v. Schwachman*, (Mass. 1938) 18 N. E. (2d) 1.

¹⁹⁶*N. & R. Theatres, Inc. v. Basson*, (1925) 127 Misc. Rep. 271, 215 N. Y. S. 157; *De Agostina v. Holmden*, (1935) 157 Misc. Rep. 819, 285 N. Y. S. 909, (see legislative definition of a labor dispute); *Wiley v. Retail Clerk's Union*, (1934) 32 Ohio N. P. (N.S.) 257; *Starr v. Laundry, etc., Union*, (1936) 155 Or. 634, 63 P. (2d) 1104, (see recent Oregon labor legislation); *Lipoff v. United Food Workers Industrial Union*, (Pa. 1938), *Labor & Unemployment Ins. Service, Prentice-Hall, Inc.*, p. 19561, (based on recent Pennsylvania labor legislation); *Brotherhood of Ry. & S. S. Clerks v. Texas & N. O. R. Co.*, (S.D. Tex. 1928) 25 F. (2d) 876, (based on Railway Labor Act); *Miller Parlor Furniture Co. v. Furniture Workers' Industrial Union*, (D.N.J. 1934) 8 Fed. Supp. 209, (based on Norris-La Guardia Act); *L. L. Coryell & Son v. Petroleum Workers' Union*, (D. Minn. 1936) 19 Fed. Supp. 749, (based on Norris-La Guardia Act); *Cupples Co., Inc. v. American Fed. of Labor*, (E.D. Mo. 1937) 20 F. Supp. 894, (based on Norris-La Guardia & Wagner Acts); *Sharp & Dohme, Inc. v. Storage Warehouse Employees Union*, (E.D. Pa. 1938) 24 F. Supp. 701 (a dispute between two labor unions as to which shall contract with the employer is a labor dispute—based on the Norris-La Guardia Act); *Blankenship v. Kurfman*, (C.C.A. 7th Cir. 1938) 96 Fed. (2d) 450, (based on Norris-La Guardia Act); *The New Negro Alliance v. Sanitary Grocery Co., Inc.*, (1938) 303 U. S. 552, 58 Sup. Ct. 703, 82 L. Ed. 683, (based on Norris-La Guardia Act); *American Furniture Co. v. I. B. of T. C. & H. of A.*, (1936) 222 Wis. 338, 268 N. W. 250, (based on Wisconsin Labor Code.)

¹⁹⁷*Kemp v. Division No. 241*, (1912) 255 Ill. 213, 99 N. E. 389, (see

bear a very close relation to the industrial ferment that is going on all about us. They represent a refusal to recognize that a labor dispute involved anyone who, by his actions or his failure to act, may have a real influence upon the controversy where the principal controversy involved employer and employee. Where it involves an outside union, a labor controversy may exist even though the employer and employees may not desire to participate. The reason for this is pointed out in *Blumauer v. Portland Moving Picture Machine Operators' Protective Union*.¹⁹⁸ The court, in holding that a labor dispute existed even though the individuals involved were not employees, did so upon the ground that

"This right of presenting its side of a controversy, organized labor may exercise by lawful means, in a lawful manner, when its members have reasonable grounds to apprehend that the practices or pay of any employer will produce an injurious effect on the working conditions of employees generally, or of those in a particular trade or calling, even though there may be no direct controversy between the employer and his immediate employees."¹⁹⁹

In a few instances where a labor dispute has arisen between an employer and his employees, third parties have attempted to intervene. Sometimes they have claimed a direct interest, sometimes only the interest of a member of the general public. Where a stranger to the controversy attempts to intervene by bringing pressure to bear upon one or the other of the parties directly concerned, courts are likely to hold that it is not in the interest of lawful competition and, therefore, wrongful. The fact that the stranger acts with a good motive is not held to justify the intervention because intervention can only be attempted by one with a direct interest in the controversy.²⁰⁰ So a salesman on com-

dissenting opinion); *A. R. Barnes & Co. v. Chicago Typographical Union* No. 16, (1908) 232 Ill. 424, 83 N. E. 940; *Keith Theatre v. Vachon*, (1936) 134 Me. 392, 187 Atl. 692; *New England Cement Gun Co. v. McGivern*, (1914) 218 Mass. 198, 105 N. E. 885; *Feller Local 144*, (1937) 121 N. J. Eq. 452, 191 Atl. 111; *Evening Times Printing & Publishing Co. v. American Newspaper Guild*, (1928) 124 N. J. Eq. 71, 199 Atl. 599; *Bieber v. Bininbaum*, (1938) 168 Misc. Rep. 943, 6 N. Y. S. (2d) 63; *Thompson v. Boekhout*, (1937) 273 N. Y. 390, 7 N. E. (2d) 674; *Markowitz v. Retail Dry Cleaners Union*, (1935) 3 Ohio Opinions 366; *Saltzman v. Employees' Local*, (1937) 10 Ohio Opinions 6, 25 Ohio L. Abs. 354.

¹⁹⁸(1933) 141 Or. 399, 17 P. (2d) 1115.

¹⁹⁹(1933) 141 Or. 399, 403, 17 Pac. (2d) 1115. See also, *George J. Grant Construction Co. v. St. Paul Building Trades Council*, (1917) 136 Minn. 167, 161 N. W. 520; *Lichterman v. Laundry and Dry Cleaning Drivers Union*, (Minn. 1938) 282 N. W. 689; *Geo. B. Wallace Co. v. International Ass'n*, (1936) 155 Or. 652, 669, 63 Pac. (2d) 1090.

²⁰⁰*Carpenters' Union v. Citizens' Committee*, (1928) 333 Ill. 225, 164 N. E. 393.

mission for an employer whose employees are on strike is not held to have an interest sufficient to maintain a suit to enjoin the striking employees from interfering with other employees of the firm.²⁰¹ On the other hand, a subscriber to a telephone company, bondholders of a corporation, and a customer holding a contract with a strike bound employer, have been held to have a direct enough interest to maintain actions against the striking unions.²⁰² But the members of one union have been enjoined from lending assistance to another union which is conducting a strike because

“the utmost, apparently, that can be said is that as workingmen, they sympathize with the efforts of a fellow workman of a different class and engaged in a different occupation to improve their conditions. They have not a sufficient interest in the result to justify their act. . . . Their interest is too remote and too uncertain.”²⁰³

Apparently the interest of an investor in his investment and of a telephone subscriber in his telephone service, stand upon a different plane from the interest of a worker in the conditions of fellow workers.

THE PUBLIC INTEREST

What, if any, interest has the public in a labor controversy? Unquestionably the public has a genuine interest in a labor controversy—an interest which should always receive serious consideration. “Individual liberty must be subject to such restraint as the public interests may require, and when the two conflict, the former must yield.”²⁰⁴ Thus the public interest demands that violent methods should not be used by either side to a labor dispute; that collective bargaining rights be granted to workers; that agreements between employer and employee be sustained wherever possible because they tend toward industrial peace and industrial democracy. These and other similar matters are definitely the concern of the public.²⁰⁵ But the general con-

²⁰¹Davis v. Henry, (C.C.A. 6th Cir. 1920) 266 Fed. 261.

²⁰²Stephens v. Ohio Telephone Co., (N.D. Ohio 1917) 240 Fed. 759; Carter v. Fortney, (N.D. W. Va. 1909) 170 Fed. 463; Chesapeake & O. C. A. Co. v. Fire Creek Coal & Coke Co., (S.D. W. Va. 1902) 119 Fed. 942.

²⁰³Foster v. Retail Clerks' International Protective Ass'n, (1902) 39 Misc. Rep. 48, 55, 78 N. Y. S. 860. Cf., however, Blumauer v. Portland Moving Picture Machine Operators' Protective Union, (1933) 141 Or. 399, 17 Pac. (2d) 1115.

²⁰⁴Kemp v. Division No. 241, (1912) 255 Ill. 213, 243, 99 N. E. 389. See also, Moore Drop Forging Co. v. Fisher, (1921) 239 Mass. 434, 132 N. E. 169; Farmers' Loan & Trust Co. v. Northern Pacific R. Co., (E.D. Wis. 1894) 60 Fed. 803; M. & M. Wood Working Co. Inc. v. Plywood & Veneer Workers, (D. Ore. 1938) 23 F. Supp. 11, 17.

²⁰⁵Pierce v. Stablemen's Union Local No. 8760, (1909) 156 Cal. 70,

sideration of the public interest should not be held as a club over either labor or capital. That it has been so used is amply illustrated by many of the reported decisions.²⁰⁶

In a number of instances, injunctions have been issued against striking employees upon the spurious argument that society favors the utmost freedom of the individual to engage in a lawful trade, and if the actions of the strikers hamper that freedom they are unlawful.²⁰⁷ The lengths to which some courts will go in perverting into nonsense the very real interest of the public in a labor dispute is well illustrated in *R. A. Freed & Co. v. Doe*, in which an injunction was issued against a union striking for a closed shop in a department store on the ground that the public has an indirect right in the choice of department store salespeople by reason of the likes and dislikes which customers form for certain of them.²⁰⁸ It would seem that the public interest is not served by denying to workers the same rights which are granted to employers and that it is best served by placing the employer and the employee upon a basis of equality in their dealings with each other as nearly as this can be done.

ANTI-TRUST LAWS

On a number of occasions, the acts and actions of trade unions have been held unlawful as being in restraint of trade, or as creating or tending to create a monopoly. These holdings have been generally based upon the language of the Sherman Anti-Trust Act and similar state laws. It will be recalled that the Sherman Act, among other things, declared it to be unlawful to form a combination or monopoly in restraint of trade or com-

103 Pac. 324; *Baltic Mining Co. v. Houghton*, (1913) 177 Mich. 632, 144 N. W. 209; *Bayonne Textile Corp. v. American Fed. of Silk Workers*, (1934) 116 N. J. Eq. 146, 155, 172 Atl. 551; see also, *Kealey v. Faulkner*, (1908) 7 Ohio N. P. (N.S.) 49, 18 Ohio Dec. N. P. 498, (in this case the rules of the union were held to be so unreasonable as to be against public policy); *Blum & Co. v. Landau*, (1926) 23 Ohio App. 426, 155 N. E. 154; *Starr v. Laundry, etc., Union*, (1936) 155 Or. 634, 63 Pac. (2d) 1104; *Jefferson & Indiana Coal Co. v. Marks*, (1926) 287 Pa. St. 171, 134 Atl. 430.

²⁰⁶For cases in which the public interest was used as a club, see, *Keith Theatre v. Vachon*, (1936) 134 Me. 392, 187 Atl. 692; *L. D. Willcutt & Sons Co. v. Bricklayers' Benevolent Protective Ass'n No. 3*, (1908) 200 Mass. 110, 85 N. E. 897; *Columbus Heating & Ventilating Co. v. Pittsburgh Building Trades Council*, (W.D. Pa. 1927) 17 Fed. (2d) 806; *R. A. Freed & Co. v. Doe*, (1935) 283 N. Y. S. 186.

²⁰⁷*Keith Theatre v. Vachon*, (1936) 134 Me. 392, 187 Atl. 692; *International Ticket Co. v. Wendrich*, (1937) 122 N. J. Eq. 222, 193 Atl. 808; *Grand Shoe Co. v. Children's Shoe Workers' Union*, (1920) 187 N. Y. S. 886; *Hellman v. Salesmen's Ass'n*, (1919) 23 Ohio N. P. (N.S.) 177.

²⁰⁸(1935) 283 N. Y. S. 186. See also, *semble* (1935), 154 Misc. Rep. 644, 278 N. Y. S. 68, 74.

merce.²⁰⁹ In order to bring labor within the purview of Anti-Trust legislation, it was necessary for the courts to hold that the word "trade," as used in this legislation, was used in a very broad sense. Thus, when a worker offers his services to an employer in exchange for pay, this exchange constitutes "trade" and the worker's labor is an article of commerce, that is, a commodity within the meaning of the statute.²¹⁰ This line of reasoning has been used to test the validity of all sorts of labor controversies.

It has been held many times that a demand for a closed shop is unlawful because its achievement would give labor a monopoly and thus prevent nonunion workmen from earning a livelihood.²¹¹ Other courts have held such a demand unlawful when its real object is "to compel the employers . . . to submit to an attempt to obtain for the union a complete monopoly of the labor market."²¹² How is it to be determined whether a monopoly is the real object or whether it is merely an incidental result of the efforts of the workers to better their conditions through a closed shop? It is

²⁰⁹July 2, 1890, C. 647, 26 Stat. at L. 209, Code Title 15, secs. 1-7, 15, secs. 1, 2. See also, House Report No. 1707, 51st Congress, Committee on the Judiciary, April 25, 1890, p. 1.

²¹⁰Campbell v. Motion Picture Machine Operators' Union, (1922) 151 Minn. 220, 186 N. W. 781; United Mine Workers v. Coronado Co., (1921) 259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975, (the Sherman Act includes trade unions); United States v. Railway Employees' Dep't, (N.D. Ill. 1922) 283 Fed. 479. Cf., *Lohse Patent Door Co. v. Fuelle*, (1908) 215 Mo. 421, 444, 114 S. W. 997; *Aberon Bakery Co. v. Raimist*, (1931) 141 Misc. Rep. 774, 776, 254 N. Y. S. 38.

²¹¹Keith Theatre v. Vachon, (1936) 134 Me. 392, 187 Atl. 692; *Folsom v. Lewis*, (1911) 208 Mass. 336, 94 N. E. 316; *Stearns Lumber Co. v. Howlett*, (1928) 264 Mass. 511, 163 N. E. 193; but cf., *Goyette v. Watson Co.*, (1923) 245 Mass. 577, 140 N. E. 285; *International Ticket Co. v. Wendrich*, (1937) 122 N. J. Eq. 222, 193 Art. 808; *Bedford Co. v. Stone Cutters' Ass'n*, (1927) 274 U. S. 37, 47 Sup. Ct. 522, 71 L. Ed. 916, but see dissenting opinions of Stone & Brandeis, JJ.; cf., *Levering & Garrigues Co. v. Morrin*, (1933) 289 U. S. 103, 53 Sup. Ct. 549, 77 L. Ed. 1062; cf., also, *State v. Stewart*, (1887) 59 Vt. 273, 9 Atl. 559; *National Fireproofing Co. v. Mason Builders' Ass'n*, (C.C.A. 2d Cir. 1909) 169 Fed. 259.

See, *State v. Jacobs*, (1900) 7 Ohio N. P. 261, 10 Ohio Dec. N. P. 252, (a secondary boycott was held to violate the state anti-trust act); *Markowitz v. Retail Dry Cleaners' Union*, (1935) 8 Ohio Opinions 366, (an attempt to maintain union prices held to be an unlawful restraint of trade.) See also, *Cameron v. International Alliance*, (1936) 119 N. J. Eq. 577, 589, 183 Atl. 157. Contra: *Maisel v. Sigman*, (1924) 123 Misc. Rep. 714, 205 N. Y. S. 807; *Farulla v. Freundlich, Inc.*, (1934) 152 Misc. Rep. 761, 274 N. Y. S. 70; *Sheehan v. Levy*, (Tex. Civ. App. 1919) 215 S. W. 229; *International Organization v. Red Jacket C. C. & C. Co.*, (C.C.A. 4th Cir. 1927) 18 Fed. (2d) 839, 843, (" . . . we do not think that the International Organization, United Mine Workers of America, constitutes of itself an unlawful conspiracy in restraint of interstate trade and commerce because it embraces a large percentage of mine workers of this country or because its purpose is to extend its membership so as to embrace all of the workers in the mines of the continent.")

²¹²*Folsom v. Lewis*, (1911) 208 Mass. 336, 338, 94 Atl. 316.

apparent that such a test leaves a very broad discretion indeed in the hands of the court. Still other courts have held that a demand for a closed shop in a single factory is consonant with public policy and, therefore, lawful, but that such a demand in substantially an entire industry may be unlawful as creating an unlawful monopoly.²¹³ Thus a monopoly may be lawful or unlawful in proportion to its effectiveness. It is altogether possible that these courts are concerned with preventing trade unions from becoming very effective. A sure way to accomplish this is to keep an industry part union and part nonunion.²¹⁴ Of course, such a motivation never appears on the surface of an opinion, but how deep does it lie below a statement that

"The principle underlying all the cases involving the question of conspiracy made effective through the violation of the Sherman Anti-Trust Law is to the effect that the plaintiff injured by reason of such conspiracy or boycott has a right to demand that trade be permitted to flow in its normal course unimpeded and undisturbed by the acts of the defendants and that public policy also demands this. Just as soon as the public is deprived of the benefit of full and free competition, or the individual is deprived of the benefit of conducting his business in the manner which seems to him most advisable, a restraint arises in normal trade conditions, which, if without justification, cannot be said to be lawful."²¹⁵

Is there such a thing as business flowing in a normal course without impediment or obstruction? And it may also be asked whether full and free competition exists anywhere in our economic life.

If labor is considered a commodity or article of commerce, then the position of those courts which have construed various acts and demands of trade unions as in restraint of commerce or trade, may have some basis for justification if the other weaknesses in the contention can be glossed over. But labor is not a commodity.²¹⁶ It is impossible to separate a workman from his labor. They are not separate entities. One does not sell labor in the same sense that one sells sugar or building materials. The Sher-

²¹³Four Plating Co. v. Mako, (1937) 122 N. J. Eq. 298, 194 Atl. 53.

²¹⁴Williams v. Quill, (1938) 277 N. Y. 1, 6, 12 N. E. (2d) 547, (the court recognizes that effective employee action is unified action. ". . . the object of the contract and of the action of the defendant labor union is to advance its own interests and ability of its members through the closed shop, to meet on even terms their employers in present or future negotiations.")

²¹⁵Hellman v. Salesmen's Ass'n, (1919) 23 Ohio N. P. (N.S.) 177, 186.

²¹⁶Maisel v. Sigman, (1924) 123 Misc. Rep. 714, 205 N. Y. S. 807. See also, Title 15, section 17, October 15, 1914, C. 323, section 17, 38 Stat. at L. 730.

man Anti-Trust Act and similar state laws were not meant to apply to labor unions. They were enacted in response to widespread demands for a curb on the activities of large-scale business, on the propensities of these businesses to drive small business out of operation by reason of the monopolies obtained by the ever growing colossi of the business world. The use of the words "trade" and "commerce" in the statute clearly imports something other than the labor of workers. To read into the Act a restraint upon the legitimate activities of labor unions is to give it a meaning which was never intended.²¹⁷ However, if it be conceded that labor unions were meant to be included, then it must be remembered that not all restraints are forbidden—only unreasonable restraints were prohibited by the anti-trust laws.²¹⁸ Of course, what is or is not an unreasonable restraint must be determined by the court, and in arriving at a conclusion it should not be forgotten that if a closed shop demand seems to portend a monopoly of labor, or if any other action by a union will tend to restrain commerce, these are but indirect results of a primary purpose which the union believes will better the conditions of its members and perhaps of labor generally. It is a rare case indeed in which the primary and direct purpose of the union is to create a monopoly or a restraint of commerce. There is a wide difference between such a primary purpose and the adoption of a method of achieving a good end which may have as an incidental effect a restraint of trade or commerce. The former is unlawful, the latter should be *damnum absque injuria*. Many courts have unwisely refused to make the distinction.²¹⁹

²¹⁷*Grant Construction Co. v. St. Paul Building Trades Council* (1917), 136 Minn. 167, 161 N. W. 520; *Campbell v. Motion Picture Machine Operators' Union*, (1922) 151 Minn. 220, 233, 186 N. W. 781, (see the dissenting opinion of Dibell, J.) But see, *United States v. Cassidy*, (N.D. Cal. 1895) 67 Fed. 698, 705.

²¹⁸*Bedford Co. v. Stone Cutters' Ass'n*, (1927) 274 U. S. 37, 56, 47 Sup. Ct. 522, 71 L. Ed. 916, (see dissenting opinion of Mr. Justice Brandeis.)

²¹⁹*Berry v. Donovan*, (1905) 188 Mass. 353, 74 N. E. 603; *Campbell v. Motion Picture Machine Operators' Union*, (1922) 151 Minn. 220, 186 N. W. 781; *United States v. Taliaferro*, (W.D. Va. 1922) 290 Fed. 214; *Bedford Co. v. Stone Cutters' Ass'n*, (1927) 274 U. S. 37, 47 Sup. Ct. 522, 71 L. Ed. 916; *Alco-Zander Co. v. Amalgamated Clothing Workers*, (E.D. Pa. 1929) 35 Fed. (2d) 203; *Apex Hosiery Co. v. Leader*, (C.C.A. 3rd Cir. 1937) 90 Fed. (2d) 155, (a sit-down strike held to place the strikers in a position of violating the Sherman Act because the merchandise in the plant was being prevented from moving in interstate commerce); cf., the following cases: *Seymour Ruff & Sons v. Bricklayers', etc., Union*, (1933) 163 Md. 687, 164 Atl. 752; *Snow v. Wheeler*, (1873) 113 Mass. 179; *Construction Co. v. St. Paul Building Trades Council*, (1917) 136 Minn. 167, 161 N. W. 520; *National Fireproofing Co. v. Mason Builders' Ass'n*, (C.C.A. 2d Cir. 1909) 169 Fed. 259; *United Leather Workers v. Herkert*, (1927) 265 U. S. 457,

The widespread misapplication of the Sherman Anti-Trust Act by the courts, together with the growing tendency to issue injunctions in labor controversies, led to the enactment of the Clayton Act by the Congress of the United States.²²⁰ Section 17 of the Clayton Act indicates a definite effort to eliminate the anti-trust act decisions in labor disputes when it provides that "the labor of a human being is not a commodity or article of commerce."²²¹ However, it was not clear as to whether it was intended to apply to all labor disputes or only to those in which employers and their employees were concerned.²²² The net result was that the Clayton Act proved almost entirely ineffective to stem the flood of labor injunctions. This was due to a number of causes, chief among these being the argument that the Act did not make lawful any act or acts which were unlawful at the time the Act was passed; that it applied only where a labor dispute between employer and employee existed; and that the Act did not forbid injunctions in strike cases when "necessary to prevent an irreparable injury to property or to a property right."²²³ It is

44 Sup. Ct. 623, 68 L. Ed. 1104; *Aeolian Co. v. Fischer*, (S.D. N.Y. 1928) 27 Fed. (2d) 560; *Levering & Garrigues Co. v. Morrin*, (1933) 289 U. S. 103, 107, 53 Sup. Ct. 549, 77 L. Ed. 1062.

²²⁰Clayton Anti-Trust Act, Title 15, section 12, Oct. 15, 1914, C. 323, section 1, 38 Stat. at L. 730. See also, House Report No. 612, 62nd Congress, Committee on the Judiciary, April 26, 1912, p. 37. *Great Northern Ry. Co. v. Local*, (D. Mont. 1922) 283 Fed. 557, 564, ("In strikes, employers too often with little cause are quick to seek injunctions and their intimidating advantages, and courts too often likewise grant them. The consequence is a disposition to view the courts as partisans of the employers, and the judicial writs of injunction as weapons against employees however lawfully they be proceeding. And it is of this Pandora's box of obvious evils to society that the Clayton Act is designed to somewhat close the lid." How far short of accomplishing its purpose the Clayton Act fell is attested to by the *Norris and Wagner Acts*); *Columbus Heating & Ventilating Co. v. Pittsburgh Building Trades Council*, (W.D. Pa. 1927) 17 Fed. (2d) 806, 808, ("To restrict the broad interpretation which might have been given to the Sherman Act (Compt., St. section 8820, et seq.), practically preventing all strikes by labor unions, the Clayton Act (38 Stat. at L. 730) was passed.")

²²¹Title 15, section 17, Oct. 15, 1914, C. 323, 38 Stat. at L. 730. See also, note 216, *supra*.

²²²Title 29, section 52, Oct. 15, 1914, C. 323, section 20, 38 Stat. at L. 738.

²²³*Moreland Theatres Corp. v. Portland Moving Picture, etc., Union*, (1932) 140 Or. 35, 43, 12 P. (2d) 333. *Packing Co. v. Butchers' Union*, (1916) 18 Ohio N. P. (N.S.) 457, 30 Ohio Dec. N. P. 438, (the Clayton Act does not allow a union to conduct a secondary boycott); *Webb v. Cooks', etc., Union No. 748*, (Tex. Civ. App. 1918) 205 S. W. 465, (discusses the state statute); *Stephens v. Ohio State Telephone Co.*, (N.D. Ohio 1917) 240 Fed. 759; *American Steel Foundries v. Tri-City Central Trades Council*, (1921) 257 U. S. 184, 42 Sup. Ct. 72, 66 L. Ed. 189; *Remington-Rand v. Crofoot*, (1936) 248 App. Div. 356, 289 N. Y. S. 1025, (in discussing sec. 876-a, Civil Practice Act of New York, the court held that the statute did not render lawful any act which was unlawful when it was enacted.)

readily apparent that the door was left open for all of the old abuses. Again the questions arose as to what constituted a labor dispute and under what situations could it be said that irreparable injury resulted. If the statute did not make lawful at least some of the acts which had theretofore been considered unlawful by the courts, it is at least permissible to question the reason for its enactment.

With the failure of the Clayton Act to abate the evils which it was intended to cover, the insistence that something be done to curb the zealotry of the courts in issuing injunctions in industrial disputes became more urgent and the growing epidemic of individual employee contracts called for a remedy. The Congress finally acknowledged these conditions by the passage of the Norris-La Guardia Anti-Injunction Act.²²⁴ Prior to the enactment of the Norris Act, several states had adopted legislation outlawing the so-called yellow dog contract. The *Coppage Case*, however, terminated the usefulness of such legislation.²²⁵

NORRIS AND WAGNER ACTS

Since the passage of the Norris Act a number of states have adopted substantially similar legislation.²²⁶ The more liberal courts have held that such legislation does not abridge any constitutional rights nor does it constitute class legislation or deprive the courts of any inherent equity jurisdiction.²²⁷ A number of

Cf., *The New Negro Alliance v. Sanitary Grocery Co., Inc.*, (1938) 303 U. S. 552, 562, 58 Sup. Ct. 703, 82 L. Ed. 683, ("The legislative history of the (Wagner) Act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that act").

²²⁴Title 29, section 101, et seq., March 23, 1932, C. 90, sec. 1, 47 Stat at L. 70. See also, House Report No. 669, 72nd Congress, Committee on the Judiciary, March 2, 1932, pp. 2, 3.

²²⁵*Coppage v. Kansas*, (1915) 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441; *People v. Western Union Telegraph Co.*, (1921) 70 Colo. 90, 198 Pac. 146; *In re Opinion of the Justices*, (N.H. 1933) 166 Atl. 640; *Jackson, Chief of Police v. Berger*, (1915) 92 Oh. St. 130, 110 N. E. 732. See also, *Order of RR. Telegraphers v. Louisville & Nashville R. Co.*, (W.D. Ky. 1906) 148 Fed. 437, (this was an early case in which federal statute of 1898, outlawing yellow-dog contracts exacted by interstate carriers, was held invalid as not within the constitutional power of Congress to regulate interstate commerce); *Goldfield Consolidated Mines Co. v. Goldfield Miners' Union No. 220*, (D. Nev. 1908) 159 Fed. 500; *Montgomery v. Pacific Electric Ry. Co.* (C.C.A. 9th Cir. 1923) 293 Fed. 680.

²²⁶The following states have adopted legislation which more or less resembles the Norris-La Guardia Act: Colorado, Idaho, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Washington, Wisconsin, Wyoming.

²²⁷*Local Union No. 26 v. City of Kokomo*, (1937) 211 Ind. 72, 5 N. E.

courts have arrived at some of the same ends contemplated by the Norris Act without the aid of any legislation but merely by the proper exercise of the powers of a court of equity.²²⁸ But the Anti-Injunction Act did not wholly solve the problems it was intended to reach.²²⁹ Although definite benefits accrued as the result of the Act, a number of courts continued to apply it so as to lead to a continuance of many of the abuses previously complained of. There were, however, some positive benefits, which included a diminution of the number of temporary injunctions granted, and a more or less general discontinuance of the yellow dog contract practice. Of course, these results were principally obtained in the federal courts and in those states which adopted similar legislation.

The right of collective bargaining and the right to attempt the unionization of nonunion fields, among other rights, were still beset with the injunctive processes of the courts of equity, which, although slower to grant such relief, nevertheless continued to grant it. In a word, legislation had not brought industrial peace. It was noticeable also that the company union idea was experiencing a phenomenal growth. The movement to discharge employees for union activities reached considerable proportions. By 1935 it was quite apparent that the Clayton Act and the Norris-La Guardia Act were not enough.

(2d) 624; *Geo. B. Wallace Co. v. International Ass'n*, (1926) 155 Or. 652, 664, 63 Pac. (2d) 1090; *Penn Anthracite Mining Co. v. Anthracite Miners*, (1935) 318 Pa. St. 401, 178 Atl. 291; *In re Cleveland & Sandusky Brewing Co.*, (N.D. Ohio 1935) 11 Fed. Supp. 198, (court in bankruptcy proceeding disposed of a labor controversy in connection with the operation of the bankrupt business disregarding the provisions of the Norris Act on the strength of sub-sections 1 and m, section 77B of the Bankruptcy Act); *Lipoff v. United Food Workers' Industrial Union*, (Pa. 1938) *Labor and Unemployment Insurance Service*, Prentice-Hall, Inc., p. 19561; *The Grace Co. v. Williams*, (C.C.A. 8th Cir. 1938) 96 Fed. (2d) 478, (Syll. 2: "The Norris-La Guardia Act, requiring hearing and findings of certain facts precedent to granting of injunctions in cases involving labor disputes, does not prohibit courts from restraining acts of fraud and violence"). *Contra*: *In re Opinion of the Justices*, (1931) 275 Mass. 580, 176 N. E. 649; *In re Opinion of the Justices*, (1933) 86 N. H. 597, 166 Atl. 640; *Bayonne Textile Corp. v. American Fed. of S. Workers*, (1933) 114 N. J. Eq. 307, 168 Atl. 799; *Blanchard v. Golden Age Brewing Co.*, (1936) 188 Wash. 396, 63 Pac. (2d) 397, (Washington Norris Act—held invalid because it is an attempt to encroach upon the judicial power. The opinion seems to be a poorly considered one. See, the dissenting opinion); cf., *American Furniture Co. v. I. B. of T. C. & H. of A.*, (1936) 222 Wis. 338, 268 N. W. 250.

²²⁸*Grant Construction Co. v. St. Paul Building Trades Council*, (1917) 136 Minn. 167, 161 N. W. 520; *Albee & Godfrey Co., Inc. v. Arci*, (N.Y. Misc. 1923) 201 N. Y. S. 172; *Decorative Stone Co. v. Building Trades Council*, (C.C.A. 2d Cir. 1926) 13 Fed. (2d) 123.

²²⁹*Geo. B. Wallace Co. v. International Ass'n*, (1936) 155 Or. 652, 665, 63 Pac. (2d) 1090.

The latest piece of legislation upon which much hope has been pinned is the Wagner National Labor Relations Act enacted by the Congress of the United States in 1935.²³⁰ Its purpose, as emphasized by the report of the House Committee on Labor, is "to remove certain important sources of industrial unrest engendered, first, by the denial of the right of employees to organize and by the refusal of employers to accept the procedure of collective bargaining. . . ." ²³¹ It is an attempt to keep labor disputes out of the courts until all other methods of settling them have been exhausted.²³² Thus, the employer is required to bargain sincerely with his employees or their representatives, though he is not compelled to reach an agreement contrary to his wishes.²³³ On the other hand, there is no attempt to "regulate the employer's control of his business in the employment, promotion, or discharge of employees so long as he does not attempt thereby to interfere with the right of self-organization of the employees or to intimidate or coerce them."²³⁴ The authority for the enactment of the statute was found in the commerce clause of the federal constitution, and the Supreme Court of the United States, in a series of cases, gave the Act a broad scope.²³⁵

²³⁰ July 5, 1935, C. 117, 46 Stat. at L. 1084, Code Title 29, secs. 151-166.

²³¹ House Report No. 1147, 74th Congress, Committee on Labor, June 10, 1935, page 8.

²³² *Bulkin v. Sachs*, (Pa. 1938) Labor and Unemployment Insurance Service, Prentice-Hall, Inc., p. 19570; see also, National Labor Relations Board v. Delaware-New Jersey Ferry Co., (C.C.A. 3rd Cir. 1937) 90 Fed. (2d) 520.

²³³ *Canter Sample Furniture House v. Retail Furniture Employees' Local No. 109*, (1937) 122 N. J. Eq. 575, 196 Atl. 210; *National Labor Relations Board v. The Sands Manufacturing Co.*, (C.C.A. 6th Cir. 1938) 96 Fed. (2d) 721. In *The Virginian Railway Co. v. System Fed. No. 40*, (1937) 300 U. S. 515, 557, 57 Sup. Ct. 592, 81 L. Ed. 789, the court held that under the Railway Labor Act the employer is only under "the affirmative duty of 'treating with' the authorizing representatives of its employees for the purpose of negotiating a labor dispute."

²³⁴ *Appalachian Electric Power Co. v. National Labor Relations Board*, (C.C.A. 4th Cir. 1938) 93 Fed. (2d) 985; *Canter Sample Furniture House v. Retail Furniture Employees' Local No. 109*, (1937) 122 N. J. Eq. 575, 196 Atl. 210; see also, *Associated Press v. National Labor Relations Board*, (1937) 301 U. S. 103, 132, 57 Sup. Ct. 650, 81 L. Ed. 953, ("The act permits a discharge for any reason other than union activity or agitation, for collective bargaining with employees"); *National Labor Relations Board v. Carlisle Lumber Co.*, (C.C.A. 9th Cir. 1937) 94 Fed. (2d) 138; *National Labor Relations Board v. The Sands Manufacturing Co.*, (C.C.A. 6th Cir. 1938) 96 Fed. (2d) 721, 724, ("The National Labor Relations Act does not prevent the employer from hiring individuals on whatever terms he may by unilateral action determine"); *National Labor Relations Board v. Union Pacific Stages*, (C.C.A. 9th Cir. 1938) 99 Fed. (2d) 153.

²³⁵ *National Labor Relations Board v. Jones & Laughlin*, (1927) 301 U. S. 1, 57 Sup. Ct. 615, 81 L. Ed. 893; *National Labor Relations Board v. Fruehauf Trailer Co.*, (1937) 301 U. S. 49, 57 Sup. Ct. 642, 81 L. Ed. 893; *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*,

Formerly it had been held uniformly that the process of manufacture did not directly affect interstate commerce but was rather intrastate business. Therefore, its regulation was not within the scope of the federal government either under the general welfare clause or under the interstate commerce clause of the federal constitution.²³⁶ However, since the adoption of the Wagner Act it has been held that

"Where activities have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect interstate commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control, although the activities may be intrastate in character when separately considered."²³⁷

(1937) 301 U. S. 58, 57 Sup. Ct. 645, 81 L. Ed. 893; *Associated Press v. National Labor Relations Board*, (1937) 301 U. S. 58, 57 Sup. Ct. 645, 81 L. Ed. 893; *The New Negro Alliance v. Sanitary Grocery Co., Inc.*, (1938) 303 U. S. 552, 561, 58 Sup. Ct. 703, 82 L. Ed. 683; *Consolidated Edison Co. v. National Labor Relations Board*, (1938) 59 Sup. Ct. 206. See also, *El Paso Electric Co. v. Elliott*, (W.D. Tex. 1936) 15 Fed. Supp. 81, (*National Labor Relations Act* does not apply to a situation in which the employer entered into an employees' representation agreement with nonunion employees before the Act was enacted); *National Labor Relations Board v. Carlisle Lumber Co.*, (C.C.A. 9th Cir. 1937) 94 Fed. (2d) 138, (*Wagner Act* is applicable to a situation in which the strike and discharge because of striking had occurred prior to the effective date of the Act); *Jeffrey-De Witt Insulator Co. v. National Labor Relations Board*, (C.C.A. 4th Cir. 1937) 91 Fed. (2d) 134; *Clover Fork Coal Co. v. National Labor Relations Board*, (C.C.A. 6th Cir. 1938) 97 Fed. (2d) 331; *Mooreville Cotton Mills, Inc. v. National Labor Relations Board*, (C.C.A. 4th Cir. 1938) 94 Fed. (2d) 61, (*National Labor Relations Act* does not apply to striking employees who seek reinstatement where they have obtained regular and substantially equivalent employment elsewhere).

²³⁶*Stout v. Pratt*, (W.D. Mo. 1935) 12 Fed. Supp. 864; *Carter v. Carter Coal Co.*, (1936) 298 U. S. 238, 56 Sup. Ct. 855, 80 L. Ed. 1160. Cf., *Consolidated Edison Co. v. National Labor Relations Board*, (1938) 59 Sup. Ct. 206, (the court goes far in this case to break down the distinction between interstate and intrastate commerce).

²³⁷*Consolidated Edison Co. v. National Labor Relations Board*, (C.C.A. 2d Cir. 1938) 95 Fed. (2d) 390, Syll. 1, affirmed as to this portion of the case by the Supreme Court on Dec. 5, 1938, 59 Sup. Ct. 206. *Tway Coal Co. v. Glenn*, (W.D. Ky. 1935) 12 Fed. Supp. 570; *National Labor Relations Board v. Jones & Laughlin*, (1936) 301 U. S. 1, 57 Sup. Ct. 615, 81 L. Ed. 893.

The question has arisen as to whether Congress having legislated upon the subject of labor controversies which affect interstate commerce such action has preempted the field and deprived the states of power to take action in the same field. See, *Fansteel Metallurgical Corp. v. Lodge 66*, (1938) 295 Ill. App. 323, 14 N. E. (2d) 991; see also, *Lauf v. E. G. Shinner Co.*, (1938) 303 U. S. 323, 58 Sup. Ct. 578, 82 L. Ed. 515; *Wisconsin Labor Relations Board v. Rueping Leather Co.*, (Wis. 1938) 279 N. W. 673. There should be no question that if the federal government has enacted legislation regulating labor relations a state is deprived of power to legislate in the same field whether it is "in the interests of peace, health and order of the state" or not. The position adopted by the Wisconsin court is hardly maintainable. The situation under discussion here was provided for in the New York Labor Relations Act in sec. 715, of that Act.

This change in point of view is a welcome one, and bids fair to give a real impetus to the adoption of regulatory measures which will be of genuine assistance in the solution of many of the pressing problems in the field of labor controversies. Legislation similar to the Wagner Act has been adopted in some of the states.²³⁸ The power of the states to pass such regulatory legislation has been held to reside in the police power of the state.²³⁹

That the Wagner Act, the Norris Act and state legislation of a similar nature, have succeeded in somewhat broadening the generally accepted definition of a labor dispute and in making collective bargaining a little more palatable cannot be doubted. But it would be a mistake to assume that the fight is won. Many courts are not yet ready to surrender on a number of important fronts. The old battles will have to be fought many times again before it can be said that more than the elementary rights of labor has been definitively settled.²⁴⁰

Two major difficulties stand in the way of an early solution of the problems in the field of industrial controversies. The first of these is the fact that even if the Norris and Wagner Acts are a positive solution, they apply to only a limited field. There are a large number of states in which no similar legislation has been adopted and, therefore, the situations which arise are dealt with without the aid of whatever benefits this legislation may lend. The second is that no matter how clear the purpose and the scope of such legislation may seem, it is subject to the interpretation of the courts. In each case it is necessary to decide whether the statute applies. Judicial interpretation has enervated many a law for which high hopes were held. In this connection Jeremy Bentham wryly observed that

“The word interpretation has a very different meaning in the mouth of a lawyer from what it has when employed by other people. To interpret a passage in an author, is to bring out of it the sense which the writer had in his mind; to interpret the law, in

²³⁸The Wisconsin, New York and Massachusetts Labor Relations Acts are good examples. At the November, 1938, election the voters of Oregon approved legislation which prohibits strikes except by a majority of a company's employees in a direct dispute over wages, hours and working conditions, requires an accounting of union funds and prevents union interference with any lawful commercial, manufacturing or farming enterprise. Obviously such legislation will solve none of the existing problems and will undoubtedly create many new ones.

²³⁹*Fenske Brothers v. Upholsterers' International Union*, (1934) 358 Ill. 239, 193 N. E. 112; *Wisconsin Labor Relations Board v. Rueping Leather Co.*, (Wis. 1938) 279 N. W. 673.

²⁴⁰*Geo. B. Wallace Co. v. International Ass'n*, (1935) 155 Or. 652, 668, 63 Pac. (2d) 1090.

the sense at least of the Roman lawyers, is often to get rid of the intention clearly and plainly expressed, and to substitute some other for it, in the presumption that this new sense was the actual intention of the legislator.

"With such a method of proceeding there is no security. Where the law is fixed, though it be difficult, obscure, incoherent—the citizen always has a chance to know it. It gives confused intimidation, less efficacious than it might be, yet always useful; we see at least the limits of the evil it can do. But let a judge dare to arrogate to himself the power of interpreting the laws, that is to say, of substituting his will for that of the legislator, and everything becomes arbitrary; no one can foresee the course which caprice will take. The question is no longer of the actual evil; however great that may be, it is small in comparison with the magnitude of possible consequences."²⁴¹

What Bentham observed of the Roman lawyers may also be said with justification of common law lawyers.

Judicial interpretation has done much to emasculate the efforts of the federal Congress and the state legislatures. Thus it has been held that a statute similar to the Norris Act did not apply to a situation in which the disputants did not sustain the relation of employer and employee; that a statute which defined labor as other than a property right is unconstitutional; that the National Labor Relations Act places the legislative stamp of approval on company unions; that a state statute based on the Clayton Act applied only where the employees were still working; that a sign in a barber shop reading, "No scabs wanted here," constituted a restraint of interstate transportation in violation of sections 1 and 4 of the Sherman Act and section 16 of the Clayton Act; that the Sherman Anti-Trust Act applied to labor unions; that the Clayton Act applied only to labor disputes between employer and employee; that a statute to prevent an employer from making it a condition of employment that his employees agree not to become or remain members of any labor organization while so employed violated the federal constitution; that a dispute between employees and employer over an attempt to unionize a branch of the plant in which they did not actually work was not a labor dispute within the terms of the Clayton Act; that because Congress did not use the word "picketing" in the Norris Act when it defined and limited the jurisdiction of the courts of the United States it indicated its intention to leave in those courts jurisdiction to restrain, if necessary, any picketing of a coercive, intimidating character, which, as has been heretofore indicated, raises the ques-

²⁴¹Bentham, *The Theory of Legislation* (1931) 155.

tion when and under what circumstances picketing is coercive and intimidating; that a struggle between two unions as to which shall represent the employees is not a labor dispute within the terms of the Norris Act.²⁴² These are but a few of the results of interpretation by the courts. In *New Negro Alliance v. Sanitary Grocery Co.*, the situation was acknowledged by the Supreme Court of the United States when it said:

"The legislative history of the act [Norris-La Guardia Act] demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that act."²⁴³

In discussing the perplexing problem of judicial interpretation in connection with the Clayton Act, the court, in *Great Northern Railroad Company v. Brosseau*, summed it up succinctly when it said that

"Notwithstanding the legislative history of the statute and its highly remedial character, as indicated by its history and the reports of the committees having it in charge, many lower federal courts have studiously striven to disregard its plain language and the actual intent of Congress as disclosed by the history of the statute. Some have held that all strikes cause irreparable injury and, therefore, the employer is entitled to an injunction to prevent such injury. Other courts have gone so far as to hold that the entire statute was a trick by Congress to frame the measure so that one part of it would nullify itself. Other courts have said there was no such thing as peaceful picketing, and hence no such thing as peaceful persuasion; therefore, the plain language of the statute must be disregarded by the court and all picketing and all attempts by strikers to exercise their rights of peaceful persuasion were to be restrained, and injunctions have been accordingly issued. Other courts, notwithstanding the specific language of the last clause of section 20, that the doing of the acts which it

²⁴²*Bull v. International Alliance*, (1925) 119 Kan. 713, 214 Pac. 459; *Hotel, Restaurant, etc., Local Union No. 181 v. Miller*, (1938) 272 Ky. 471, 114 S. W. (2d) 501 (cf., House Report No. 1147, 74th Congress, Committee on Labor, June 10, 1935, page 17); *Bogni v. Perotti*, (1915) 225 Mass. 152, 112 N. E. 853; *Heitkemper v. Central Labor Council*, (1920) 99 Or. 1, 192 Pac. 765; *United States v. Taliaferro*, (W.D. Va. 1912) 290 Fed. 214; *Duplex Co. v. Deering*, (1921) 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349 (Clayton Anti-Trust Act); *United Mine Workers v. Coronado Co.*, (1921) 259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975; *Columbus Heating and Ventilating Co. v. Pittsburgh Bldg. Trades Council*, (W.D. Pa. 1927) 17 Fed. (2d) 806; *Knapp-Monarch Co. v. Anderson*, (E.D. Ill. 1934) 7 F. Supp. 332; *United Electric Coal Companies v. Rice*, (C.C.A. 7th Cir. 1935) 80 Fed. (2d) 1. See also, *Simon v. Schwachman*, (Mass. 1938) 18 N. E. (2d) 1; *Adams v. Building Service Employees Union*, (Wash. 1938) 84 Pac. (2d) 1021.

²⁴³*The New Negro Alliance v. Sanitary Grocery Co., Inc.*, (1938) 303 U. S. 552, 58 Sup. Ct. 703, 82 L. Ed. 683.

permits should not be held to be in conflict with any federal law, have restrained strikes upon the ground that they violated the Sherman Anti-Trust Law and statutes forbidding the obstruction of the United States mails.

"In my judgment, all such action by courts is a gross abuse of judicial power and a direct refusal on their part to obey a statute which was intended to limit their powers. It may be that the statute is economically and socially unwise, because of the vast injuries which strikes inflict upon society. Those considerations, however, are for Congress and not for the courts. There is no reason that a just court can assign why American courts should not have as cheerfully obeyed the Clayton Act as the English courts obeyed the Trades Disputes Act of 1906."²⁴⁴

What was said here by the court of the fate that befell the Clayton Act in the courts is generally true of the fate of other legislation in the field of labor relations. As we have seen, the Norris and Wagner Acts and state legislation upon the same subject have met and are meeting somewhat similar treatment. We have but to look at the dissenting opinion of Mr. Justice McReynolds in *National Labor Relations Board v. Jones & Laughlin Co.*, to see what can happen to the legislative intent in the hands of a court out of sympathy with the economic and social aims of the legislature.²⁴⁵ That the opinion happens to be the dissenting opinion does not mean that a change in the complexion of the court may not make it some day the majority opinion. Such an occurrence is well within the realm of possibility.²⁴⁶

Apparently the efficacy of legislation rests in large part upon the readiness both of public opinion to receive it as a solution and of the courts to accept it at its face value. Either a hostile public opinion or courts economically and socially out of sympathy with the purposes of the statute involved, or both, will destroy the effectiveness of the legislation, or at least reduce its efficacy to a considerable degree.²⁴⁷ What then can be said for the future?

²⁴⁴(D. N. D. 1933) 286 Fed. 414, 420.

²⁴⁵(1937) 301 U. S. 1, 57 Sup. Ct. 615, 81 L. Ed. 893.

²⁴⁶Compare, *Adkins v. Children's Hospital*, (1923) 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785, and *West Coast Hotel Co. v. Parrish*, (1937) 300 U. S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703.

²⁴⁷*Pierce v. Stablenen's Union Local No. 8760*, (1909) 156 Cal. 70, 103 Pac. 324, (St. 1903, p. 289, Ch. 235, which provided that employees concerned in a trade dispute should not be subject to injunction held invalid as constituting class legislation); cf., *Local Union No. 26 v. City of Kokomo*, (1937) 211 Ind. 72, 5 N. E. (2d) 624; *Bull v. International Alliance*, (1925) 119 Kan. 713, 241 Pac. 459, (the holding of the court is contrary to the letter and spirit of the legislation involved); *Jensen v. St. Paul Motion Picture Machine Operators' Local Union*, (1935) 194 Minn. 58, 259 N. W. 811, (state Norris Act strangely interpreted to prevent picketing in the dispute under consideration); *Elkind & Sons v. Retail Clerks', etc., Ass'n*, (1933) 114

CONCLUSION

There are three fields in which it will be necessary to work intensively to accomplish the goal which all men of good will desire, whether they be aligned with labor or capital. These three are legislation, legal education and public opinion. It would be a comparatively simple task to outline plans for the functioning of an industrial world so that the points of friction would be minimized. Such plans usually border on the utopian and have generally been found to work better on paper than in action. We

N. J. Eq. 586, (a statute which permits picketing legalizes a private nuisance and legislature cannot do that); *Feller v. Local 144*, (1937) 121 N. J. Eq. 452, 191 Atl. 111; *Associated Flour Haulers v. Sullivan*, (1938) 168 Misc. Rep. 315, 5 N. Y. S. (2d) 982; *Thompson v. Boekhout*, (1937) 273 N. Y. 390, 7 N. E. (2d) 674; *Jewish Hospital v. Doe*, (1937) 252 App. Div. 581, 300 N. Y. S. 1111; *The Metropolitan Life Insurance Co. v. New York State Labor Relations Board*, (N.Y. 1938) Labor and Unemployment Insurance Service, Prentice-Hall, Inc., p. 19627, (an order by the labor relations board to bargain exclusively with one union does not preclude employer from negotiating individually with employees acting for themselves); *The Williams Mfg. Co. v. United Shoe Workers*, (Ohio 1937), Labor and Unemployment Insurance Service, Prentice-Hall, Inc., p. 16114; *Heitkemper v. Central Labor Council*, (1920) 99 Or. 1, 192 Pac. 765, (the court definitely refused to abide by the local statute); *Culinary Workers' Union No. 331 v. Fuller*, (Tex. Civ. App. 1937) 105 S. W. (2d) 295; *Knapp-Monarch Co. v. Anderson*, (E.D. Ill. 1934) 7 Fed. Supp. 332, (The interpretation given by the court to the Norris Act is unjustified); *United Electric Coal Companies v. Rice*, (C.C.A. 7th Cir. 1935) 80 Fed. (2d) 1, (Norris Act misinterpreted); *Donnelly Garment Co. v. International Ladies' Garment Workers' Union*, (W.D. Mo. 1937) 20 Fed. Supp. 767; *Donnelly Garment Co. v. International Ladies' Garment Workers' Union*, (W.D. Mo. 1937) 21 Fed. Supp. 807 (this case is worth nothing because of the remarkable about-face by Otis, J., from an opinion in the case cited immediately preceding this one. For further proceedings in this case see (C.C.A. 8th Cir. 1938) 99 F. (2d) 309); *Safeway Stores v. Retail Clerks' Union Local No. 148*, (1935) 51 Pac. (2d) 372.

In *Bayonne Textile Corp. v. American Fed. of S. Workers*, (1933) 114 N. J. Eq. 307, 168 Atl. 799, we find an argument that indicates the difficulties which confront attempted solutions of the labor problem by legislation. The court holds that the statute does not apply because the prerogatives of the Court of Chancery do not emanate from the Legislature and, therefore, cannot be encroached upon by it. See also, *Frank v. Herold*, (1901) 63 N. J. Eq. 443, 52 Atl. 152; *In re W. C. Reilly*, (1919) 23 Ohio N. P. (N.S.) 65, 31 Ohio Dec. N. P. 364. Cf., *Aberdeen Restaurant Corp. v. Gottfried*, (1935) 158 Misc. Rep. 785, 285 N. Y. S. 832, (in this case the court does not try to evade the legislative fiat). On the question of the attitude which courts should adopt toward remedial legislation there is an excellent statement in *Chamberlin, Inc. v. Andrews*, (1936) 271 N. Y. 1, 2 N. E. (2d) 22. See also, *In re Sweitzer*, (1917) 13 Okla. Cr. 154, 162 Pac. 1134; *Miller Parlor Furniture Co. v. Furniture, etc., Union*, (D. N.J. 1934) 8 Fed. Supp. 209; *Tway Coal Co. v. Parrish*, (1937) 300 U. S. 379, 393, 57 Sup. Ct. 578, 81 L. Ed. 703. But cf., *Heintz Mfg. Co. v. Local No. 515*, (E.D. Pa. 1937) 20 Fed. Supp. 116; *Truax v. Corrigan*, (1921) 257 U. S. 312, 338, 42 Sup. Ct. 124, 66 L. Ed. 254.

Bemis Bros. Bag Co. v. Feidelson, (W.D. Tenn. 1936) 13 Fed. Supp. 153, (the opinion is expressed that federal district courts ought not declare a statute unconstitutional except where there is no other alternative); *Precision Castings Co. v. Boland*, (W.D. N.Y. 1936) 13 Fed. Supp. 877.

must not forget that solutions must be practicable as well as desirable.

If we start by asking what is the principal problem that confronts us, the answer might well be that that problem is to obtain a realization upon the part of both employer and worker that while their interests do not entirely coincide, they are also not mutually exclusive—that one cannot prosper at the expense of the other. There can be no real industrial democracy until these two forces acknowledge the fact that both have an active interest in the finished product which is brought into existence by the combination of the financial investment of the one and the labor of the other. This means that there must be recognition upon the part of the employer that the worker is entitled to recognition as an equal, and that in order to be an equal he must be allowed to acquire equal economic power through combination with his fellow workmen. It is folly to talk of freedom of contract, of the right to work or not to work, of voluntary individual employee contracts and the like. A contract is voluntarily and freely entered into when both parties to that contract negotiate as economic equals. There can be no voluntary bargaining, in the real sense of the word, with an inferior. Therefore, the employer must be willing to allow the worker to organize freely and without interference or fear of economic reprisal. We are living in an age in which collective action is recognized as a necessity. Large scale business operations are not a passing phenomenon—they are absolutely necessary to the proper functioning of our economy. It serves no real purpose to talk of a return to the days when the business world was composed of small individual units. We cannot go back to a day that is passed without serious dislocation of our economy. Our industrial world has become geared to intensive and extensive operations, and one might as well talk of a reversion to the horse and buggy as to a return to an era of small scale business. The individual workman does not fit into the present day picture as an effective economic bargaining unit. His salvation lies not in individual action but in combining with his fellows. The rights which we grant freely to business should and must be granted just as freely to the worker. When employer and employee attain equal bargaining status, their respect for each other will lead them toward a willingness to negotiate peacefully in the confidence that as equals the advantage does not lie on either side.

Arguments in terms of conspiracies, justifications, inalienable rights, etc., are no longer valid if they ever were. Good faith is an essential element in all of the undertakings of mankind. If that element is lacking, our whole civilization becomes a hollow mockery. Trade unions and their members should be considered as acting in good faith unless it is clearly proven otherwise. Seldom indeed has it been the case that workers have deliberately embarked upon a course of sabotage or of obstruction for the sake of sabotage or obstruction. There must be a readiness and a willingness to distinguish between effective action which may cause incidental damage, and damaging action for its own sake.

In an industrial system in which collective action on the part of labor is welcomed, there will be less friction and more co-operation. This has been demonstrated time and time again.²⁴⁸ It is true that in a number of instances labor has had misguided leadership and poor advice. But this is also true of business. So long as we remain what we are, there will always be instances of such conduct, but these are the exception and not the general rule. The answer is not suppression, but a chance to develop along the lines of co-operation. Given the chance to treat with business as equals, there will develop (and in fact already has developed) a quality of labor leadership and responsible trades union units which augurs well for the future. Those employers who refuse to recognize this may be classed as survivals from the embryonic stage of the industrial era.²⁴⁹

²⁴⁸*Agwilines, Inc. v. National Labor Relations Board*, (C.C.A. 5th Cir. 1936) 87 Fed. (2d) 146, 150; *National Labor Relations Board v. Jones & Laughlin*, (1937) 301 U. S. 1, 42, 57 Sup. Ct. 615, 81 L. Ed. 893, ("Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances. . . .") See also, Senate Report No. 573, Committee on Education & Labor, May 1, 1935, p. 2.

²⁴⁹By reference to a responsible unit it is not intended to infer that labor unions should be compelled to incorporate. Incorporation is not synonymous with responsibility. It has certainly not meant this in the case of business organizations. The term "responsible unit" is here used in the sense of the feeling of responsibility that should come naturally to all organizations as they gain in strength and prestige. Whether a union is incorporated or not, its life blood is its members and if they do not feel a sense of responsibility, the corporation which would be their outward shell would only reflect their feelings. Corporations are moral in their dealings with others only so far as the individuals who operate them are moral. The courts have developed a very satisfactory technique of dealing with unincorporated associations and this should not be disturbed.

What part can legislation play in this scheme?²⁵⁰ It is a truism that legislation cannot be effective if it has outrun its time. Legislation that works is legislation that is in step with the dominant thought of its era. Before the Norris-La Guardia and Wagner Acts were enacted, much of the material covered by these acts was already considered to be the law by a small but growing minority of courts. Some courts of equity are keeping abreast of the times. For them such legislation is merely a codification of what they have already decided. For other courts these statutes can serve as guides, and for still others they are only something to interpret away because they do not fit in with their personal economic and social views. Thus legislation can be effective

²⁵⁰That legislation will not wholly solve our problems is apparent from the records of the United States Department of Labor which indicate that in 1934, the year prior to the passage of the Wagner Act, there were 1,856 strikes, in 1935, 2,014 strikes, in 1936, 2,172 strikes, in 1937, 4,470 strikes. However, in the first seven months of 1938, there were only 1,353 strikes compared with 3,217 in the same period of 1937, which may indicate that perhaps the Wagner Act may bring in its wake better industrial relations.

The Minnesota State Bar Association, in December, 1937, appointed a Committee on Labor and Social Security Law for the purpose of studying, among other things, the labor legislation of other countries and of other states in this country and on the strength of that study to make its recommendations to the Association. The committee has completed its study and made its recommendations which are embodied in the 1938 Proceedings of the Minnesota State Bar Association. The report is thorough and well prepared but one recommendation is of doubtful value and may, if adopted, result in aggravating a situation which is, at most, only temporary. Reference is made to the recommendation that, "the employees should be protected in the selection of their representatives not only against coercion by their employer, but also against coercion by fellow employees and against coercion by outside organizers. Such a provision is particularly needed at this time when two rival organizations of labor are competing with each other for the privilege of organizing the employees in different industries." The competition which now exists between the C. I. O. and the A. F. of L. is no more unusual than competition between two or more business houses for the business of a third party. No one has ever seriously suggested that such competition is coercive of that third party. The fear is unjustified and the recommendation would not serve any worthy purpose if enacted into law. It is suggested that the New York courts have had to deal with this problem without the aid of any such law and no dire results have occurred there as a result of the decisions of the courts and, by the same token, none will occur in Minnesota or any other jurisdictions.

See also, House Report No. 1147, 74th Congress, Committee on Labor, June 10, 1935, p. 16. Jevons, *The State in Relation to Labour* (1882) 165:

"... it is clear that there can be no royal road to legislation in such matter. . . . We must consent to advance cautiously, step by step, feeling our way, adopting no foregone conclusions, . . . expecting no infallible guide. We must neither maximize the functions of government . . . nor minimize them. . . . Moreover, we must remember that, do what we will, we are not to expect approach to perfection in social affairs. We must recognize the fact clearly that we have to deal with complex aggregates of people and institutions, must often take 'all in all or not at all.' Tolerance therefore is indispensable. We may be obliged to bear with evil for a time that we may avoid a worse evil. . . ."

tive but only in-so-far as the courts and public opinion want it to be. The Norris and Wagner Acts, and similar statutes, will not solve our problems, but they can be of assistance even if they do no more than act as educational forces of public opinion. It is undoubtedly true that the Norris and Wagner Acts, especially the latter, have been of invaluable aid in educating labor and many employers to a standard of labor relations which had not been either widely recognized or practiced before the passage of that legislation. Indeed, the public itself has received a liberal education in these fields because of the publicity attendant upon the passage and enforcement of these statutes and similar legislation. Public opinion can be a powerful agent in the solution of the employer-employee problem in this country. Its force is already apparent in our legislation—legislation which has come a long way from the early unlawful enticement of servants statutes and anti-picketing statutes to the Norris and Wagner Acts. It is vitally necessary that public opinion be kept abreast of the needs of our times and this can best be done by throwing light on the dark places of our industrial economy rather than by the organization of medieval vigilante committees.

The final but not the least important element which must be considered is the bench and bar.²⁵¹ The law has for centuries been principally concerned with the protection of property rights and the security of transactions.²⁵² The training which the legal profession has received has leaned generously toward the conservative side. While it is true that the law should not outdistance the times in which it exists, it is also true that it must not lag with the hindmost. The law should be an instrument of progress—an instrument to interpret life in the terms of today.²⁵³ Law schools must sooner or later realize that some of their graduates, as legislators and judges, will eventually help to make and apply the law. Their education should equip them with a philosophy that is alive and vibrant to the needs and desires of the age in which they live. It is no longer sufficient to train men to a keen knowledge of the purely legal subjects. They should and must be well grounded in the social and economic conditions and

²⁵¹Cohen, *Law and the Social Order* (1933) 4: "Still it is true that most improvements in the law had to be won against the opposition of the bench and bar."

²⁵²Maitland, *Constitutional History of England* (1908) 538. Also, Jevons, *The State in Relation to Labour* (1882) 38.

²⁵³See the dissenting opinion of Maxey, J., in *Kraemer Hosiery Co. v. American Fed. of F. F. H. W.*, (1931) 305 Pa. St. 206, 241, 157 Atl. 588.

philosophies of the workaday world in which they and the law must operate. So long as judges continue to have a part in making the law, and so long as their personal economic and social views continue to intrude themselves into their opinions (and being human they will find it difficult to exclude these opinions entirely), lawyers should be trained to take these matters into account to the best advantage of the society in which they live and work.²⁵⁴

A good part of our hope for the future lies in a general realization that the problems of labor relations will not be solved by reference to abstract theories but rather by a determination on the part of the employer to recognize that the stake of the employee in his work is larger than just a job—by a determination on the part of the employee to so govern himself as to be worthy of the position which he seeks in the economic life of the day—by a determination on the part of the courts to recognize that their place in labor disputes is that of an arbiter and not that of a partisan.

²⁵⁴Laski, *The State in Theory and Practice* (1935) 24.