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THE DEVELOPMENT OF LABOR LAW IN KENTUCKY

By GEORGE NEFF STEVENS*

In view of the growing importance of labor law in the United States, it is advisable that the lawyers of each state become familiar with the status of labor decisions and statutes in their own home state. The National Labor Relations Act and the Fair Standards Act have accelerated the need. While these acts relate to and control labor problems in the field of interstate commerce, they are already influencing intrastate labor problems. It is the purpose of this article to present as concisely as possible a study of the case and statutory law in Kentucky bearing on labor problems, to the end that the lawyers and laymen of the state, knowing what has been done, may see more clearly what must be done in this field of growing importance.

LABOR'S RIGHT TO ORGANIZE

The right of laborers to organize in order to achieve their mutual aims was won in Kentucky at an early date. The story of the fight is depicted in the cases that have reached the Court of Appeals. It was a comparatively easy victory. Legal contentions, which might have been used to delay the achievement of the right to organize, were frequently so strongly attacked by obiter of the highest court, obviously sympathetic with the struggles of the laboring man, that their use was successfully discouraged in advance.

CONSPIRACY

A. Common Law Conspiracy

A study of the early history of collective labor action reveals that one of the first, and for many years a most successful weapon used against combinations of laborers was the criminal charge of common law conspiracy. The illegality condemned by

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the law was deemed to arise from the mere existence of a combination.¹

No attempt has ever been made in this state to defeat the right of laborers to organize on the grounds that such combination constitutes a conspiracy at common law. The reason for this, in all probability, may be traced to the decisions in *Sayre v. Louisville Union Benevolent Association*,² in 1863, and *Aetna Insurance Co. v. The Commonwealth*,³ in 1889. The first case was an action for damages for breach of contract by the Association against Sayre. It appears that Sayre had violated certain by-laws of the Association. Sayre's defense was to the effect that the contract between the Association and himself was illegal as a conspiracy in restraint of trade, and therefore, not binding. In the opinion, the court saw fit to discuss at length the question whether a combination of workmen to raise wages constituted a conspiracy at common law. The court opined that it was not, basing its decision on the famous case of *Commonwealth v. Hunt*.⁴

In the second of these cases, the defendant insurance company was indicted for conspiracy arising out of a combination on the part of the defendant insurance company and others to maintain rates. The court was called upon to define the crime of conspiracy. In an elaborate opinion the court reviewed the development of the elements of this crime and concluded by adopting the language of Mr. Wright, that:

"There appears to be no evidence that during the first of these periods (A.D. 1200 to 1600) any other crime of conspiracy or combination was known to the common law than that which was authoritatively and 'finally' defined in A.D. 1305 by the ordinance of conspirators (33 Edw. 1), as consisting in confederacy or alliance for the false and malicious promotion of indictments, and pleas, or for embracery or maintenance of various kinds."⁵

¹ *Rex v. Journeymen Tailors*, 8 Mod. 10 (1721); *Hawkins, Pleas of the Crown*, bk. 1, c. 72, Sec. 2 (1716). Case of the Philadelphia Cordwainers, discussed by Professor Nelles in "The First American Labor Case", 41 Yale L. J. 165 (1931).

² 62 Ky. 143, 1 Duv. 143 (1863).

³ 106 Ky. 864, 51 S.W. 624 (1899).

⁴ 4 Metc. 111 (Mass., 1842), see Nelles, "Commonwealth v. Hunt", 32 Col. L. R. 1128 (1932).

⁵ This quotation was from Mr. Wright's "Law of Criminal Conspiracies", (1873). Mr. Wright was an eminent author in this field in his day. However, subsequent research has tended to bring to light additional materials of such a nature as to seriously undermine the basis of Mr. Wright's contentions. See Landis, in the Historical Introduction to his "Cases on Labor Law" (1934) at pp. 3-7.

It is submitted that such a definition of the crime of conspiracy, combined with the favorable attitude of the court towards the organization of laborers found in the Sayre case, and reiterated in the Aetna case, precluded, once and for all, any attack on labor from this angle.

B. Conspiracy of Laborers

In its early years, also, the attempts of labor to organize met active opposition at the hands of the legislature. Thus in England, in the year 1548, Parliament enacted the Bill of Conspiracies of Victuallers and Craftsmen, imposing heavy penalties upon "any artificers, workmen or labourers [who] do conspire, covenant, or promise together, or make any oaths, that they shall not make or do their work but at a certain price of rate, or shall not enterprise or take upon them to finish that another hath begun, or shall do but a certain work in a day, or shall not work but at certain hours and times."

This particular act is of importance in this state, because of the provision of the Kentucky Constitution, in Sec. 233, to the effect that:

"All laws which on the first day of June, one thousand seven hundred and ninety-two, were in force in the state of Virginia, and which are of a general nature, and not local to that state, and not repugnant to this constitution, nor to the laws which have been enacted by general assembly of the Commonwealth, shall be enforced in this state until they shall be altered or repealed by the general assembly."

In considering what laws were in force in Virginia, so as to be a part of the law of Kentucky, under this provision, the Kentucky Court of Appeals has ruled as follows:

"But only such principles and rules as constituted a part of the common law prior to the fourth year of the reign of James I are, or ever were, in force in this state. This is clearly implied in the Act of 1776. To declare that the common law and statutes enacted prior to that time should be in force was equivalent to declaring that no rule of the common law not then recognized and in force in England should be recognized and enforced here. James I ascended the throne of England in 1603 (March 24th) and the fourth year of his reign commenced March 24, 1607; and when it is sought to enforce in this state any rule of English common law, as such, independent of its soundness in principle, it ought to appear that it was established and recognized as the law of England prior to the latter date."⁶

A careful survey of the statute law of Kentucky failed to

⁶ Aetna Insurance Co. v. Commonwealth, 106 Ky. 864, 51 S.W. 624 (1899).

reveal any action of the General Assembly expressly adopting any policy similar to that of the English Parliament above set forth. However, in the year 1810 there appeared a three volume work, containing all the statute law of Kentucky, compiled by one William Littell. In the Appendix to the second volume, entitled "A Collection of All the Acts of Parliament and Acts of Virginia of a General Nature, which remain in force in the State of Kentucky, etc.", at page 546, there appears the following:

"2 & 3 Edward VI, Chap. 15, A.D. 1548.
Conspiracy of Victuallers and Craftsmen.

It is enacted by the king our sovereign lord, the lords and commons in this present parliament assembled, and by the authority of the same, that if any butchers, brewers, bakers, poulterers, costermongers or fruiterers, shall at any time from and after the first day of March next coming, conspire, covenant, promise, or make any oaths that they shall not sell their victuals but at a certain price, or if any artificers, workmen, or labourers, do conspire, covenant or promise together, or make any oaths that they shall not make or do their works but at a certain price or rate, or shall not enterprize or take upon them to finish that another hath begun, or shall do but certain work in a day, or shall not work but at certain hours and times, that then every person so conspiring, covenanting, swearing, or offending, being lawfully convicted thereof . . . (shall be punished)."

"II. And if it fortune any such conspiracy, covenant or promise, to be had and made by any society, brotherhood or company of any craft, mystery or occupation of the victuallers above mentioned, with the presence or consent of the more part of them, that then, immediately upon such act of conspiracy, covenant or promise had or made, over and besides the particular punishment, before in this act appointed for the offender, their corporation shall be dissolved to all intents, constructions and purposes."

Section One of the above also appears in "A Digest of the Statute Law of Kentucky, Being a Collection of all the Acts of the General Assembly of a Public and Permanent Nature, also the English and Virginia Statutes yet in force, etc." by William Little and Jacob Swigert.⁸ Section Two of the above was omitted. None of the other numerous digests of Kentucky statutes has included any part of the English statute under consideration. The works themselves give no explanation why this particular statute was included in the appendix to the first compilation of Kentucky statutes, and excluded thereafter, first in part, then in full, in later compilations. Naturally, the belief by William Littell that this statute was a part of the com-

⁷ William Littell, "The Statute Law of Kentucky" (3 Vol., 1810), Vol. II, pp. 6, 7, 8.

⁸ (2 Vol., 1832.) In Vol. 1, at p. 292.

mon law of Kentucky would not be binding. So also, its later omission by other compilers is not conclusive evidence that it is not a part of Kentucky common law. The question—Is this statute of Conspiracy of Victuallers and Craftsmen a part of the common law of Kentucky?—has never been directly raised. However, the Court of Appeals did discuss it in great detail in the case of *Aetna Insurance Co. v. Commonwealth*, above mentioned.

As previously noted, that case raised the question—What constitutes a conspiracy? The Kentucky court recognized, in view of section 233 of the Constitution, above referred to, that the common law of Kentucky included both English judicial decisions and dicta, and English statutory law, in force prior to March 24, 1607. The attitude of the court towards the judge-made law of conspiracy, as of that time, has already been mentioned. With respect to the statutory law, in its discussion, the court stated:

“At the time we adopted the English law, the statutes passed in the time of the sixth Edward were in full force, which forbade all conspiracies and covenants of artificers, workmen or laborers not to make or do their work but at a certain price or rate. . . . But so far as we are informed, the right of workmen to combine for an increase or maintenance of their wages by lawful means has never been held unlawful in this Commonwealth. The statutes of Henry, Edward, and Elizabeth upon that subject, so far as the Kentucky authorities show, have always been as dead as they were in England after the Act of 1875 . . .”

In view of this attitude on the part of the Court of Appeals it becomes apparent why the opponents of organized labor never made a direct attack on this ground.⁹

⁹In view of the actual parties before the court, the court's discussion of whether the English statutes mentioned were a part of the Kentucky common law must be considered as mere dictum. However, the court did suggest the treatment that would be given on direct attack. It should be noted that in Sec. 233 of the Kentucky Constitution there appears the provision that only those laws “not local to that state” shall be the law of this Commonwealth. The argument that the statutes under consideration were local to England, in view of their economic origin and purpose, is suggested in that part of the opinion wherein the Court pointed out that although the statutes of Edward VI, adopted in 1552, against forestallers and regrators, were in force at the time Virginia got its common law, still Virginia found it necessary to pass specific provisions against such traffic in order to obtain foods for the Revolutionary army.

JUDICIAL RECOGNITION OF LABOR'S RIGHT TO ORGANIZE

Thus were the possibilities of attack on charges of criminal conspiracy eliminated. As a result, labor had won, beyond the shadow of a doubt, the right to organize. That it would, and that it did, may be more graphically illustrated by quoting from various opinions of the Kentucky Court of Appeals. As early as 1863, in *Sayre v. Louisville Union Benevolent Association*,¹⁰ the Court of Appeals ruled that:

" . . . as a workman who is bound by no contract, may lawfully demand any wages that he may choose, any number of workmen may lawfully combine for the same purpose. . . ."

In 1899, in *Aetna Insurance Co. v. The Commonwealth*,¹¹ appears this significant statement:

" . . . But, so far as we are informed, the right of workingmen to combine for an increase or maintenance of their wages by lawful means has never been held unlawful in this Commonwealth. . . ."

Continuing, in 1912, in *Saulsberry v. Cooper's International Union*,¹² the court said:

" . . . The right of laborers to organize for protection . . . has been many times before the courts of this country, and such right has been uniformly upheld. . . ."

Again in 1920, in *Diamond Block Coal Co. v. United Mine Workers of America*,¹³ it is stated that:

"Labor organizations have a status in this country the same as other associations. Courts without exception have recognized the right of laboring men to associate themselves together to better their conditions and to increase their wages by lawful means. . . ."

"Capital may lawfully organize for its advancement and protection. It does so every day. Labor may rightfully do the same thing. This is the American way—the best-known way. . . ."

One last example, from *Aulich v. Craigmyle*,¹⁴ decided in 1933, where the court said:

"The right of workmen to form unions . . . is so well settled, the question is not now a debatable one."

However, new obstacles to hamper the use by labor of its new-found power through organization, were already in the wind.

¹⁰ 62 Ky. 143, 1 Duv. 143 (1863).

¹¹ 106 Ky. 864, 51 S.W. 624 (1899).

¹² 147 Ky. 170, 143 S.W. 1018 (1912).

¹³ 188 Ky. 477, 222 S.W. 1079 (1920).

¹⁴ 248 Ky. 676, 59 S.W. (2d) 560 (1933).

ORGANIZED LABOR'S RIGHT TO USE ITS POWER

During the nineteenth century the law of criminal conspiracy, as applied to labor organization, became more and more restricted, both in England and America, as a result of both statutory enactment and case law. As a result, the opponents of organized labor turned to other devices. In this connection the possibilities of the doctrine of restraint of trade,¹⁵ the development of the tort of civil conspiracies,¹⁶ and a new twist to the doctrine of inducing breach of contract,¹⁷ were of great significance.

If a court found that the agreement of any particular combination was in restraint of trade, then that agreement would be unenforceable.¹⁸

If a court found a conspiracy to injure, resulting in damage, civil liability followed.¹⁹ Whether or not a combination of laborers constituted a conspiracy to injure turned on the purpose of the combination in the eyes of the court. If the purpose was held to be to promote its own trade interests, then it was held proper, regardless of resulting injury.²⁰ If the purpose was held to be "to injure the party in his trade as distinguished from the intention of legitimately advancing their own interests", then, if damages resulted, civil liability arose.²¹

¹⁵ Landis, "Cases on Labor Law" (1934), Historical Introduction, p. 19.

¹⁶ Landis, *supra*, note 15, at p. 24.

¹⁷ Landis, *supra*, note 15, at p. 25.

¹⁸ *Hilton v. Eckersley*, 6 El. & Bl. 47 (1856). But see criticism of language of Crompton, J., in *Hilton v. Eckersley*, in the opinion of Bowen, L.J., in *Mogul Steamship Co. v. McGregor, Gow & Co.*, L.R., 23 Q.B.D. 598 (1899).

¹⁹ It is beyond the scope of this paper to consider in detail the development of this theory. It is suggested that for further information one read the material in Landis, Historical Introduction to "Cases on Labor Law" (1934), pages 19 and 24, and examine the English cases of *Allen v. Flood*, (1898) A.C. 1; *Mogul Steamship Co. v. MacGregor, Gow & Co.*, (1899) L.R., 23 Q.B.D. 598; *Quinn v. Leatham*, (1901) A.C. 495; *Sorrell v. Smith*, (1925) A.C. 700. See also, *Arkansas Wholesale Grocers Assn. v. F.T.C.*, 18 F. (2d) 866 (8th C., 1927), cert. den., 275 U. S. 533 (1927). For articles, see, Freund, "Malice and Unlawful Interference", 11 Harv. L.R. 449 (1898); Ames, "How Far an Act May be a Tort Because of the Wrongful Motive of the Actor", 18 Harv. L.R. 411 (1905); Walton, "Motive as an Element in the Common and in the Civil Law", 22 Harv. L. R. 501 (1909); Lewis, "Should the Motive of the Defendant Affect the Question of his Liability", 5 Col. L.R. 107 (1905), and 37 Harv. L.R. 143 (1923).

²⁰ *Allen v. Flood*, (1898) A.C. 1.

²¹ *Quinn v. Leatham*, (1901) A.C. 495.

The new twist on the doctrine of inducing breach of contract, as applied to organized labor, developed in England in 1905-1906.²² In these years the House of Lords decided that ordinary union objectives were not sufficient justification for inducing breach of contracts of service without consequent liability.

RESTRAINT OF TRADE

The doctrine of Restraint of Trade is a limited one. Wrote Bowen, L.J., in *Mogul Steamship Co. v. McGregor, Gow & Co.*²³:

“ . . . Contracts, as they are called, in restraint of trade, are not, in my opinion, illegal in any sense, except that the law will not enforce them. . . . No action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade. . . . ”

In other words, the courts go only so far as to release one or more contracting parties from an otherwise valid agreement on the ground that the contract is in restraint of trade. The applicability of the doctrine, therefore, is limited to situations in which one or more contracting parties have failed to live up to their promises. As a weapon in industrial dispute, this doctrine is of limited value. This would account for the paucity of cases involving the doctrine in Kentucky. Only two cases of interest to us on this point, have reached the Court of Appeals. The first was *Sayre v. Louisville Union Benevolent Association*,²⁴ decided in 1863. Member Sayre had violated a by-law of the Association to the effect that no member “shall go into any river or trade and work for less than the wages, nor take, bargain for, or carry any freight for less than the established rate in the trade”. This action was brought to collect damages for the breach. The court denied Sayre’s liability, ruling that the by-law involved was in restraint of trade, and therefore, unenforceable. The invalidity of the by-law, said the court, was not because it bound men not to work unless they could get a reasonable price for their labor, but because the by-law failed to make provision that the rate established be reasonable, from the viewpoint of the public, as well as the parties.

²² *South Wales Miners’ Federation v. Glamorgan Coal Co.*, (1905) A.C. 239, and *Danaby Collieries Co. v. Yorkshire Miners’ Assn.*, (1906) A.C. 239.

²³ (1899) L.R., 23 Q.B.D. 598.

²⁴ 62 Ky. 143, 1 Duv. 143 (1863).

The importance of this opinion in Kentucky labor law cannot be overstressed. It held that combinations of laborers to raise wages were proper. It added that the agreements that they make, however, *will be enforced only if they are reasonable, considering the interest of the public at large.*

The next case to be considered in this subdivision is *Huston v. Rentlinger*,²⁵ decided in 1891. Here the doctrine was applied to an agreement between a group of employers, as contrasted with the situation in the *Sayre* case. A by-law of a board of insurance underwriters, a voluntary association formed for the purpose of securing uniformity in rates of premiums, prohibited any member from employing any solicitor who had severed his connection with another member of the board. The appellee in this case had been denied privileges of the association because he had broken this by-law. He asks to be reinstated. The court granted his request, ruling that the above by-law was in restraint of trade, and, therefore, unenforceable.

By this decision, the Kentucky Court of Appeals made it clear that contracts, whether of employers or employees, in restraint of trade were unenforceable.

Before passing on, however, attention must be called to certain language found in this case. The court said:

“ . . . The laborer has a right to fix his own price for his labor, and the employer the sum he is willing to pay, and combinations entered into for the purpose of preventing the exercise of those rights are unlawful. . . . ”

If carried to its logical conclusion, this statement would have spelled trouble for organized labor in this state. The possibility here suggested that such combination of laborers, or employers, constituted a criminal conspiracy was eliminated, as above shown, by the decision in the *Aetna Insurance Company* case. But the unenforceability of agreements by such combinations for such purposes as being in restraint of trade was distinctly reiterated in the *Aetna* case,²⁶ in the following dictum:

“ . . . We must not be mistaken as intimating that contracts in restraint of trade, or which prevent a contracting party from accepting employment from or giving it to whomsoever he may desire, are not illegal, in the sense of being void, as against public policy. That such contracts are unenforceable is settled law in this state. . . . ”

²⁵ 91 Ky. 333, 15 S.W. 867 (1891).

²⁶ *Aetna Insurance Co. v. Commonwealth*, 106 Ky. 364, 51 S.W. 624 (1899).

Does the *Huston* case overrule the *Sayre* case? If a member of a labor union went to work for a lower wage than the union had set, and the union brought suit against this laborer for damages resulting from this act, would the court hold that the contract with respect to the wages of laborers was in restraint of trade under the above language of the *Huston* case and therefore unenforceable, or would the court say that whether or not the contract is in restraint of trade depends upon whether or not the wage scale set by the union, of which this party was a member, was reasonable, from the viewpoint of the public, as well as of the parties? No mention of the *Sayre* case appears in the *Huston* case. It is to be hoped, that, if the above proposition ever does come before the Court of Appeals, it will apply the rule of the *Sayre* case.²⁷

THE TORT OF CIVIL CONSPIRACY

The tort of civil conspiracy in so far as it applies to employer-employee controversies never flowered in the Commonwealth of Kentucky. The reason for this lies in a series of cases decided in this state during the years when England was working out the application of the doctrine to combinations of labor there. In these Kentucky cases, employees were attempting to apply the doctrine to combinations of employers. The first of this series was *Hundley v. Louisville & Nashville Ry. Co.*²⁸ This was a suit by an employee against the railroad to

²⁷ There have been several cases in the Kentucky Court of Appeals involving the doctrine of restraint of trade as applied to contracts between employers and individual employees. In the typical case, A, an employee, contracts with B, the employer, that he will not engage in the same business, in the same territory, for a certain period after termination of the contract by either party. The contract is terminated, and A sets up in the same business, within the time and/or area prohibited, in violation of the contract. Suit by B to enjoin A follows. The Kentucky Court of Appeals has said, with respect to such agreements: "Covenants of this character, though recognized to be in partial restraint of trade, are sustained where properly limited as to time and territory and are not otherwise against public policy, the test generally being whether the restraint is necessary for the protection of the business or good will of the employer, and, if so, whether it imposes on the employee any greater restraint than is reasonably necessary to secure the business of the employer, or the good will thereof . . ." *Thomas W. Briggs Co. v. Mason*, 217 Ky. 269, 239 S.W. 295 (1926). Accord: *Eigelbach v. Boone Loan & Investment Co.*, 216 Ky. 69, 237 S.W. 225 (1926); and *Davey Tree Expert Co. v. Ackelbein*, 233 Ky. 115, 25 S.W. (2d) 62 (1920).

²⁸ 105 Ky. 162, 20 Ky. L. Rep. 1085, 48 S.W. 429 (1898).

recover damages for wrongful acts of the defendant whereby plaintiff had been prevented from obtaining employment. The defendant railroad, along with others, had an agreement whereby none of them would hire any employee discharged for cause by any one of them. Plaintiff alleged that this was a conspiracy, and that he had been injured by it, because of defendant's false entry of discharge for cause. In discussing whether or not plaintiff had stated a cause of action the court said:

" . . . It was one of the purposes of the common law to protect every person against the wrongful acts of every other person, and *it did not matter whether they were committed by one person or by a combination of persons*, and under it an action was maintainable for the injuries done by disturbing a person in the enjoyment of any right or privilege which he had." (Italics added.)

And again, a little farther along in the opinion, the court said:

"Injury is the gist of the action. The liability is damage for doing, not for conspiracy. The charge of conspiracy does not change the nature of the act. . . ."

The court, thus, denied the possibility of tort arising out of mere conspiracy.²⁹ As was indicated in the opinion, it felt that the cause of action, if any, was simply:

"Thus, if one is prevented, by the wrongful act of a third party, from securing some employment he has sought, he suffers a legal wrong, provided he can show that the failure to employ him was the direct and natural consequences of the wrongful act."³⁰

In spite of this decision, the idea evidently still persisted that the presence of a conspiracy would make wrong that which, if done by one person, might be right. Such a contention was made, in effect, in *Baker v. Metropolitan Life Insurance Co.*³¹ Plaintiff had been discharged by the defendant pursuant to an alleged conspiracy based on an agreement between defendant

²⁹ It should be noted that there was no feeling on the part of this court similar to that found in *Quinn v. Leathem*, (1901) A.C. 495, where the court said: ". . . Does a conspiracy to injure, resulting in damage, give rise to civil liability? It seems to me that there is authority for that proposition, and that it is founded in good sense. . . . That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted. . . . A man may resist without much difficulty the wrongful act of an individual. . . . but it is a very different thing . . . when one man has to defend himself against many combined to do him wrong."

³⁰ Quotation from *Chambers v. Probst*, 145 Ky. 381, 140 S.W. 572 (1911).

³¹ 23 Ky. L. Rep. 1174, 64 S.W. 913 (1901).

and other insurance companies not to hire each other's former employees within a two-year period after severance of relations. Plaintiff had been employed by another insurance company within two years of taking a position with defendant. When defendant learned this, plaintiff was discharged. In this action plaintiff insisted that the gist of his action was not breach of contract, but the conspiracy which resulted in his discharge. The court dismissed the action on the ground that:

"It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whatsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice."

The court did suggest that a civil action would lie if actual legal damages resulted from some overt act done in pursuance of a conspiracy. But, the language of the opinion left little doubt that it was not the conspiracy that gave rise to the cause of action, but a wrongful act interfering with plaintiff's right.

The same party brought another action at the same time on the same facts against the Sun Life Insurance Company of America,³² by whom he had been formerly employed. His theory, in this case, was damages for procuring his discharge from the employment of another.³³ In dismissing the case the court said, by way of dictum, that, to recover, plaintiff must show a conspiracy to do an unlawful act by reason of which a civil right of plaintiff was infringed.

At the same term of court, one Trimble, a former employee of the Prudential Insurance Company, sued it, to recover damages for alleged conspiracy to prevent him from receiving employment. He alleged that he had sought employment from another insurance company and been turned down because of the agreement among the insurance companies, above mentioned. It should be noted that in this case, *Trimble v. The Prudential Insurance Co. of America*,³⁴ Trimble, so far as pleadings go, satisfied the dicta of both the *Hundley* and the *Sun Life* cases. Yet the court dismissed the complaint. Why? Said the court:

(The insurance companies) "had the right to employ, or not to

³² *Baker v. Sun Life Insurance Company of America*, 23 Ky. L. Rep. 1178, 64 S.W. 967 (1901)

³³ With respect to this theory, see the next subdivision of this article.

³⁴ 23 Ky. L. Rep. 1184, 64 S.W. 915 (1901).

employ any applicant as they pleased. The alleged agreement that neither of them would employ one who had been discharged by either of the other two was contrary to public policy, and not obligatory. The refusal of the two companies to employ appellant was, therefore, their voluntary act. It violated no legal right of his. . . ."

Here a man was prevented from receiving employment by what the court itself designated a wrongful act, and yet, no liability followed, said the court, on the theory of the decision in *Baker v. Metropolitan Life Insurance Company*.³⁵ It is submitted that this decision, regardless of its obvious partiality for defendants and its amazing logic, did deny the possibility of tort liability arising from conspiracy, as such.

The only Kentucky case in which the contention was made that a combination of laborers, acting pursuant to a common design, should be held liable for damages on a theory of conspiracy, is *Saulsberry v. Coopers' International Union*.³⁶ This was a suit by an employer to force the defendant union to furnish him with union labor, or at least, to allow him to use the union seal. Speaking of the pleadings and proof, the court said:

"There is an intimation in the pleading, if not a positive charge, that the failure of appellees to contract with appellant was the result of a conspiracy entered into between the walking delegates . . . and appellant's competitors, for the purpose of destroying his business. We find no substantial evidence in the record to justify or support this charge. But even if it were true, it would be of no avail; for since appellees had the right to cease laboring for appellant, it is immaterial what moved them to exercise this right. . . ."

As a result, it can be definitely said that the tort of civil conspiracy, so dangerous to organized labor in its early years in England, found no sympathy in Kentucky's highest court.

INDUCING BREACH OF CONTRACT

The possibility of a successful action for damages for inducing a breach of contract was eliminated in Kentucky by the decision of the Court of Appeals in *Chambers & Marshall v. Baldwin*.³⁷ This case established the rule that a party to a contract cannot maintain an action against a person who, regardless of motive, advises and procures the other party to break it.³⁸

³⁵ *Supra*, note 31.

³⁶ 147 Ky. 170, 143 S.W. 1018 (1912).

³⁷ 91 Ky. 121, 153 S.W. 57 (1891).

³⁸ Referring to this decision, the Court of Appeals in *Boulter v.*

No attempt has ever been made, so far as cases in the Court of Appeals are concerned, to hold a labor organization liable for damages for inducing breach of contract. The theory of the English authorities above mentioned,³⁹ could not be successfully argued in this state. It is based on the idea that one is liable for inducing a breach of contract unless he can show sufficient justification. Whereas, it should be noted, Kentucky maintains that one is not liable for inducing breach of contract, regardless of his motive, unless the act is clearly shown to be the proximate cause of the damage sustained.⁴⁰ Also, the English theory turned on the belief that ordinary union objectives were not sufficient justification. It is submitted that Kentucky authorities take a different view on this also. For example, the Court of Appeals in *Saulsberry v. Coopers' International Union*,⁴¹ approved this statement:

"The courts have invariably upheld the right of individuals to form

Macauley, 91 Ky. 135, 15 S.W. 60 (1891), wrote: ". . . It is, however, contended for appellant that the principle upon which the leading English case of *Lumley v. Gye*, 2 El. & Bl. 228 (sic), was decided, is correct, and applicable to this . . . The theory upon which *Lumley v. Gye* seems to have been decided is that remedies given by the common law in such cases as that are not limited to any description of servants or service, and the action was maintained upon the principle stated in Comyn's Digest, that 'in all cases where a man has a temporal loss or damage by the wrong of another he may have an action upon the case to be repaired in damages'. . . . But it was held in *Chambers v. Baldwin* that, to maintain an action upon the case at common law, the act upon which it is founded must not only amount to a legal wrong, but be the approximate cause of the loss or damage sustained, and that upon the principle, and according to the decided weight of authority in the United States, whether a legal wrong has been done or not depends upon the nature and quality of the act, not upon the motive of the person doing it; the following clear and forcible statement of the proposition in *Jenkins v. Fowler*, 24 Pa. St. 308, being quoted and approved: 'Malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence is lawful.'" The Court of Appeals felt that the proximate cause of the loss or damage was the refusal of the contracting party to go through with his promise, rather than the act of the third person who induced the contracting party so to act.

In line with this interpretation see the language of the Court of Appeals in *Baker v. Sun Life Insurance Company of America*, 23 Ky. L. Rep. 1178, 64 S.W. 967 (1901), that: "A party to a contract cannot maintain an action against a person who has maliciously advised and procured the other party to break it, unless the person procuring the breaking of the contract did so by coercion or deception, and thus caused the party to break the contract against his will, or contrary to his purpose."

³⁹ See, *supra*, footnote 22.

⁴⁰ See, *supra*, footnote 38.

labor organizations for the protection of the interest of the laboring classes, and have denied the power to enjoin the members of such associations from withdrawing peaceably from any service, either singly or in a body, even where such withdrawal involves a breach of contract."⁴²

INTERFERENCE WITH CONTRACTUAL RELATIONS

Attention must, however, be called to *Chambers v. Probst*.⁴³ This was an action to recover damages sustained by reason of plaintiff's discharge as a railroad crossing watchman as a result of the allegedly unwarranted, unlawful and malicious intermeddling of the defendant. At first glance one might get the impression that this case allowed a recovery against a third party for inducing breach of contract. Such is not the case. There was no breach of contract, because plaintiff's contract was terminable at will. The basis for the judgment for the plaintiff in this case was, in the language of the court, that:

"We are of the opinion that it is an actionable wrong to unlawfully interfere with one's right to labor, and that it is unlawful to make to an employer false and malicious statements concerning the manner in which the employee discharges his duty."

This opinion is, therefore, direct authority for the view that liability does follow from unlawful interference with contractual relations resulting in loss or damage.^{43a}

It stands alone, however, in this field. No attempt has ever been made to hold a labor organization liable on this theory, in Kentucky. The reasons are, in all probability, two: first, the decision in the *Baldwin* case, for reasons above set out; and

⁴² 147 Ky. 170, 143 S.W. 1018 (1912).

⁴³ See also, a similar dictum in *Diamond Block Coal Co. v. United Mine Workers of America*, 188 Ky. 477, 222 S.W. 1079 (1920).

^{43a} 145 Ky. 381, 140 S.W. 572 (1911).

^{43a} It is, unfortunately, beyond the scope of this article to examine in detail the possible effect of the decision in the *Probst* case on the general rule announced in the *Baldwin* case. It is submitted that although the cases may be reconciled they are in conflict in theory. In passing, it would seem that the *Baldwin* case refused to find the third person liable because the plaintiff had a cause of action against the contracting party for breach of contract. Whereas, in the *Probst* case, since there was no breach of contract, the court was compelled to hold the third person liable, or leave the plaintiff without a remedy against anyone. Yet, it should be noted, the same sort of intervening act by an independent person—the refusal of a party under contract to go on with contract, regardless of whether it means a breach of said contract or not—is found in both cases. Query—Why was this the proximate cause of loss in one case and not in the other?

second, certain language in the *Probst* case with respect to what the court meant by "unlawful" interference. Said the court:

"It is universally agreed that any interference with the right to labor which is the result of competition is justifiable."

ENTICING LABOR TO ABANDON CONTRACT

In 1867, the following statute became law in Kentucky:⁴⁴

"If any person shall wilfully entice, persuade, or otherwise influence any person or persons who have contracted to labor for a fixed period of time, to abandon such contract before such period of service shall have expired, without the consent of the employer, shall be fined not exceeding fifty dollars, and be liable to the party injured for such damages as he or they may have sustained."⁴⁵

This statute is still a part of the Criminal Law of Kentucky.⁴⁶

No prosecutions under this Act, if there have been any, have ever reached the Court of Appeals. Why have labor's opponents failed to make use of this apparently available device? The answer lies tucked away in *Boulier v. Macauley*,⁴⁷ decided in 1891. This was an action for damages claimed to have resulted from the defendant's action in inducing one Mary Anderson, a well-known dramatic performer, to breach her contract with the plaintiff, and to perform for the defendant. In view of the decision in *Chambers v. Baldwin*,⁴⁸ that a party to a contract cannot maintain an action against one who, even with malice and design to injure, and to benefit himself, advises and procures the other party to the contract to breach it, the plaintiff in the *Boulier* case attempted to found a cause of action on the theory that the defendant's action, under the facts of the case, was a violation of the statute above set forth, and therefore compensable.⁴⁹ The court answered this contention as follows:

"We are satisfied that the statute, passed soon after slavery ceased

⁴⁴ "Acts 1867", c. 2042, p. 103; Bullock & Johnson, "General Statutes of the Commonwealth of Kentucky" (1873) p. 341.

⁴⁵ According to Landis, in the Historical Introduction to his "Cases on Labor Law" (1934), in 1349, the Ordinance of Laborers imposed liability, both civil and criminal, upon a master who enticed a servant away from another. When Elizabeth codified all prior labor legislation in the Statute of Elizabeth in 1562, no special provision was included dealing with enticement of servants. However, Landis points out, citing authority, that the action for enticement survived this neglect, and was recognized in the courts thereafter.

⁴⁶ Ky. Stat. (Carroll's 1936) Sec. 1349.

⁴⁷ 91 Ky. 135, 15 S.W. 60 (1891).

⁴⁸ 91 Ky. 121, 15 S.W. 57 (1891).

⁴⁹ Note that this statute expressly creates a civil cause of action in favor of the party injured by the acts declared unlawful.

to exist in this state, and consequent change of the labor system took place, was intended to apply principally to farm laborers, and to extend application of it so as to include contracts for performance of dramatic artists would be not only fraught with much injustice, unnecessary strife, and litigation, but is entirely beyond the intended scope and operation of it."

Thus limited, this statute no longer carries the threat to organized labor apparent on its face.⁵⁰

"ENDS" FOR WHICH LABOR MAY ORGANIZE

On numerous occasions the Court of Appeals of Kentucky has suggested the "ends" for which labor may legally organize. Thus, the court has stated that labor might organize, "to promote their mutual advantage";⁵¹ to secure fair wages;⁵² to maintain high standards of workmanship;⁵³ to elevate the material, moral and intellectual welfare of the membership;⁵⁴ to secure the abolition of child labor, the 'trucking' system, tenement house labor and prison labor;⁵⁵ to secure better hours;⁵⁶ to secure

⁵⁰ A survey of the case and statute law in Kentucky reveals that this interpretation of the Statute still stands. Attention is directed, however, to *Chesapeake & Ohio Ry. Co. v. Pack*, 192 Ky. 74, 232 S.W. 36 (1921), in which the problem was indirectly involved. The case arose out of a civil charge of false imprisonment. The defense asserted that the plaintiff had been detained, not by it, but by known officers, charged with the crime of enticing laborers (miners) to abandon their contracts. The court saw fit to dismiss the case on the ground that the defense offered was sufficient to show an adequate reason for the defendant's refusal to resist the officers in arresting a passenger. Unfortunately, from our view-point, the court ruled that it was no concern of the railroad whether the arrest was or was not valid, under such circumstances as these.

⁵¹ *Sayre v. Louisville Union Benevolent Assn.*, 62 Ky. 143 (1863).

⁵² *Hetterman v. Powers*, 102 Ky. 133, 43 S.W. 180 (1897); *Aetna Ins. Co. v. Commonwealth*, 106 Ky. 864, 51 S.W. 624 (1899); *Saulsberry v. Coopers' International Union*, 147 Ky. 170, 143 S.W. 1018 (1912); *Diamond Block Coal Co. v. United Mine Workers of America*, 188 Ky. 477, 222 S.W. 1077 (1920); *Piercy v. Louisville & Nashville Ry. Co.*, 198 Ky. 477, 248 S.W. 1042 (1923); *Alsbrook v. Commonwealth*, 243 Ky. 814, 50 S. W. (2d) 22 (1932); *Hotel, Restaurant and Soda Fountain Employees Local Union No. 181, v. Miller*, 272 Ky. 466, 114 S.W. (2d) 501 (1938).

⁵³ *Hetterman v. Powers*, 102 Ky. 133, 43 S.W. 180 (1897).

⁵⁴ *Hetterman v. Powers*, 102 Ky. 133, 43 S.W. 180 (1897); *Diamond Block Coal Co. v. United Mine Workers of America*, 188 Ky. 477, 222 S.W. 1079 (1920); *Alsbrook v. Commonwealth*, 243 Ky. 814, 50 S.W. (2d) 22 (1932).

⁵⁵ *Hetterman v. Powers*, 102 Ky. 133, 43 S.W. 180 (1897).

⁵⁶ *Saulsberry v. Coopers' International Union*, 147 Ky. 170, 143 S.W. 1018 (1912); *Hotel, Restaurant and Soda Fountain Employees Local Union No. 181 v. Miller*, 272 Ky. 466, 114 S.W. (2d) 501 (1938).

better working conditions;⁵⁷ to induce employers to establish usages in respect to wages and working conditions which are fair, reasonable, and humane;⁵⁸ and recently, to achieve "the fundamental right to contract collectively with the employer."⁵⁹

A recent decision by the Court of Appeals held that if the purpose of a union was to establish a closed shop, that purpose is unlawful.⁶⁰ This is the only "end" which has been declared illegal in this state to date. But, it emphasizes the importance of the legality of the "end", for the means which organized labor may employ are limited to cases in which the end desired is, in the opinion of the court, legitimate.

THE MEANS AVAILABLE TO ORGANIZED LABOR

In order to accomplish an "end" recognized by the Kentucky Court of Appeals as proper, the Court has stated that a labor organization may use the strike;⁶¹ it may indulge in peaceful picketing;⁶² it may use any peaceable means, not partaking of fraud, to induce others to become members;⁶³ it may acquaint the public with facts which it regards as unfair, give notoriety to its cause, and use persuasive inducements to bring its own policies to triumph, and picketing or publicity for such purposes is not per se unlawful;⁶⁴ when engaged in a lawful strike, its members may join a crowd to persuade other men who propose to work not to take their places;⁶⁵ its members have a law-

⁵⁷ *Saulsberry v. Coopers' International Union*, 147 Ky. 170, 143 S.W. 1018 (1912); *Diamond Block Coal Co. v. United Mine Workers of America*, 188 Ky. 477, 222 S.W. 1079 (1920); *Piercy v. Louisville & Nashville Ry. Co.*, 198 Ky. 477, 248 S.W. 1042 (1923); *Alsbrook v. Commonwealth*, 243 Ky. 814, 50 S.W. (2d) 22 (1932); *Hotel, Restaurant and Soda Fountain Employees Local Union No. 181 v. Miller*, 272 Ky. 466, 114 S.W. (2d) 501 (1938).

⁵⁸ *Hudson v. C.,N.O. & T.P. Ry.*, 152 Ky. 711, 154 S.W. 47 (1913).

⁵⁹ *Hotel, Restaurant and Soda Fountain Employees Local Union No. 181 v. Miller*, 272 Ky. 466, 114 S.W. (2d) 501 (1938).

⁶⁰ *Hotel, Restaurant and Soda Fountain Employees Local Union No. 181 v. Miller*, 272 Ky. 466, 114 S.W. (2d) 501 (1938).

⁶¹ *Saulsberry v. Coopers' International Union*, 147 Ky. 170, 143 S.W. 1018 (1912); *Alsbrook v. Commonwealth*, 243 Ky. 814, 50 S.W. (2d) 22 (1932); *Newton v. Commonwealth*, 244 Ky. 41, 50 S.W. (2d) 18 (1932).

⁶² *Music Hall Theatre v. Moving Picture Machine Operator's Local No. 165*, 249 Ky. 639, 61 S.W. (2d) 283 (1933).

⁶³ *Diamond Block Coal Co. v. United Mine Workers of America*, 188 Ky. 477, 222 S.W. 1079 (1920).

⁶⁴ *Music Hall Theatre v. Moving Picture Machine Operator's Local No. 165*, 249 Ky. 639, 61 S.W. (2d) 283 (1933).

⁶⁵ *Newton v. Commonwealth*, 244 Ky. 41, 10 S.W. (2d) 18 (1932); *Commonwealth v. Compton*, 259 Ky. 565, 82 S.W. (2d) 813 (1935).

ful right to assemble, to address their fellowmen, and to endeavor in a peaceful, reasonable and proper manner to persuade them regarding the merits of their cause, and to enlist sympathy, support and succor in the struggle for legitimate labor "ends";⁶⁸ and, finally, members of a labor union may assemble and agree to pursue, and pursue, any legal means to gain their ends, that is, use persuasive powers in a peaceable way.⁶⁷

LIMITATIONS ON THE MEANS

In the use of persuasion, assembly, the strike, picketing, and the like, organized labor has not been allowed a free hand. Certain definite limitations have been imposed. Thus, for example, the Kentucky Court of Appeals has ruled that labor organizations may use only "lawful means" in their struggle to gain legitimate "ends";⁶⁸ that when the purpose of the combination is to raise wages, their right is limited to obtaining "reasonable prices" for their labor;⁶⁹ that the laborers so combining to get higher wages must be bound by no contract;⁷⁰ that laborers so combining must not resort to intimidation and violence, whereby property is destroyed, or its safety imperiled;⁷¹ that they must use peaceable means, not partaking of fraud;⁷² that the acts permitted must not be carried to the extent of violating the criminal law;⁷³ that ". . . force, violence,

⁶⁸ *Alsbrook v. Commonwealth*, 243 Ky. 814, 50 S.W. (2d) 22 (1932); *Commonwealth v. Compton*, 259 Ky. 565, 82 S.W. (2d) 813 (1935).

⁶⁷ *Commonwealth v. Compton*, 259 Ky. 565, 82 S.W. (2d) 813 (1935).

⁶⁸ *Aetna Insurance Co. v. Commonwealth*, 106 Ky. 864, 51 S.W. 624 (1899); *Diamond Block Coal Co. v. United Mine Workers of America*, 188 Ky. 477, 222 S.W. 1079 (1920).

⁶⁹ *Aetna Insurance Co. v. Commonwealth*, 106 Ky. 864, 51 S.W. 624 (1899).

⁷⁰ See, *Sayre v. Louisville Union Benevolent Association*, 62 Ky. 143, 1 Duv. 143 (1863); and see, *Aetna Insurance Co. v. Commonwealth*, 106 Ky. 864, 51 S.W. 624 (1899). But see, *Saulsberry v. Coopers' International Union*, 147 Ky. 170, 143 S.W. 1018 (1912); *Diamond Block Coal Co. v. United Mine Workers of America*, 188 Ky. 477, 222 S.W. 1079 (1920).

⁷¹ *Underhill v. Murphy*, 117 Ky. 640, 78 S.W. 482 (1904); *Saulsberry v. Coopers' International Union*, 147 Ky. 170, 143 S.W. 1018 (1912); *Diamond Block Coal Co. v. United Mine Workers of America*, 188 Ky. 477, 222 S.W. 1079 (1920).

⁷² *Diamond Block Coal Co. v. United Mine Workers of America*, 188 Ky. 477, 222 S.W. 1079 (1920).

⁷³ *Cobb v. Commonwealth*, 242 Ky. 424, 46 S.W. (2d) 776 (1932); *Alsbrook v. Commonwealth*, 243 Ky. 814, 50 S.W. (2d) 22 (1932); *Newton v. Commonwealth*, 244 Ky. 41, 50 S.W. (2d) 18 (1932); *Commonwealth v. Compton*, 259 Ky. 565, 82 S.W. (2d) 813 (1935).

or threats thereof, terror, menace, intimidation, coercion, deliberate misrepresentation, spreading of falsehoods, and the like, can never be tolerated";⁷⁴ and, finally, that picketing will not be permitted, regardless of how peaceable, if it becomes a nuisance.⁷⁵

THE USE OF THE INJUNCTION IN INDUSTRIAL DISPUTES

The conclusions listed in the three immediately preceding subdivisions were garnered from cases arising on many and varied legal theories. However, most of them resulted from the court's decisions in cases wherein the petitioner had requested injunctive relief. The importance of the injunction in industrial strife cannot be overestimated. It has proved to be the thorn in the side of organized labor.⁷⁶

It is, therefore, interesting to discover that the earliest case in the Kentucky Court of Appeals involving the use of the injunction in industrial disputes was one in which organized labor used this weapon successfully against a former employer of union labor. The case was *Hetterman v. Powers*,⁷⁷ decided in 1897. The case involved the right of a union to protect its property, a point which will be considered in detail later on in this article.

The next case involving the use of the injunction in an industrial dispute was *Underhill v. Murphy*,⁷⁸ decided in 1904. Suit was brought by a former employer against former employees, all of whom were members of a union, to enjoin the commission of acts of violence and intimidation. The proof showed that defendants picketed plaintiff's place of business, beat up one of plaintiff's employees, threatened others with

⁷⁴ *Music Hall Theatre v. Moving Picture Machine Operator's Local No. 165*, 249 Ky. 639, 61 S.W. (2d) 283 (1933).

⁷⁵ *Music Hall Theatre v. Moving Picture Machine Operator's Local No. 165*, 249 Ky. 639, 61 S.W. (2d) 283 (1933).

⁷⁶ For a historical survey of the use of the injunction in labor disputes, see Landis, *Historical Introduction to "Cases on Labor Law"* (1934), at p. 36-37; Nelles, "A Strike and its Legal Consequences", 40 *Yale L.J.* 507 (1931); Frankfurter and Greene, "The Labor Injunction", (1930); Witte, "Early American Labor Cases", 35 *Yale L. J.* 825 (1926); Bonnett, "The Origin of the Labor Injunction" 5 *So. Cal. L.R.* 105 (1931). In Landis' *Historical Introduction*, the author says that the earliest precedent for the use of the injunction in labor controversy occurred in England in 1868, and the first case in this country so using the injunction was decided in 1877.

⁷⁷ 102 Ky. 133, 43 S.W. 180 (1897).

⁷⁸ 117 Ky. 640, 78 S.W. 482 (1904).

similar treatment, and prevented them from going to or working on jobs away from the plaintiff's place of business. The proof also showed that plaintiff had at one time been under contract with the union to hire union help at certain wages, that when this contract expired it had not been renewed because of inability of the plaintiff and the union to agree as to wages. In sustaining the issuance of the injunction below, the court said, speaking of the rights of organized labor on the one hand, and owners of a business on the other:

"The constitutional right of free speech may not be infringed. Peaceful persuasion or lawful appeals to reason or sentiment may not be interfered with. But when intimidation and violence are resorted to, and thereby property is destroyed, or its safety imperiled, the chancellor may properly, by injunction, protect the owner of the property in the enjoyment of his constitutional right that his property shall not be taken from him."⁷⁹

It is submitted that no fair-minded person could say that, consistent with law and order, this decision was unfair to organized labor. On the contrary, in the face of over-activity, the court recognized the right of organized labor to achieve its "ends" through peaceful means.

Eight years later, in *Saulsberry v. Cooper's International Union*,⁸⁰ this fact situation came before the Court of Appeals. The defendant labor union had been under contract with the plaintiff whereby it furnished him labor at a stipulated price of 35 cents per hour for a day's work of nine hours. Goods produced by this union labor were stamped with the stamp of the union as proof of this. When this contract expired, the union offered a new contract with an eight-hour day at 40 cents per hour. Plaintiff refused to sign. Whereupon, the union leaders took possession of its stamp and notified the employees that they were "out of a job". Plaintiff brought this suit demanding that the union be forced to bargain with him, at his terms, or, at least,

⁷⁹ Attention is directed to the fact that this case is authority for the rule in Kentucky that equity will not decline to take jurisdiction of a case on the ground that the act complained of is a crime. Said the court: "The enforcement of the criminal law is for the criminal court, but where the breach of the criminal law is also a violation of a property right the chancellor may interpose by injunction to protect property."

⁸⁰ 147 Ky. 170, 143 S.W. 1018 (1912).

that the union be forced to let him use its stamp.⁸¹ Said the court:

"The simple question presented by this record is, Can a labor organization be required to enter into a contract with one desiring the services of its men upon terms not acceptable to it? The lower court held that it could not. In that conclusion we concur."

In the body of the opinion the court recognized the right of organized labor to cease furnishing union labor, the right to strike for better wages, and the right of the union to control its property. This decision represents yet another victory for organized labor.

Another eight years passed before the next injunction case arising out of a labor controversy reached the Court of Appeals. In 1920, in *Diamond Block Coal Co. v. United Mine Workers of America*,⁸² this fact situation was before the court. Suit was brought by the plaintiff, a coal mining company, to enjoin the defendant labor union from erecting houses near plaintiff's coal mine, and from inducing or persuading any of the plaintiff's employees to break their contracts of employment with the plaintiff. The facts brought out at the trial showed that the defendant union had never been able to make a labor agreement with the plaintiff company. In fact, the facts showed that plaintiff company fired any employee who became affiliated with a labor union, and for that alone. A temporary restraining order had been granted below on the basis of the complaint filed, and was sustained on the hearing of a motion by defendant to dissolve the same. The Court of Appeals concluded that the injunction had been improperly issued, and ordered it dissolved at once. The importance of this case warrants extensive quotation from the opinion. Said the court:

"As there is no evidence to support the allegations of the petition that defendants have used threats, intimidation, coercion, and fraud to accomplish their purposes, and as these allegations are specifically denied by defendants, thus putting the burden of proof upon the plaintiff, and as it is admitted by plaintiff and its officers that its mines continue uninterruptedly to run, and no employe has been induced by defendants, or either of them, to leave its employment at any time, it follows that the plaintiff has wholly failed to make out its case unless

⁸¹ Your attention is directed to the fact that in these two cases last discussed, we find factual evidence of dealings between employers and unions before 1904 of an obviously friendly nature. Trouble arose in both cases not out of attempts to unionize, but simply because the employer and the union could not agree on renewal terms.

⁸² 188 Ky. 477, 222 S.W. 1079 (1920).

it be that the peaceable solicitation of miners to become members of the organization in that district was a violation of the rights of the plaintiff, . . . In its last analysis, plaintiff's only complaint supported by evidence is that defendants . . . are soliciting other employes to become members of the union.

"The general rule seems to be that organizers of labor unions may use any peaceable means, not partaking of fraud, to induce persons to become members, and equity will not enjoin such organizers, or their associates, from attempting by proper argument to persuade others to join the union so long as they do not resort to force or intimidation. If the union should induce employes of the plaintiff to become members of its organization, and the plaintiff, as it has done in the past, should discharge such employes because of their membership in the union, and the plaintiff should thereby lose the service of the employe, the proximate cause would not be the joining of the union by the employe, but the discharge of the employe by the plaintiff, and the plaintiff could have no legal redress of the defendant, even though all its employes should so join the union and should in consequence suffer discharge by the plaintiff, and its business should be closed. . . .

"In this jurisdiction the rule is thoroughly established that a labor organization, through its officers and agents, may organize new branches and solicit membership among employes of concerns that are opposed to union labor so long as they use only peaceable means, such as persuasion and argument, and are not guilty of threats against the person or property, intimidation, coercion, or fraud. . . ."

It is obvious that the decision in the Court of Appeals was markedly favorable to organized labor. But, this case, on its facts, brings to light a deplorable misuse of an extraordinary remedy created, not to hamper, but to obtain justice. On the basis of a petition containing allegations which the pleader was, as it subsequently appeared, absolutely unable to prove, an injunction was issued restraining another party from doing what, as it subsequently appeared, it had a legal right to do. The misuse of the injunction in this way in labor disputes has led other jurisdictions, notably the federal government, to take steps to put a stop to it. It is no argument to say, but on appeal, the injunction will be dissolved if improperly granted. That is too late in many cases, in view of the nature of the controversy, the economic and social conditions and positions of the parties. Since the Court of Appeals of Kentucky has condemned such practice by dissolving injunctions improperly issued, why should the lawyer, or the layman, object to a law which limits the issuance of an injunction in industrial controversy to a point after there has been a full hearing on the merits? When a rule of procedure, or a remedy available in the courts, is perverted by those interested solely in their own selfish ends so as to make of the law a tool of injustice, that rule

of procedure or that remedy must be corrected, or limited, until, once again, it is a means of obtaining justice, and that alone. It is to be hoped that the Kentucky bar will stand behind the people of Kentucky, in fact, urge them to correct this existing defect in the administration of justice in this Commonwealth.⁸³

Mention might be made, in passing, of the fact brought out in this case that it was the practice of the plaintiff company to "fire" any employee who joined a labor union. There appear to be no cases in the Kentucky Court of Appeals passing directly on the validity of the so-called "Yellow-Dog" contract,—that is, an agreement by an employee that he will refrain from joining a labor organization. Such contracts have been held valid. Thus in *Hitchman Coal and Coke Export Co. v. Mitchell*,⁸⁴ the Supreme Court issued an injunction to restrain a labor union from inducing workmen who had signed such contracts to break them by joining the union. In *Adair v. United States*,⁸⁵ federal legislation declaring such a contract illegal was held unconstitutional. In *Coppage v. Kansas*,⁸⁶ a similar state enactment was held unconstitutional. However, the Norris-LaGuardia Act,⁸⁷ by rendering such contracts unenforceable in the federal courts, has rendered nugatory this line of authority, in so far as it applies to federal cases. Many states have reached the same result by similar legislation.

It is submitted that there is no imperative need in Kentucky for legislation with respect to yellow-dog contracts. In a strong dictum in the *Diamond Block* case, the Court of Appeals said:

"The courts . . . have denied the power to enjoin members of such associations from withstanding peaceably from any service, either

⁸³ For fuller information on the nature of anti-injunction legislation, its purpose, its constitutionality, and the like, see the provisions of the Norris-LaGuardia Act, 47 U. S. Stat. 70, c. 90, 29 U.S.C.A. Secs. 101-115; see *Levering & Garrigues v. Morrin*, 71 F. (2d) 284 (C.C.A. 2dC.) (1934); cert. denied, 293 U.S. 595 (1934); Frankfurter and Greene, "Congressional Power over the Labor Injunction", 31 Col. L.R. 385 (1931); Christ, "The Federal Anti-Injunction Bill", 26 Ill. L.R. 516 (1932); Witte, "The Federal Anti-Injunction Act", 16 Minn. L.R. 638 (1932); Fraenkel, "Recent Statutes Affecting Labor Injunctions and Yellow-Dog Contracts", 30 Ill. L.R. 854 (1936); Riddlesbarger, "State Anti-Injunction Legislation", 14 Ore. L.R. 501 (1935).

⁸⁴ 245 U.S. 229, 38 Sup. Ct. 65 (1917).

⁸⁵ 208 U.S. 161, 28 Sup. Ct. 277 (1908).

⁸⁶ 236 U.S. 1, 35 Sup. Ct. 240 (1915).

⁸⁷ 47 U.S. Stat. 70, c. 90; 29 U.S.C.A. Secs. 101-115.

singly, or in a body, even where such withdrawal involves a breach of contract."⁸⁸

In 1933, the Court of Appeals decided *Music Hall Theatre v. Moving Picture Machine Operators' Local No. 165*.⁸⁹ Injunctive relief was requested by the plaintiff theatre against the defendant union, whose members had been formerly employed by the plaintiff. Plaintiff and defendant had been unable to agree on wages when the contract expired. Plaintiff, thereupon, hired a non-union operator. The defendant established a picket line at plaintiff's theatre, consisting of three or four men who patrolled the sidewalk at and near the entrance to the theatre, one of whom carried a banner with the inscription, "This theatre does not employ union operator, member of Local No. 165 . . . affiliated with the American Federation of Labor". The facts show that these pickets also accosted prospective patrons, told them the building was a fire trap, or that no show was going on at the time, or that the theatre was not open, or that the non-union operators didn't know their business, as a result of which there was likely to be a fire. They also distributed handbills calling attention to the use of non-union operators. Plaintiff's business fell off over 50%. A temporary injunction was issued in the court below, restraining all such activities. On appeal the Court of Appeals held, in the language of a later case,

" . . . the circuit court had improperly issued an injunction against the peaceful picketing by carrying the banner, but had properly enjoined the making of false statements, the indulgence of violence, and interference with the business."⁹⁰

This decision recognized the validity of picketing as a legitimate weapon of organized labor in industrial disputes. It should be noted that the purpose of the picketing in this case was not to induce other workers to join the union or not to take the jobs of men on strike, but to force the plaintiff to deal with the defendant union by inducing or persuading third persons to withdraw their patronage. In so far as this court recognized the right of the defendant union to induce or persuade such third persons by peaceful means, such as peaceful picketing and truthful plac-

⁸⁸ See also a similar dictum in *Saulsbury v. Coopers' International Union*, 147 Ky. 170, 143 S.W. 1018 (1912).

⁸⁹ 249 Ky. 639, 61 S.W. (2d) 283 (1933).

⁹⁰ *Hotel, Restaurant and Soda Fountain Employees' Local Union No. 181 v. Miller*, 272 Ky. 466, 114 S.W. (2d) 501 (1938).

ards to withdraw their patronage, this case is authority for the validity of the use of the primary boycott in industrial disputes.⁹¹ However, in so far as this court declared illegal the action of the defendant union in attempting to persuade prospective customers of the plaintiff to withdraw their trade by means of coercive pressure applied to the actual or prospective customer, such as to put such customer in fear of personal loss or damage, this case is authority for the general rule that secondary boycotts are illegal weapons in industrial disputes.⁹²

The most recent case to reach the Court of Appeals, involving the use of the injunction in industrial disputes, is *Hotel, Restaurant, and Soda Fountain Employees' Local Union No. 181 v. Miller*,⁹³ decided in 1938. Plaintiff Miller, a restaurant owner, sued in equity to restrain the defendant labor union from picketing his restaurant and interfering with his business. The purpose of the picketing, as shown from the facts, was to force plaintiff to employ members of the defendant union.⁹⁴ Miller stated that he permitted defendant to solicit his employees to join the union, and that they refused, and, thereafter, these

⁹¹ The boycott, one of labor's most potent weapons, is not easy to define. It covers a wide range and variety of activities, ranging from a mere withdrawal of business by an individual to an organized effort by a group of individuals to procure all others to withdraw their business, by means ranging from simple persuasion to disturbance of business relations with third persons by force, or threats, or intimidation. Boycotts are classified as primary and secondary. A primary boycott has been defined as a combination to refrain from dealing with a certain party, or a combination to advise or by peaceful means to persuade that party's customers to refrain from dealing with him. See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

⁹² A secondary boycott differs from the primary in that it is a combination to exercise coercive pressure upon customers, actual or prospective, of the party, in order to cause them to withhold or withdraw patronage from such party through fear of loss or damage to themselves should they deal with him. See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

⁹³ 272 Ky. 466, 114 S.W. (2d) 501 (1938).

⁹⁴ Attention is called to this fact in order to distinguish this case from one in which the primary effort of the union is to induce employees to join the union, and where the methods used are not such as to constitute a secondary boycott. (See footnote 92 *supra*). This distinction would seem important because of the language in *Diamond Block Coal Co. v. United Mine Workers of America*, 183 Ky. 477, 222 S.W. 1074 (1920), that, "In this jurisdiction the rule is thoroughly established that a labor organization, through its officers and agents, may organize new branches and solicit membership among employees of concerns that are opposed to union labor, so long as they use only peaceable means, such as persuasion and argument, and are not guilty of threats against the person or property, intimidation, coercion, or fraud."

employees formed their own union. These employees, acting as as a group, then made a contract with Miller. Miller thereupon told defendant labor union that he was no longer in a position to deal with them. Whereupon the defendant labor union began picketing the restaurant, carrying a placard bearing the words, "This Restaurant is unfair to organized labor—Hotel, Restaurant and Soda Fountain Employees' Local Union No. 181, affiliated with the American Federation of Labor".

The court dismissed, as unimportant, the fact that Miller discharged his only employee who belonged to the defendant union, on the ground that "a tender of re-employment was made, but the cook refused to return. Deeming her action as voluntarily quitting work, the incident of her discharge may not be regarded as affecting subsequent developments."

The Court of Appeals said:

"The case seems to be narrowed to this one question: Where the employees of a business or industry have organized and concluded a collective contract with the employer in relation to their wages, hours of labor, and working conditions, may a general labor union, to which none of the employees have belonged, picket the place of business?"

It then proceeded to answer its question in the negative.

It is submitted that if this court had simply said that they would not tolerate strikes, boycotts, picketing, or the like, of an employer in controversies arising out of jurisdictional disputes on the part of two or more labor unions, whether local or national, this case would have been a distinct contribution to legal theory. Such a decision could have been based on the theory that such activity as found in this case was in the nature of a secondary boycott, directed against fellow workers in a rival union, through pressure on their employer, and as such is illegal according to the law of Kentucky.

The germ of such a decision does lie in the case. It is found in those expressions on the part of the court to the effect that workers must be guaranteed the right of freedom to choose who their representatives should be.⁹⁵

⁹⁵ Unfortunately, the court weakened the import of such statements by citing as authority for same, case law and statute law, aimed not at interference by unions with unions or laborers, but at interference by employers with union activity. For instance, the Court cited the National Labor Relations Act as authority for its conclusion, saying: "Though that statute, as we have said, is in no respect applicable to this case, we are justified in accepting it as placing the legislative stamp of legitimacy upon company unions and the decisions of the

The most important rule laid down by this case appears in the following:

"Under the modern concept that a company union may speak for Labor, it cannot be said that an employer who has dealt with it freely and fairly is unfair to organized labor. And if not unfair, then the picketing of his place of business by a rival group, to its detriment (as was proven in this case), was illegal and the employer is entitled to the protection of the law."

It is submitted that this conclusion, in so far as it forbids rival *bona fide* labor unions from indulging in measures that work

Supreme Court as judicial sanction of such as authorized representatives of Labor. These declarations confirm the view that dealings with a company union is a fair labor practice, . . ."

Your attention is directed to Sec. 8 (2) of the N.L.R.A. where it is stated that it is an unfair labor practice for an employer ". . . to dominate or interfere with the formation or administering of any labor organization or contribute any financial or other support to it". In Matter of Ansin Shoe Manufacturing Co. (1 N.L.R.B. 929), the purpose of section 8 (2) was said to be: "to prevent the rights of employees from being hamstrung by an organization which has grown up in response to the will and purpose of the employer, an organization which would not be, in the sense of section 7, an organization of the employees' choice. The workers may be aware of their employer's antipathy to union organization and seek to propitiate him by acceptable conduct. This may be unavoidable. But the employer can be prevented from engaging in overt activity calculated to produce that result. If labor organizations are to be truly representative of the employee's interest, as was the intention of Congress as embodied in this Act, the words 'dominate and interfere with the foundation of any labor organization' must be broadly interpreted to cover any conduct upon the part of an employer which is intended to bring into being even indirectly, some organization which he considers favorable to his interest." With this interpretation of the National Labor Relations Act by the National Labor Relations Board in mind, turn to the facts before the Kentucky Court of Appeals, as stated in the opinion: ". . . During his (the labor union representative) negotiations with Miller to unionize his restaurant, he and another were permitted to come there and solicit the employees to join the union. It appears that excepting the provision for a 'closed shop', the proposed terms were agreeable to the appellee. There is a conflict in the testimony as to whether Miller opposed the movement. However, we think the weight of the evidence is that he left to the employees what action should be taken after having stated what he deemed to be the advantages and disadvantages of joining the union—perhaps emphasizing the disadvantages. During this period, in which several conferences were held, the employees suggested that they should organize an independent group, or what is commonly called a company union. Miller agreed and they effected such an organization. A written contract respecting their relations was made by the group and Miller. It may be said here that before this was done the only employee who had belonged to the appellant union was discharged by Miller. . . ." It is submitted that it would seem very unlikely that the N.L.R.B. if this were a case under its jurisdiction, would have reached the same conclusion as did the Kentucky Court of Appeals, with respect to the position of this company union as an independent bargaining agency.

injury to an employer who has dealt with one of them in good faith, is a step towards the establishment of a sound public policy. There would seem to be no valid reason for allowing arguments arising out of jurisdictional disputes between rival labor groups to be carried so far as to cause injury to innocent third parties.

This case is also authority for the view that picketing for the purpose of establishing a "closed shop" is unlawful. Here is direct evidence of the importance of the "ends" for which organized labor is working. Picketing, which the Court of Appeals said was proper where the "end" involved was valid, is illegal where the "end" is considered unlawful.

Lastly, the court held that there was no labor dispute under the facts of this case.⁹⁶

In conclusion, it may be said that more labor law has been made in Kentucky in the injunction suits than in all other types of litigation put together. It will be seen from the foregoing that much remains to be decided; that abuses do exist; that, perhaps, legislation, carefully drafted after diligent study, should be enacted to make more certain the rights of employers, organized employees and other employees, and in addition, to safeguard the rights of the great body of citizens who make up the "public"—a group too frequently neglected in the economic struggle between individuals, alone or in combination.

RECENT CRIMINAL ACTIONS IN INDUSTRIAL DISPUTES

In 1932, in *Cobb v. Commonwealth*,⁹⁷ the Court of Appeals sustained the conviction of one Cobb, charged with the crime of banding and confederating together, for the purpose of intimidating, alarming or disturbing any person or persons.⁹⁸ The

⁹⁶ Attention is directed to the following cases, in which the courts have held that a case involves or grows out of a labor dispute within the meaning of the Norris-LaGuardia Act (47 U.S. Stat. 70, c. 90) and various state anti-injunction statutes, even though none of the plaintiffs' employees are members of defendant union: *Senn v. Tile Layers' Protective Union*, 301 U.S. 468, 57 Sup. Ct. 857 (1937); *Cinderella Theatre Co. v. Sign Writers' Local Union*, 6 F. Supp. 164 (E.D. Mich., 1934); *Dean v. Mayo*, 8 F. Supp. 73 (W.D. La., 1934); *Dr. Lietzman v. Radio Broadcasting Station W.C.F.L.*, 282 Ill. App. 203 (1935); *Restful Slipper Co. v. United Shoe and Leather Union*, 116 N.J. Eq. 521, 174 Atl. 543 (1934).

⁹⁷ 242 Ky. 424, 46 S.W. (2d) 776 (1932).

⁹⁸ Ky. Stat. 1241-a-1.

facts were as follows: A miner's strike was in progress. One Hoffman, age 71, had refused to quit work. One night he was taken out, whipped, and threatened with death unless he promised to quit working. Hoffman was able to identify Cobb as one of his assailants. The evidence brought out that Cobb was a union sympathizer, that union meetings were held in his store, and that the whipping of Hoffman was a direct result of union activities in furtherance of the strike.

The success of the Commonwealth in this case led to several additional attempts to make use of this device in trouble arising out of labor disputes.

The first case in this group was *Alsbrook v. Commonwealth*.⁹⁹ A strike was in progress. Men attempted to go to work. They were prevented, and persuaded, not to do so. Actual physical damage was done to the property of one man who attempted to crash the picket line, consisting of between twenty-five and forty men. The language of the Court of Appeals in this case is significant:

"The case fundamentally presented a direct conflict between the rights of the appellant and the rights of the Love boys, both safeguarded by the law. As said in the case of *Commonwealth v. Morton*, 140 Ky. 631, 131 S.W. 506, 508, Ann. Cas. 1912 B, 454: "The right to live in peace and quiet, and pursue according to his own inclinations such lawful employments as he pleases, is one of the highest privileges of the citizen. It is one of the inalienable rights guaranteed to him by the Constitution that no man or set of men can abridge or deny. Every citizen of the commonwealth is entitled to be protected in the peaceable enjoyment of any legitimate business or occupation he is following. He has a right to pursue his vocation or employment without molestation, or threat, or violence. . . . No person or persons have the right to undertake to compel him by threat or intimidation to leave his house, or abandon his business or calling, or to alarm or disturb him in the quiet possession of either."

"On the other hand, men engaged in a lawful strike as was the appellant and his associates have a lawful right to assemble and to address their fellow men and to endeavor in a peaceful, reasonable and proper manner to persuade them regarding the merits of their cause, and to enlist sympathy, support and succor in the struggle for a betterment of working conditions, or for higher wages, or for the advancement of their interests."

In the same year, in the case of *Newton v. Commonwealth*,¹⁰⁰ this fact situation came before the Court of Appeals. A strike was in progress at the Brownsville mine. A group of strikers, including Newton, formerly employees at this mine, had

⁹⁹ 243 Ky. 814, 50 S.W. (2d) 22 (1932).

¹⁰⁰ 244 Ky. 41, 50 S.W. (2d) 18 (1932).

assembled on a road leading to the company property. There were approximately one hundred and fifty men in this group. By means of persuasion, they successfully prevented several would-be workers from going to the mine. No force was used, but there was language of such a nature as to raise fears of the use of force. However, none of these statements could be pinned on Newton. The facts brought out that when the strike was called, all but three of a total of eighty-two employees quit work. Some fifteen men later started to work, but were persuaded not to do so. The Court of Appeals reversed Newton's conviction below, stating that the proper instruction in such a case was:

"If you believe from the evidence that the defendant, Henry Newton, joined the crowd on the occasion in question solely for the purpose of persuading the men who proposed to work not to take the place of the striking miners, and did not do so in pursuance of a confederacy to intimidate, alarm, or disturb them, or any of them . . . you will find him not guilty."

The latest attempt to use this section of the criminal law in industrial strife appears in 1935, in the case of *Commonwealth v. Compton*.¹⁰¹ Compton and forty others were jointly indicted, charged with the statutory offense of confederating and banding together for the purpose of intimidating, alarming, and injuring others. The fact situation of this case is rather interesting. The scene is the mine of the Edgewater Coal Company. The United Mine Workers of America undertook to organize the employees of this company. There was another organization on the grounds, commonly known as the Company Union, undertaking to organize the same employees. A clash of opinion developed between the two organizations, following which the United Mine Workers of America called a general strike.

Some time after the strike had started, the United Mine Workers, fearing that an attempt would be made by those who were not members to go back to work, called a meeting, and at this meeting decided to establish a picket line consisting of 100 to 300 men to persuade those who might try to go to work from so doing. This picket line was established, and various employees of the company were persuaded from going to the mine by the said pickets. No force was used, but those who attempted to pass the picket line were warned that they might be shot by men hidden in the hills, not members of the union, but violently

¹⁰¹ 259 Ky. 565, 82 S.W. (2d) 813 (1935).

sympathetic to its interests. The warning was apparently effective, and indictment of Compton, who was present as a picket, and some of the others followed. In passing on the liability of the defendant, under the charge made, the court discusses at some length the rights of labor unions. The language should be quoted:

"As a matter of right, members of a labor union may assemble and agree to pursue, and pursue any legal means to gain their ends; that is, to use persuasive powers in a peaceable way to induce others to join their organization, or by the same means to persuade others not to take their jobs, but in doing so they must keep within legal bounds. They may not transgress the law; the acts permitted must not be carried to the extent of violating the statute involved in this case."

This decision, along with the others in this subdivision, makes it clear that labor organizations need have no fear of this statutory crime, so long as they employ peaceable and proper means in their struggle for higher standards of living in the community.

MISCELLANEOUS CASES INVOLVING LABOR

A. Libel

*United Mine Workers of America v. Cromer*¹⁰² was an action of libel arising out of the publication by the union in its newspaper, of an article wherein the plaintiff in this case was listed as a detestable scab and blackleg, because of his refusing to join the union cause in a recent strike. In sustaining a judgment for the plaintiff, the court said:

". . . It is well settled that all written words, which hold the plaintiff up to contempt, hatred, scorn, and ridicule, and which, by thus engendering an evil opinion of him in the minds of right-thinking men, tend to deprive him of friendly intercourse in society, are libelous per se. . . . The rule that words are to be understood in mitiore sensu has been superseded. Words are now construed by the courts in their plain and popular sense. Under this rule, the words 'detestable blackleg' are, we think, libelous per se."

B. Landlord and Tenant

A case decided in the Court of Appeals on February 17, 1939, namely, *Coldiron v. Good Coal Co.*,¹⁰³ presents an interesting situation arising out of an industrial dispute. The case arose out of a forcible entry and detainer proceeding by the coal

¹⁰² 159 Ky. 605, 167 S.W. 891 (1914).

¹⁰³ —Ky. —, 125 S.W. (2d) 757 (1939).

company against the defendant. The pleadings show that the defendant was an employee of the plaintiff company, as a coal miner; that he leased a house from plaintiff "for a term to continue so long as the lessee shall labor for the lessor"; that thereafter defendant was discharged; that when he failed to leave the house, this proceeding was instituted. The defendant insists that he was wrongfully discharged by the plaintiff, that is, for engaging in union activities; and that this is an unfair labor practice over which the National Labor Relations Board has exclusive jurisdiction. On a demurrer to the defendant's answer which was sustained, and upon refusal of defendant to plead further, judgment was entered for the plaintiff. The court said:

"The fact that appellant alleges that he was discharged for union activity and that this allegation is admitted by the demurrer is not controlling for, as pointed out above, we are without jurisdiction to examine into the propriety of his discharge and even if the allegation were denied we would not be authorized to hear evidence thereon. The issue thus tendered would not be triable elsewhere than before the Labor Board. It is only by a finding of that board that it can be determined whether or not appellant is still an employee. His mere allegation of unlawful discharge certainly does not accomplish this purpose. The allegation that he is discharged is sufficient to show that the lease is terminated and he is therefore guilty of the detainer. If, in fact, appellant is not discharged, only the Labor Board can say so. Obviously, we are concerned here solely with the relationship of landlord and tenant and not of master and servant. It is true that the tenancy under this contract is so far a mere incident to the employment that we would deem the finding of the Labor Board if one existed to be pertinent to the question of continuance of the term of the lease.

"However, the Labor Board is given no power to grant or refuse a forcible detainer and the state courts are given no power to examine into the motives for appellant's discharge. The two bodies move in different orbits. Nothing that we may say here could preclude action by the Labor Board within its exclusive jurisdiction. To determine that appellee was without right to bring this proceeding would be to deny it all relief so long as appellant chose to remain on the premises and make no application to the Labor Board. A determination to this effect, if appellant has in fact not been improperly discharged, would thus result in placing a burden upon appellee's business whether it be interstate or intrastate which was certainly not intended by the National Labor Relations Act."

This case is another example of the reason why lawyers and laymen in this Commonwealth must familiarize themselves with the whole field of labor law. Federal legislation in this field causes repercussion in many places, creating new problems for the courts, the lawyers, the legislature and the people of this Commonwealth to solve.

THE PROTECTION OF UNION PROPERTY

In this discussion of the development of labor law in Kentucky, there is plenty of evidence pointing to an early recognition in this Commonwealth of the rights of organized labor. Nowhere is this more clearly shown than in the measures that have been taken to protect union property. In the year 1890, a statute was enacted for the "Protection of label or brand—of Union or Labor Association".¹⁰⁴

In 1897, in the case of *Hetterman v. Powers*,¹⁰⁵ a group of cigar workers, as individuals, and as members of a cigar makers' union, brought an action to restrain Hetterman Bros. from using a certain cigar label, claimed to be the property of the union, on cigars manufactured by said Hetterman Bros. The defendant attacked plaintiff's claim on the ground that the label was not a trade-mark, and, therefore, not a proper subject for the relief requested. This case started, it should be pointed out, before the statute above mentioned, went into effect. The court noted this and pointed out that the adoption of the statute did not change, but merely codified the common law rule. Said the court, in granting the relief requested by the plaintiff union:

"And, first, we may admit that the label is not used as a trade-mark, in the ordinary sense of that word. . . . But we cannot agree, on that account, that it does not represent a valuable right, which may be the subject of legal protection. . . . Hence it is indisputable that the employee, whose skilled labor in the production of a particular commodity creates a demand for the same that secures for him higher, remunerative wages, has as definite a property right to the exclusive use of a particular label, sign, symbol, brand or device, adopted by him to distinguish and characterize said commodity as the product of his skilled labor, as the merchant or owner has to the exclusive use of his adopted trade-mark on his goods. . . ."

The court held:

"On the whole case, therefore, we are of the opinion that the law may be justly invoked by organized labor to protect from piracy and intrusion the fruits of its skill and handiwork, and that brain and muscle may be the subjects of trade-law rules, as well as tangible property."

Many years later, in *Saulsberry v. Coopers' International Union*,¹⁰⁶ an action was brought by an employer to force the

¹⁰⁴ 1890, vol. 1, c. 823, p. 99, par. 1, 2, 3, 4; now, Ky. Stat. Sec. 4749—4752. In 1894, c. 46, p. 68, par. 1, 2, 3, which are now Ky. Stat. Secs. 4753—4755, were added.

¹⁰⁵ 102 Ky. 133, 43 S.W. 180 (1897).

¹⁰⁶ 147 Ky. 170, 143 S.W. 1018 (1912).

union, with whom he had failed to agree on wages, to allow him to use the union stamp on his products. The court refused the request, saying:

"The stamp belonged to the union, and they took it away when they quit plaintiff's employ. It was the sign by which the business world was advised that the goods manufactured were union made, and the plaintiff had no right to its use except when his goods were made by union labor."

From these two cases it seems only fair to conclude that the Kentucky Court of Appeals is as astute to protect the property of organized labor as it is to protect the property of any other person or thing within its jurisdiction.

THE RIGHT OF ORGANIZED LABOR TO BRING SUIT

Most, if not all, labor organizations are mere voluntary associations. As a result, the question arises—May such a voluntary association bring suit in its own name? The Kentucky Code of Practice in Civil Cases makes no provision for suits by or against voluntary associations in their own names.¹⁰⁷ Turning to the case law, therefore, we find that the Kentucky Court of Appeals has considered this question on several occasions.

In *Hetterman v. Powers*,¹⁰⁸ an action was brought by a group of individuals suing for themselves and all their associates and fellow members in two different unions. These unions were also plaintiffs in the suit, which was to restrain use by the defendant of plaintiffs' union stamp. The defendant, by way of defense, averred:

"That the membership is an ever-changing one, constantly varying in numbers, composed of few thousand today, and many thousand tomorrow, . . . 'a shifting crowd'; that the plaintiffs, therefore, are not qualified to sue, and have, in fact, no legal rights that can be made the subject of a suit."

In answer to this defense, the court said, after citing a statute enacted after this suit was filed, giving to a union the right to sue to protect misuse of the union stamp:¹⁰⁹

"This suit was filed before the adoption of this statute, but it indicates the policy of the law. . . ."

¹⁰⁷ Your attention, however, is directed to Ky. Stat. Secs. 4750-4751, which provide that a union or association of working men and women may bring suit to enjoin improper use of a union label, etc., registered under that act.

¹⁰⁸ 102 Ky. 133, 43 S.W. 180 (1897).

¹⁰⁹ See footnote 107 *supra*. See also the section in this article on Protection of Union Property.

"On the whole case, therefore, we are of opinion that the law may be justly invoked by organized labor to protect from piracy and intrusion the fruits of its skill and handiwork. . . ."

It would seem that this case must be limited to its particular facts in so far as it appears to sustain the right of an unincorporated labor association to bring suit in its own name. The decision one year later in *Nichols v. Bardwell Lodge No. 179 I.O.O.F.*,¹¹⁰ points that way. In this case the court said, with respect to the right of an unincorporated association to sue in its own name:

"While parties to an action may be either natural or artificial, they must be real, and not fictitious; and a mere voluntary association has not the power to sue in the name of the association."

And almost conclusive evidence that such is the law in Kentucky appears in a dictum in *Diamond Block Coal Company v. United Mine Workers of America*,¹¹¹ to the effect that:

"It is a general rule that voluntary associations, such as the United Mine Workers of America, have neither power to sue nor to be sued in the association name, except in special cases."¹¹²

THE RIGHT TO SUE A LABOR ORGANIZATION IN ITS OWN NAME

In *United Mine Workers of America v. Cromer*,¹¹³ the defendant union asked for a reversal of judgment entered against it in the court below on the ground that it was a volun-

¹¹⁰ 105 Ky. 172, 48 S.W. 426 (1898).

¹¹¹ 188 Ky. 477, 222 S.W. 1079 (1920).

¹¹² In *Payne v. McClure Lodge No. 539*, 115 S.W. 764 (Ky. 1909), where the action was brought in the name and style "McClure Lodge No. 539, Free and Accepted Masons, by W. H. Ford, Floyd Sanders, and J. L. Sturgeon," and where defendant objected to such a method of procedure, the court held such pleading proper, saying: ". . . An action in the name of and for the use and benefit of a church, lodge, society, or other unincorporated organization, may be brought in the name of the church, lodge, society, or other unincorporated organization by one or more of the members who are acting with the consent or by the direction of the other members or a majority of them. (citing Ky. authority.) And unless it is made to appear that the action is not prosecuted for the use and benefit of the persons in whose interest it is instituted, or that they are acting without their consent and authority, the right to maintain it cannot be successfully disputed by mere averments in the answer unsupported by evidence. This practice finds ample support in section 25, Civ. Code practice, providing that: 'If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all.'"

¹¹³ 159 Ky. 605, 167 S.W. 891 (1914).

tary association, and, therefore, not suable in its own name. The Court held that:

"As we have in this state no statute authorizing a suit against a voluntary association as such, it is doubtless true that such an association is not suable merely in the name of the association."¹¹⁴

The court then continued:

"Notwithstanding this fact, however, we take it that the question must be raised in some proper way (i.e., by special demurrer), where the facts appear on the face of the petition, or by answer in the nature of a plea in abatement, where such facts do not appear."

Failure to raise the proper objection at the proper time results in a waiver of this defense in Kentucky. Thus, in the *Cromer* case, the court held that where defendant answered to the merits without saving the question, the defense that it was not suable in the name of the association was waived.

Recently, in *Hotel, Restaurant, and Soda Fountain Employees' Local Union No. 181 v. Miller*,¹¹⁵ the Court of Appeals held that the defendant had waived the right to have the case dismissed on a special demurrer to the petition for defect of party, in that as an unincorporated association it could not be sued under its union name, because it had, previously thereto, entered its appearance to the suit by having moved for and obtained a modification of a restraining order.

In conclusion, then, an unincorporated labor organization may, by proper and timely objection, defeat any attempt to bring suit against it in its union name, in the courts of Kentucky.¹¹⁶

TRADE AGREEMENT OR LABOR CONTRACT

"The process of collective bargaining results, not in a labor contract, but in a trade agreement. This imposes no obligation

¹¹⁴ A similar opinion is expressed in *Diamond Block Coal Co. v. United Mine Workers of America*. See last paragraph of preceding subdivision.

¹¹⁵ 272 Ky. 466, 114 S.W. (2d) 501 (1938).

¹¹⁶ It should be noted that as a result of the decision written by Mr. Chief Justice Taft, in the case of *United Mine Workers of America v. Coronado Coal Company*, 259 U.S. 344, 42 Sup. Ct. 570 (1922), an unincorporated labor organization is subject to suit in the federal courts in its common name. For a recent application of this see *National Assn. of Industrial Insurance Agents v. Committee for Industrial Organization*, 25 F. Supp. 540 (D.C.D.C., 1938). For a discussion of this doctrine in the federal courts for the Eastern District of Kentucky, see *Christian v. International Association of Machinists*, 7 F. (2d) 481 (E.D. Ky., 1925).

upon the employer to offer or upon the laborers to accept work; it guarantees neither to the employers workmen, nor to the laborers jobs. It is nothing more than a statement of the conditions upon which such work as is offered and accepted is to be done. The contract of employment is still between the individual employer and the individual employee, though the provision of the order in which men are to be taken on and laid off may give to or withhold from laborers a chance to dispose of their services." Thus writes Mr. Hamilton, in his article on "Collective Bargaining" in the *Encyclopedia of the Social Sciences* (1930).

That the process of collective bargaining, however, may result in a labor contract, and that organized labor may validly make such a contract, binding on both the union members, as employees, and on the employer, is demonstrated in the decision of the Court of Appeals of Kentucky in *Saulsberry v. Coopers' International Union*.¹¹⁷ This case involved a suit by an employer to force a labor union to come to terms with him. Plaintiff argued that many individual employees had not wanted to cease work, that they were satisfied with the old contract, made by the union with the employer. Said the court:

"The old contract had been made by the union. The union alone was clothed with power to contract for its members, and the contract, if made at all, had to be made by the union. Hence the wish or will of individual members cannot be considered in determining the rights of the parties to this controversy. If the union had a right, through its representatives, to contract, which is not denied, then the desire of individual members cannot be taken into consideration at all, and it is immaterial whether they were satisfied or dissatisfied with the proposed arrangement. The union was willing to make a contract, but it demanded one more favorable in terms for the men than the old contract. Should it be enjoined from doing so because some of the members of the union were satisfied with the old contract? Undoubtedly, if the officers of the union are clothed with power to represent and speak for it, this right cannot be taken from them or abridged, except by the union itself. It is not a matter for judicial determination at the instance of any one save the union."

From this, the conclusion may be drawn that a labor union, in Kentucky, may make a contract under which it is to furnish labor for a definite period under definite terms of employment, and that such a contract is binding on the employer party because of the contract, and on the employees furnished under the contract because of their membership in the union.

This is, however, the only case of this nature in Kentucky

¹¹⁷ 147 Ky. 170, 143 S.W. 1018 (1912).

which has come to my attention. It should be carefully distinguished from the cases to be discussed immediately hereafter. In this case, the members of a labor organization had empowered their organization, acting through its officers, to make a contract which would bind them, as union members, to work under certain conditions. In the cases to follow there is no evidence of such authority, and, in fact, no argument that there was such authority given. With this in mind, it can be said that in most cases arising in Kentucky, the processes of collective bargaining have resulted, as Hamilton suggests, "not in a labor contract, but in a trade agreement". The Court of Appeals has, on several occasions, considered the nature and effect of a trade agreement.¹¹⁸

Thus, in *Hudson v. Cincinnati, N. O. & T. P. Ry. Co.*,¹¹⁹ where the court had before it the question of the nature of an agreement between a union and an employer, it was said that such an agreement was not a contract. The court gave as its reason for this conclusion that the agreement was unsupported by any consideration; that there was no offer, "for none of its terms can be considered as a proposal."¹²⁰

What, then, is the nature and effect of such an arrangement between a union and an employer? The *Hudson* case suggests that its purpose is merely to establish a usage.¹²¹

If an arrangement between a union and an employer is made, with respect to wages, hours, disputes, seniority and the like, what must an employee do in order to get the benefits of such an agreement? If an employee, who makes a contract with an employer, is a member of a union which has a trade agreement with this employer, is that union membership enough to

¹¹⁸For materials on trade agreements generally, see Fuchs, "Collective Labor Agreements in American Law", 10 St. Louis L.R. 1 (1925); Rice, "Collective Labor Agreements in American Law", 44 Harv. L.R. 572 (1931); Anderson, "Collective Bargaining Agreements", 15 Ore. L.R. 229 (1936).

¹¹⁹152 Ky. 711, 154 S.W. 47 (1913).

¹²⁰It is submitted that an offer might be found in this,—if you pay these wages, and establish this scale of hours, we will not strike. Such a proposal has been held sufficient to create a binding contract in other jurisdictions. See, for example, *Johnson v. American Ry. Express Co.*, 163 S.C. 198, 161 S.E. 473 (1931). Where a binding contract is found, then, on the theory of third party beneficiary, the employee is held entitled to the benefits of such union contract.

¹²¹This theory is followed quite generally. See, for example, *Moody v. Model Window Glass Co.*, 145 Ark. 197, 224 S.W. 436 (1920); *Unkovich v. N. Y. Central R.R.*, 117 N.J. Eq. 20, 174 Atl. 876 (1934).

give him the advantages of this trade agreement? The *Hudson* case, supra, held that it was not. If an employee knows of such a trade agreement, is a member of the union that made it, and knows that this trade agreement established a usage which the employer has adopted, will he get the advantages of such trade agreement by merely contracting to work for the employer? The *Hudson* case held that he would not.

In order to get the benefits of this trade agreement, held the court in the *Hudson* case, there must be an express ratification of the terms of the trade agreement by the employee in his contract with the employer.

It is submitted that in so far as this case held that usage is no part of a contract between employer and employee, it is no longer the law in Kentucky. This is shown clearly by the decision in *Gregg v. Starks*,¹²² where proof was offered and accepted that a trade agreement between a union and an employer was by usage and practice considered to be a part of all contracts of employment by and between the employer and individual employees in the capacity under consideration. In the *Gregg* case it was contended that *since the plaintiff was not a member of the union*, he could not claim that the trade agreement was a part of his contract of employment. The Court said:

“. . . the mere fact that the contract was negotiated between the railroad company and an organization representing a part of its conductors cannot exclude other conductors not members of the organization from its benefits, when the non-member conductors and the railroad company recognized and treated it as the contract under which the service of such conductors were rendered and accepted.”

This case, therefore, establishes the rule that when a union and an employer have signed a trade agreement, which establishes certain usages in that trade, these usages become a part of any contract of employment in that trade, whether the employee is a member of the union or not, so long as it can be shown that employer and employee recognized and considered it as a part of the contract under which services were to be rendered and accepted.

When a trade agreement becomes a part of a contract of employment by the application of the rule just stated, it has been held that the employee who receives the benefits of such trade agreement must also abide by its burdens.¹²³

¹²² 188 Ky. 834, 224 S.W. 459 (1920).

¹²³ *Aden v. Louisville & Nashville Ry. Co.*, 276 S.W. 511 (Ky. 1921).

Thus, in Kentucky, the agreement between union and employer known as a trade agreement is not a contract. It is a mere usage. In order to profit by this usage, the individual employee, be he union member or non-union member, must include it in his contract, either expressly or by implication.

UNION MEMBERS, THE UNION AND THE TRADE AGREEMENT

At times the trade agreement negotiated between an employer and a union has worked to the alleged disadvantage of a member of the union. The resulting litigation has established certain principles of importance in this field.

In a case before the Court of Appeals, reported as *Piercy v. Louisville & Nashville Ry. Co.*,¹²⁴ the court had this problem to decide. Sometime before 1922 the union and defendant railroad had entered into a trade agreement with respect to seniority rights. One Stanfill, who appears to be the party plaintiff in this case, had a contract of employment with the defendant railroad, which included seniority rights in accordance with this trade agreement. About 1921, agitation began in the union for a change of the existing seniority arrangement. Stanfill, a union member, opposed this movement. However, in 1922, a majority of the union voted to change the seniority ratings, and, thereafter a new trade agreement, with these changes, was accepted by the railroad. In as much as Stanfill was adversely affected by these changes, he brings suit to protect his seniority. The court held that a union does not have the power to waive the personal rights of an individual member acquired under a contract with a third party.

In *Aulich v. Craigmyle*,¹²⁵ the court held that where no personal contractual rights of a member were involved, the member was bound by the duly constituted acts of the organization, within the legal limits of its powers. This case arose out of a refusal by the union to sustain certain claims as to seniority made by the plaintiff. In as much as no contract seniority rights by and between employer and employee were proved, the court said that the seniority rights of plaintiff were controlled by

¹²⁴ 198 Ky. 477, 248 S.W. 1042 (1923).

¹²⁵ 244 Ky. 676, 59 S.W. (2d) 560 (1933).

the by-laws of the union, of which he was a member. The court also pointed out that:

"In a controversy between a member and the association, the remedies provided by its constitution and by-laws were the remedies within the organization, and as a general rule they must be exhausted before an appeal by a member to the courts."

In *Norfolk & W. Ry. Co. v. Harris*,¹²⁶ the court had occasion to construe the extent to which a trade agreement becomes a part of the contract of an individual employee and an employer. It was shown that the trade agreement provided that grievances between employer and individual employees should be heard and determined by union tribunals, with a right of appeal to a higher union tribunal, and, even, an appeal from that to the authority provided by, and existing under, the Federal Railway Labor Act.¹²⁷ The plaintiff in this case was dissatisfied with the results of his appeal to the union tribunals arising out of a disagreement with his employer. The court held that:

"The regulations of the brotherhood and its agreement with the railway company are the sources of ascertainment of the rights of the individual employees who are members of the brotherhood and the usage upon which the individual contract of employment is based."

As a result, the court held that it was not within its province to inquire into and determine the expediency or wisdom of the union constitution or by-laws, or to interfere with the application of same, unless it is shown that through fraudulent, arbitrary or capricious application of such rules, the private property of individual members was jeopardized.

The *Harris* case, then, is authority for the rule that where the terms of a trade agreement provide the method of settlement of disputes, an employee, claiming a right arising out of this trade agreement, as against an employer or the union, is bound by the decision reached in accordance with the method provided.

In effect the decision is that the employee must take the burdens imposed by the trade agreement, which is a part of his contract, along with the benefits.

Finally, in *Louisville & Nashville Ry. Co. v. Bryant*,¹²⁸ the Court of Appeals held that where a term in a trade agreement was ambiguous the court would give to it that construction

¹²⁶ 260 Ky. 132, 84 S.W. (2d) 69 (1935).

¹²⁷ 1926—45 U.S.C.A. 151, et seq.

¹²⁸ 263 Ky. 578, 92 S.W. (2d) 749 (1936).

which the employer and the union had placed upon it, rather than that for which the individual employee contended.

These few cases, it is submitted, establish the rule that the extent of the rights obtained by an individual contracting with reference to a trade agreement are controlled by the terms of the trade agreement, as construed by the parties to it, so long as their interpretation is in good faith.^{128A}

It is submitted that the Kentucky Court of Appeals has had but a few of the many possible problems that can, and probably will, arise out of the trade agreement. The question presented is—Should the people of the Commonwealth of Kentucky, through adequate legislation, based on extensive study, point the way to the solution of such problems, or should they wait until the cases arise, leaving it to the courts to find the law? The one suggests the adoption of a policy to which all could immediately conform; the other might mean years of doubt before the courts have a chance to speak.

LABOR LAW AND THE LEGISLATURE

All the labor law in Kentucky did not originate in the courts. Frequently the legislature has expressed, by way of statute, the policy that shall guide the courts in cases coming before them. No attempt will be made at this time to trace the success or failure of legislative policy in this regard. But, a history of the enactments of the legislature, bearing directly on labor law problems, will be essayed.

The early digests, those compiled by William Littell,¹²⁹ William Littell and Jacob Swigert,¹³⁰ Wickliffe and Turner and Nicholas,¹³¹ and R. H. Stanton,¹³² in that order, gathered the statutory law of Kentucky enacted prior to 1865. A careful search of these works revealed that the legislatures of that period were not overly interested in labor problems. Probably the most important bit of legislation along these lines, was "An

^{128A} At this point, one might well turn back to the section herein on Restraint of Trade, and consider the possibility suggested in the last paragraph of that section as applied to the problem of this particular subdivision.

¹²⁹ William Littell, "The Statute Law of Kentucky" (3 vol.), 1810; 2 additional volumes appeared between 1810 and 1815.

¹³⁰ William Littell and Jacob Swigert, "A Digest of the Statute Law of Kentucky (2 vol.), 1822.

¹³¹ Wickliffe, Turner & Nicholas, "Revised Statutes" (1 vol.) 1852.

¹³² R. H. Stanton, "Revised Statutes" (2 vol.) 1860.

Act reducing into one, the several acts concerning Servants", which was approved on January 16, 1798.¹³³ This statute dealt with indentured servants, provided for specific performance of such contracts, for at least a seven-year period, and provided for treatment, care, discharge, and the like, of such servants. Mention has already been made of the English Statute of Conspiracy of Victuallers and Craftsmen, which appeared in the Appendix to volume 2 of Littell's collection.¹³⁴

The first measure of unusual interest, so far as this study is concerned, was enacted and approved in 1867.¹³⁵ It is that statute which, in general terms, declared that one who willfully enticed a laborer to breach his contract of labor would be liable for damages and fined.¹³⁶

In 1870 the first complete and adequate lien in favor of mechanics, laborers and materialmen was enacted and approved.¹³⁷ Prior to this time, some counties had such a lien and others had none. This statute provided state-wide protection. This provision is the first bit of legislation, so far as I could discover, passed in Kentucky, primarily for the benefit of the laboring man.

During the year 1873, the so-called Ku Klux law was enacted, making it a crime to unlawfully confederate together, for the purpose of intimidating, alarming or disturbing any person or persons, or to do any felonious act.¹³⁸

The first piece of legislation aimed at the correction of dangerous working conditions became law in 1884. It was entitled an "Act to provide for and regulate the ventilation of coal mines in this State, and the better protection of miners."¹³⁹ By its terms an inspector of mines was to be appointed, and he

¹³³ William Littell, "The Statute Law of Kentucky, 1810, vol. 2, pp. 6, 7, 8.

¹³⁴ See discussion in this article under heading, Conspiracy, subdivision B.

¹³⁵ "Acts 1867", at p. 103; Bullock & Johnson, "General Statutes of the Commonwealth of Kentucky" (1873) at p. 341. See Ky. Stat. Sec. 1349.

¹³⁶ This statute has been discussed in full under the heading "Enticing Labor to Abandon Contract" herein.

¹³⁷ "Acts 1869-1870", at p. 100; Bullock & Johnson, *ibid.* pp. 620-624.

¹³⁸ Bullock & Johnson, "General Statutes of the Commonwealth of Kentucky" (1873), p. 366; approved Apr. 11, 1873. For discussion, see section herein entitled, "Recent Criminal Actions in Industrial Disputes". See Ky. Stat. 1241-a-1.

¹³⁹ Bullitt and Feland, "The General Statutes of Kentucky" (1887), at p. 263-268.

was to devote his full time to seeing that mines were properly ventilated, that sufficient outlets were maintained, and the like. The Act applied to all mines in which more than five men were employed. This was the beginning. In 1888, the Act was amended, extending the power of the inspector to check not only ventilation, exits and air-supply, but also drainage, timbering and general security.¹⁴⁰ Other amendments came in course, until today Kentucky has a comprehensive and detailed statute, setting up the Department of Mines and Minerals, providing for innumerable exigencies.¹⁴¹

In 1890, "An Act for the better protection of skilled labor and for the registration of labels, marks, names, brands, or devices covering the products of such labor of associations or unions of working men or women" was enacted and affirmed.¹⁴² This, it is submitted, was the first legislative recognition of the rights of organized labor in Kentucky.¹⁴³

The Bureau of Agriculture, Labor and Statistics was established in 1892.¹⁴⁴ Its purpose was to collect statistics concerning the annual production from mechanical industry and skill, the character of labor employed in mines, factories and on the farms, and the wages paid such employees. By an amendment in 1902, statistics were ordered collected "concerning labor wherever and however employed in this State", including the number and sex of such laborers, and the compensation paid them.¹⁴⁵ Before passing, attention is called to an act of March 15, 1912, amending Ky. Stat. Sec. 33a-7, to the effect that labor inspectors and their assistants must not take part in, or become involved in, any strikes or similar labor difficulty, except in performance of his duties.¹⁴⁶

In 1894, the legislature enacted Ky. Stat. Sec. 1350 making it a misdemeanor for any corporation or person or persons,

¹⁴⁰ Act of April 6, 1888. Bullitt and Feland, "The General Statutes of Kentucky", Appendix (1887), pp. 4-6.

¹⁴¹ Ky. Stat. 2739-2 through Ky. Stat. 2739-55. Effective July 13, 1934; 1934 ex. s., c. 21; 1934, c. 100.

¹⁴² Bullitt and Feland, "The General Statutes of Kentucky", Second Appendix (1888), pp. 53-54. See Ky. Stat. Secs. 4749-4755.

¹⁴³ For a discussion of this Statute, see section herein entitled "Protection of Union Property".

¹⁴⁴ Barbour and Carroll, "The Kentucky Statutes" (1894), pp. 183-186. See Ky. Stat. Sec. 31, et seq.

¹⁴⁵ Carroll, "The Kentucky Statutes", (3rd ed. 1903), pp. 193-194; Ky. Stat. Sec. 33A.

¹⁴⁶ "Acts 1912", ch. 108, p. 304.

having the ownership or control of any factory, mine or workshop in Kentucky, to pay wage-earners in anything except money. This statute put into effect the provision Sec. 244 of the Kentucky Constitution that wage-earners should be paid in lawful money. It is submitted that here again we find legislation enacted primarily for the benefit of the working group.

In this same year, 1894, a statute was enacted under which convict-made goods were required to be marked.¹⁴⁷ This provision was amended in 1897 to include convict-mined coal and convict-made coke.¹⁴⁸ Finally, in 1937, by Ky. Stat. Sec. 524 through 526, provision has been made whereby convict-made goods cannot be sold in Kentucky, whether made there or elsewhere, except that such goods can be bought by wholly tax supported institutions operated by the governments of the United States, Kentucky or any other state.¹⁴⁹

The next important bit of labor law was enacted in 1898. This statute provided how and when wages of employees in mines should be paid, and, further, made it unlawful for any mining employers to coerce or require, directly or indirectly, any employee to buy supplies of any kind from any store whatsoever.¹⁵⁰

The present Constitution of Kentucky, at section 243, makes provision for the age at which children may be employed. The first statute with respect to child labor in Kentucky became law in 1902.¹⁵¹ It was a mild measure, merely providing that children under fourteen could not be employed in any workshop, factory, or mine in the commonwealth. By an Act of March 17, 1906, a limited protection was extended to children above the age of fourteen, who were employed in mills, mines and factories in the commonwealth. In 1908, the Child Labor Laws were again amended.¹⁵² The list of prohibited employments for children under fourteen was extended. Children between fourteen and sixteen were prohibited from certain employment, unless they had an employment certificate, approved by the superintendent of schools. A provision con-

¹⁴⁷ Barbour & Russell, "The Kentucky Statutes" (1894), pp. 524-526.

¹⁴⁸ Carroll, "The Kentucky Statutes", (3rd ed. 1903), pp. 340-341.

¹⁴⁹ 1936, 4th ex. s., c. 16, p. 133.

¹⁵⁰ Caldwell, "Annotated Supplement to the Kentucky Statutes, Edition 1894" (1899), p. 69. See Ky. Stat. Secs. 2738r-1 and 2738r-2.

¹⁵¹ Carroll, "The Kentucky Statutes" (3d ed., 1903), p. 284.

¹⁵² Carroll, "The Kentucky Statutes" (4th ed., 1909) pp. 299-304.

trolling the permissible hours of labor for children under sixteen was inserted. It provided a sixty-hour week, with a maximum of ten hours in any one day, and prohibited such labor between seven P.M. and seven A.M. Sanitary provisions were also included. This statute showed a marked increase in the number and kinds of safeguards thrown around children. Further extensions of prohibited types of work, to various age groups of children, appeared in a new child labor law, adopted in 1914.¹⁵³

It will be noted that the first regulation of hours of labor through act of the Kentucky legislature, was in the field of child labor. This was followed in 1910 by an act which provided that eight hours shall constitute a day for laborers and mechanics employed on all public works in the Commonwealth of Kentucky.¹⁵⁴ Then in 1912, an "Act to regulate the employment of females in order to safeguard their health" became law.¹⁵⁵ The hours of work of females under twenty-one years of age was limited to sixty hours in any one week, with a maximum of ten in any one day, unless such female were a nurse or a domestic servant. For females over twenty-one, the hours of work were restricted to similar hours in certain specified employment. The act also required that seats be provided for female help, that proper rest rooms be maintained, and that records should be kept.

But, with this group of statutes, the legislature stopped. So far as I know, no statute has ever been enacted in this state setting up a schedule of maximum hours of labor for men. Adverse decisions by the courts in other jurisdictions on such regulations were probably the reason. Is that reason still valid today? The people of the Commonwealth of Kentucky know the answer.

Returning to our historical survey, the next important development was the passage of a Workmen's Compensation Act in 1914.¹⁵⁶ This statute was declared unconstitutional in *Kentucky State Journal Co. v. Workmen's Compensation*

¹⁵³ Thum, "Supplement to 1909 Kentucky Statutes" (1915), p. 55. See Ky. Stat. Sec. 326, et seq.

¹⁵⁴ Thum, "Supplement to 1909 Kentucky Statutes" (1915) p. 489; "Acts 1910", c. 123, p. 344. See Ky. Stat. Sec. 2290b-1.

¹⁵⁵ Thum, "Supplement to 1909 Kentucky Statutes" (1915), p. 444; 446; "Acts 1912", c. 77, p. 232. See Ky. Stat. Sec. 4866b-1 through 4866b-8.

¹⁵⁶ Thum, "Supplement to 1909 Kentucky Statutes" (1915), p. 1174; "Acts 1914", c. 73, p. 226.

Board.¹⁵⁷ Undismayed, the legislature passed a new Workmen's Compensation Act in 1916.¹⁵⁸ And, in *Greene v. Caldwell*,¹⁵⁹ the Court of Appeals held that the new Act was constitutional. The statute was amended in 1918.¹⁶⁰

During the period from the end of the World War until some time after the recent depression was well under way, little or no new legislative measures primarily for the protection of the interests of laboring men and women were enacted. However, in recent years three important measures have become law in Kentucky.

The first of these, which became effective on May 16, 1936, is the Old Age Assistance Law.¹⁶¹ This provided for old age assistance, under specified circumstances, at the age of sixty-five, in the maximum amount of \$15 a month.

The second, which became effective on March 5, 1938, provided for Unemployment Compensation.¹⁶² At section 4748g-2, Ky. Stat., appears this declaration of state policy:

" . . . Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern. . . . This act is enacted as a part of a national plan of unemployment compensation and social security."

The third, which became effective on May 31, 1938, is an "Act to Establish Minimum Fair Wages for Women and Minors".¹⁶³

These last three enactments in particular, and this whole survey in general, point out what can be done in the way of solving social and economic problems through a wise and careful legislative policy. There is no need for a feeling of antagonism between the legislature and the courts. There is need for cooperation, by and among, employer, employee and consumer, the law-makers, the law-interpreters, and the law-enforcers. There is need of careful draftsmanship within the powers delegated by the sovereign people. There is need of wise, far-

¹⁵⁷ 161 Ky. 562, 170 S.W. 1166 (1914).

¹⁵⁸ Ky. Stat. Secs. 4880-4987; Act of March 23, 1916, c. 38, p. 354.

¹⁵⁹ 170 Ky. 571, 186 S.W. 648 (1916).

¹⁶⁰ Carroll, "Kentucky Statutes", (5th ed. 1918), p. 1009-1046; "Acts 1918", c. 176, p. 690.

¹⁶¹ Ky. Stat. Secs. 3766bb-1 through 3766bb-16; "Acts 1936", c. 94.

¹⁶² Ky. Stat. Secs. 4748g-1 through 4748g-22; "Acts 1938", c. 50.

¹⁶³ Ky. Stat. Secs. 4767a-1 through 4767a-20; "Acts 1938", c. 105, p. 491.

sighted policy. In view of the past history of labor law in the Commonwealth of Kentucky, there is good reason to anticipate further enlightened and progressive legislation and decisions in the future.

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