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Miscellaneous—Peaceful Picketing

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in the highest court of Georgia for five years. His application was refused, as it appeared that at least half of his five years of practice in Georgia had been spent working and living outside of that state. Upon appeal the Court of Appeals affirmed, holding that the Appellate Division acted within its discretionary powers in ruling that petitioner did not show compliance with the residence requirements as laid down in *Matter of Lerch.*[13]

"The period of five years, during which the applicant must have practiced in another state, assumes the fact that he also resided there during that time."[14] Applying this rule in the instant case the court felt that one who seeks admission to the New York Bar without examination because he has been a member of the Bar of another State must have resided, continuously or substantially so, in that other jurisdiction for five years. The Court further implied that it was within the discretionary powers of the Appellate Division to determine if this provision had been complied with.

The new Court of Appeals Rule, which embodies this residence requirement, states that "in its discretion, the Appellate Division may admit to the Bar and license to practice without examination a person who . . . while residing in such other state . . . has actually practiced for a period of at least five years in its highest court . . ."[15] This new rule is intended to have the same meaning and effect as former rule II as heretofore construed and applied.[16] Thus it appears that the present state of law in this area is as it was under the former rule II as construed by the *Lerch* dicta.

Peaceful Picketing

The perennial problem of peaceful picketing found its way to the Court of Appeals under rather unusual circumstances in *Wood v. O'Grady,*[17] where a union had been picketing a retail liquor store for almost two years. In spite of the length of time involved, and the wording of the signs carried by the pickets,[18] the Court found that this was organizational picketing and thus not subject to injunction.[19]

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13. 280 N. Y. 74, 19 N. E. 2d 788 (1939).
14. *Id.* at 75, 19 N. E. 2d at 789.
15. Court of Appeals Rule VII-1 (eff. June 15, 1955).
16. 309 N. Y. at 47, 127 N. E. 2d at 801.
17. 307 N. Y. 532, 122 N. E. 2d 386 (1954).
18. "The employees of this store are non-union. Please do not patronize this non-union store. We are members of the A. F. of L., Local 122 of AFL."
19. The Appellate Division was reversed; 283 App. Div. 83, 126 N. Y. S. 2d 408 (1st Dep't 1954).

The really difficult problem in this area, that of federal preemption,[20] does not arise in this case—it was not alleged that this business was in interestate commerce—so the Taft-Hartley Act is not involved. The Federal Constitution provides a general sort of protection of picketing,[21] as does also the State Constitution,[22] which is spelled out a little farther in state statutes.[23] Organizational picketing in which the supposed object of the union is to organize the employees of the picketed establishment, has been almost universally protected in New York for at least the past three decades.[24] Recognitional picketing, in which the object of the union is to force the employer to recognize it as the sole bargaining agent for his employees even though the employees have not voted on the matter, is of course illegal.[25] The difficulty in distinguishing between these two activities, particularly when there is authority for the proposition that no real distinction exists,[26] has often bothered the courts. The problem is highlighted by the numerous decisions which allow a union to continue picketing but with a change in the wording of the signs.[27]

The decision in the instant case would seem to establish organizational as a legal operation no matter how long it has been carried on at one place of business, or how few employees are involved.[28] However, the matter may not be as firmly decided as it would appear to be at first glance. The opinion of the court speaks for only two judges; Judge Desmond concurred in a separate opinion, and Judge Fuld agreed with the result in still another opinion. The other three judges were united in their dissent. In the second place, the case is seriously weakened by the fact that the employer alleged no damages,[29] much less the irreparable damages that are usually reckoned a *sine qua non* in injunction cases. Finally, the employer threatened to fire his employees if they joined the union, made numerous disparaging remarks in public about the union, and engaged in other similar

20. See Comment, *Jurisdiction and Free Speech Problems in Peaceful Picketing*, 4 BUFFALO L. REV. 232 (1955), which also deals at greater length with the problems involved in the instant case.

21. U. S. CONST. amend. 1, the freedom of speech clause.

22. N. Y. CONST. art. I § 17: "Employees shall have the right to organize and to bargain collectively through representatives of their own choosing."

23. N. Y. CIV. PRAC. ACT § 876-a, which declares that injunctions shall not issue except under certain specified conditions in cases arising out of "a labor dispute." N. Y. LABOR LAW § 703: "Employees shall have the right of self-organization . , . free from interference, restraint, or coercion of employers . . ." See N. Y. LABOR LAW § 700 for a broad statement of policy along these lines.

24. *May's Furs and Ready to Wear v. Bauer*, 282 N. Y. 331, 26 N. E. 2d 279 (1940); *Exchange Bakery & Restaurant v. Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1927).

25. N. Y. LABOR LAW § 704; *S. & H. Grossinger, Inc., v. Burke*, 124 N. Y. S. 2d 40 (1953); *Holiday Bakers v. Motto*, 132 N. Y. S. 2d 8 (1954).

26. Petro, *Recognition and Organizational Picketing in 1952*, 2 LAB. L. J. 819; *Saperstein v. Rich*, 202 Misc. 923, 114 N. Y. S. 2d 779 (1952).

27. *Dinny & Robbins v. Davis*, 290 N. Y. 101, 48 N. E. 2d 280; *La Manna v. O'Grady*, 278 App. Div. 77, 103 N. Y. S. 2d 476 (1st Dep't 1951).

28. In the instant case there were three employees.

29. 307 N. Y. at 537, 541, 122 N. E. 2d at 388, 390.

practices to the extent that he was guilty of at least one unfair labor practice himself;[30] this made difficult the showing of clean hands which equity requires. Had any damages been alleged, or had the employer come into court with clean hands, the tenor of *all* the majority opinions suggests that the result might have been different, and that the Court might have looked a little harder to find recognitional picketing if no other pathway to an injunction had presented itself. It is suggested that management visions of a return to the unhappy days of *Thornhill v. Alabama*[31] are unduly pessimistic.

Militia

In *Nistal v. Hausauer*,[32] a former national guardsman brought a proceeding under Article 78 of the Civil Practice Act[33] against the commanding general of the National Guard, to compel issuance of an honorable discharge in place of the "discharge without honor," which had been given under the signature of the commanding general, as Chief of Staff, with the accompanying recital that the action was "By the Command of the Governor." The Special Term[34] dismissed the proceeding on the ground that the relief demanded was beyond the jurisdiction of the court, and in the power of the Governor only. The Appellate Division[35] reversed, seeing the act of discharge by the officer as judicial rather than executive in quality, and therefore reviewable by certiorari.[36] The Court of Appeals reversed the Appellate Division, basing its decision on lack of jurisdiction over the subject matter, since a purely executive function was involved.[37]

The commanding general is also head of the State's Division of Military and Naval Affairs. By statute, it is provided that the Governor may perform his duties as Commander in Chief through that Division.[38] The kind of discharge to be given an enlisted man is not controlled by statute and "must necessarily be left in the

30. N. Y. LABOR LAW § 704 (10).

31. *Thornhill v. Alabama*, 310 U. S. 88 (1940), in which picketing was equated with speech and therefore protected, was soon drastically limited by a long line of cases. See Comment, *op. cit. supra* note 20.

32. 308 N. Y. 146, 124 N. E. 2d 94 (1954).

33. Proceeding against a body or officer.

34. 203 Misc. 89, 115 N. Y. S. 2d 75 (1952).

35. 282 App. Div. 7, 121 N. Y. S. 2d 712 (1st Dep't 1953).

36. Article 78 was enacted in 1937. Prior thereto, the Civil Practice Act contained provisions separately governing the special proceedings theretofore known as certiorari to review, mandamus and prohibition. The old terms live on.

37. A proceeding against a body or officer does not lie to review a legislative or executive function. *Neddio v. Schrade*, 270 N. Y. 97, 200 N. E. 657 (1936); *Matter of Long Island R. R. v. Hylan*, 240 N. Y. 199, 148 N. E. 189 (1925). A decision made by the Governor, or by his order, is not subject to review. *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 50 N. E. 791 (1898).

38. See N. Y. CONST. art. IV, § 3; N. Y. MILITARY LAW §§ 3, 10, 11; N. Y. EXECUTIVE LAW § 190.