



1-1-1947

Contributors to the January Issue/Notes

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Recommended Citation

John H. Merryman, John E. Cosgrove, Edward J. Flattery & James D. Sullivan, *Contributors to the January Issue/Notes*, 22 Notre Dame L. Rev. 181 (1947).

Available at: <http://scholarship.law.nd.edu/ndlr/vol22/iss2/5>

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NOTES

INTERNATIONAL LAW—NATIONALITY OF THE CORPORATE PERSON.—The nationality of the fictional corporate person presents interesting problems in domestic and international law. Although the concepts of nationality and citizenship are not strictly applicable to such artificial person, corporations are endowed with them by the courts and legislatures for economic and political purposes. Among the many problems to which the concept of nationality has been applied to corporations are the following, which are the most prominent: (a) the status of a corporation, whether enemy or alien, in time of war; (b) questions of jurisdiction in suits at law; (c) applicability of tax statutes; (d) eligibility for consular recognition and protection in foreign countries; and (e) status under treaties. No one rule for the determination of nationality has been accepted by the various nations, they

¹ Arminjon, *Treatise on the Nationality of Corporations*, Document No. 53, Spanish Treaty Claims Commission (1907).

preferring to apply various criteria to the different situations encountered. One writer¹ has listed the approaches to this problem under the following six headings:

1. The corporation takes the nationality of the state which authorizes its existence.
2. The nationality of the corporation is determined by that of the country within whose jurisdiction it has been organized.
3. The nationality of the corporation is determined by the nationality of the stockholders.
4. The corporation takes the nationality of the country of subscription or domicile of the majority of the shareholders at the time of subscription.
5. The nationality of the corporation is the same as that of the country where it has its principal place of business.
6. The judge shall determine the nationality of the corporation in accordance with the facts which have been enumerated.

Without any attempt by the writer to criticise the above classifications, it may be stated that at the present time the three most widely employed rules are numbers 1, 3, and 5, although there is a discernible pragmatic tendency toward rule 6 in some courts.² A discussion of the various situations will reveal the application of these rules to specific cases.

Status of a corporation, whether enemy or not, in time of war.—Trading with the enemy.—The Trading with the Enemy Act of the United States³ defines as an enemy, “. . . any corporation incorporated within such (enemy) territory . . . or incorporated within any country other than the United States and doing business within such territory.” These tests of corporate nationality have been adopted in the Trading with the Enemy Acts of most nations. Thus in the British Act,⁴ an enemy is defined as “any body of persons constituted or incorporated, in, or under the laws of, a State at war with His Majesty.” The French Act⁵ makes similar provisions for the determination of enemy status, as does the Order in Council of the Norwegian government-in-exile, of May 18, 1940.⁶

The German Act⁷ employed a slightly broader application of the same tests in that “all corporations, the original legal personality of

² In *re Daimler v. Continental Tyre and Rubber Co.*, 2 A. C. 307, (1916), the various opinions showed a definite tendency toward a strict fact finding attitude, the judge being advised to consider all the facts in forming his opinion, regardless of any arbitrary criterion.

³ Exec. Order No. 8389, 5 Fed. Register 1400 (April 10, 1940).

⁴ Trading with the Enemy Act, 2&3 Geo. 6, c. 89 (Sept. 5, 1939).

⁵ Journ. Off., p. 11093 (September 4, 1939).

⁶ Norsk Lovtidend, No. 2, p. 40 (1940).

⁷ Reichsgesetzblatt I, p. 191 (Jan. 15, 1940).

which is based on the laws of an enemy state" were deemed enemies. Under this rule, the London branch of a Swiss bank with main offices in Switzerland was considered an enemy, as was a corporation whose office was in a neutral country, but which was constituted under enemy law, for example, an international cartel which transferred its main office from Paris to Switzerland during the war.⁸ The acts of other nations have followed a similar pattern.⁹ They regard incorporation under the laws of an enemy state and doing business in enemy territory as conclusive tests of the status of the corporation.

The same criteria have been employed in various regulations issued in the United States under the Trading with the Enemy Act. The General Orders of the Alien Property Custodian include in the term "foreign national" "any business organization, organized under the laws of, or having its principal place of business within designated foreign countries."¹⁰ In the U. S. Censorship Regulations an enemy national includes "any organization to the extent that it is actually situated within enemy territory."¹¹ The Regulations relating to the Transportation of Enemy Aliens on American Vessels and Aircraft provide that the term "enemy" shall mean "any corporation incorporated within such (enemy) territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."¹²

In addition to these tests, however, every major nation with the exception of the United States, has adopted the rule that control of a corporation by enemy aliens will render the corporation an enemy, no matter under whose law or in what country it was organized. The necessity for such a rule is obvious when we regard the anomaly of domestic or neutral corporations whose stock is held by enemy aliens and whose officers and agents are, or are under the control of, alien enemies. The question of the application of the control doctrine was thoroughly argued in the first World War in the celebrated case of *Daimler Co. v. Continental Tyre and Rubber Co.*¹³ Here a company was organized under the laws of England and had its principal office in London. Of the twenty-five thousand shares of stock, one was owned by the secretary of the company, a naturalized British citizen, the rest being in the hands of German nationals resident in Germany.

⁸ Moehring, *Die Behandlung feindlichen Vermoegens*, 7 *Zeitschrift der Akademie für Deutsches Recht* 125 (1940).

⁹ For a full discussion of the subject and a more adequate documentation, the reader is referred to Domke, *Trading with the Enemy in World War II* (1943).

¹⁰ Sec. 2 General Order No. 2, sec. c(4) General Order No. 14, sec. 2(ii) General Order No. 15.

¹¹ U. S. Censorship Regulations sec. 1801.2 (c) (3), 8 Fed. Reg. 1644 (1943).

¹² Sec. 22.1 (b), 8 Fed. Reg. 2820 (1943).

¹³ *Daimler Co., Ltd. v. Continental Tyre and Rubber Co., Ltd.*, 2 A. C. 307 (1916).

The secretary instituted suit in the English court to collect money owing it by a British corporation, they having refused to pay on the grounds that to do so would be trading with the enemy. Although the case was decided on a technicality, the principal discussion concerned the application of the control doctrine in similar situations. The opinion of Lord Parker of Waddington met the question squarely. "Such a company," he said, "may, however, assume an enemy character. This will be the case if its agents or the persons in *de facto* control of its affairs, whether authorized or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies. A person dealing with the company in such a case is trading with the enemy." He proceeded to state that the character of the individual shareholders cannot of itself affect the character of the company—but goes on to say that it may be considered in determining the character of its agents or the persons in *de facto* control. As a result of this case and later decisions applying it,¹⁴ the doctrine of control became a part of the British Trading with the Enemy Act of World War II,¹⁵ where the expression "enemy" includes "any body of persons (whether corporate or uncorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy." The Trading with the Enemy Acts of Canada,¹⁶ Australia,¹⁷ and New Zealand¹⁸ are similar, and the continental European nations have the same provision in their Acts.¹⁹ As we have stated, the United States has not incorporated this doctrine into its Act and, as we shall see later, our courts have refused to apply the doctrine to any of the other situations to be discussed.

Even among the nations who have ascribed to it, the criteria of control have not been settled. In the Canadian Consolidated Regulations respecting Trading with the Enemy,²⁰ and the New Zealand Trading with the Enemy Regulations,²¹ the fact that "one-third or more of the issued share capital or of the directorate of a company" has been held by enemy aliens, provides the legal basis for considering a corporation an enemy. Other Acts are silent on this point, making the determination of the domestic or enemy status of a corporation

¹⁴ See *The Hamborn*, A. C. 993, where the court expressly accepts Lord Parker's dictum in the *Daimler* case (1919).

¹⁵ Trading with the Enemy Act, 2&3 Geo. 6, c. 89, sec. 2(1)c (Sept. 5, 1939).

¹⁶ Sec. 1(b)iii, sec. 1a.

¹⁷ National Security Regulations, Statutory Rules 1942 No. 268 (June 19, 1942).

¹⁸ R. 3(1).

¹⁹ For a fuller discussion see Domke, Trading with the Enemy in World War II, ch. 8, 9, appen. A to S.

²⁰ Order in Council P. C. 3959, August 21, 1940, as amended.

²¹ The New Zealand Gazette, No. 91, p. 2355 (September 4, 1939).

largely within the arbitrary powers of the courts administering the Acts. The omission is probably intentional.

The refusal of United States courts and legislatures to employ the doctrine of control has led to some interesting decisions. In *Hamburg-American Line Terminal and Navigation Co. v. United States*,²² the plaintiff was a domestic corporation, but all of its stock was held by an enemy, the Hamburg-American Line, a German corporation. The court, in holding it to be an American, within the meaning of the Trading with the Enemy Acts, said, "It (Congress) definitely adopted the policy of disregarding stock ownership as a test of enemy character and permitted property of domestic corporations to be dealt with as non-enemy." In a similar case, the Supreme Court of the United States stated, "Before its passage the original Trading with the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of the stockholders. These had been plainly indicated by the diverse opinions in *Daimler Co. v. Continental Tyre and Rubber Co.* . . . And we find no support for the suggestion that Congress authorized the taking of property of other corporations because one or more stockholders were enemies."²³ During World War II the question arose again in *Toa Kigyo Corporation v. Offenberger*,²⁴ where the stockholders of the United States corporation were non-resident Japanese nationals and the manager was a resident Japanese national. Here again the actual character of the corporation was ignored and the rule remained unchanged.

The problem arises in reverse when the stockholders of a corporation situated in enemy territory are non-enemies and seek to have the corporation regarded as a non-enemy for that reason. This question was dealt with in the case of *H. P. Drewry S. A. R. L. v. Onassis*.²⁵ In this case the plaintiff was a French corporation with its registered office and place of business in Paris. Most of the stock of the corporation was held by a British subject who fled to England when France was occupied. The court refused to regard the corporation as a non-enemy, saying, "to permit the nationality and residence of stockholders to dictate the decision in cases of this character would mean that American owned corporations incorporated and having their residence in enemy territory would be exempt from the operation of the law.

²² 277 U. S. 138, 96 S. Ct. 470, 72 L. Ed. 822 (1928).

²³ *Behn, Meyer and Co., Ltd. v. Miller (Alien Property Custodian)* 266 U. S. 457, 45 S. Ct. 165, 69 L. Ed. 374 (1925).

²⁴ N. Y. L. J., p. 687 (Feb. 14, 1942); *cf. Fritz Schulz, Jr. Co. v. Raimes & Co.*, 100 Misc. 697, 166 N. Y. S. 567 (1917); *cf. Martinez v. La Asociacion de Senoras Damas del Santo Asilo de Pance*, 213 U. S. 20, 25 (1909) where it was held that a corporation under the laws of Spain in Puerto Rico was, after the United States took over, "If a citizen of any country, a citizen of Puerto Rico."

²⁵ N. Y. L. J., p. 1496 (Nov. 17, 1942).

Such a result could make a travesty of the Trading with the Enemy Act in many instances. It is the nationality and residence of the corporation that controls, not that of the stockholders." The fact that all the assets of the corporation were removed from France before the Germans arrived was of no avail before the court; "Even if we assume that the plaintiff's sympathies are with the United Nations — and that assumption is seemingly justified — the legal status of the plaintiff remains unaltered. The Trading with the Enemy Act makes no distinction between an enemy in law and an enemy in spirit. Sympathies of the persons affected cannot sway the result. Whoever comes within the sweep of the definition is an enemy!"

The injustice and poor logic of this rule in application are patent. A more comprehensive criticism of it will be found in a subsequent part of this paper dealing with the jurisdiction of courts.

Prior to the *Daimler* case, the British test for the nationality of corporations in time of war was the "commercial domicile" of the corporation. By this was meant the actual place of business of the company—its residence. In the application of this test the nationality of the stockholders or officers was not considered.²⁶ Since that case, however, the English courts have applied the control test to questions other than those arising under the Trading with the Enemy Act. In *The Ham-born*,²⁷ the question of liability for condemnation as prize arose where the ship in question was owned by a Dutch corporation, all of whose stock was in the hands of Germans. The court expressly accepted Lord Parker's dictum in the *Daimler* case and, applying it to the present situation, held that the Dutch ship was actually a German and subject to condemnation. As recently as 1943, a British court applied the doctrine of "commercial Domicile" in the case of *The Pamia*.²⁸ In this case the property in question was owned by a Belgian corporation which had moved its offices to the United States when Belgium was occupied. It was held that the company was not an enemy since its residence was in the United States.

²⁶ The nationality of stockholders was expressly ignored in the following cases applying the doctrine of "commercial domicile": *Janson v. Drifontein Consolidated Mines A. C. 484* (1902) (suit for collection of insurance on losses during Boer war by South African Corporation whose stockholders were English); *V/O Sovracht v. N. V. Gebruder van Uden's Scheepvaart en Agentuur Maatschappij*, 1 All. E. R. 76 (1943), 59 T. L. R. 101 (Dutch Corporation enemy after invasion and occupation by Germany); *Gebruder van Uden v. Burrell* (1916) S. C. 391 (Scotch decision—same holding); *In re Merten's Patents* (1915) I K. B. 857 (Suit to revoke patents granted to German company whose stockholders were British; cf. *Société Anonyme Bedge des Mines D'Aljustrel (Portugal) v. Anglo-Belgian Agency, Ltd.* (1915) 2 Ch. D. 409, where it was held that a Belgian corporation was not an enemy because Germany had only partially occupied the country, and therefore part of Belgium was still friendly.

²⁷ A. C. 993 (1919).

²⁸ 112 L. J. P. 34 (1943).

In Australia, the control doctrine is generally applied. *In re G. Hardt and Co. Pty. Ltd.*,²⁹ an Australian importing and exporting company whose stock was owned by Germans was held to be of enemy character, and a comptroller appointed to manage its affairs. Under French Law the court does not regard the nationality of the shareholders as decisive, but applies the tests of enemy character to them. Thus, in *S. A. Les Parfums Tosca*,³⁰ the enemy character of the corporation was denied, although the controlling stock was owned by a German national, because he resided in the then neutral Netherlands, and was not on the blacklist. Likewise, in the *Societe Le Zenith*,³¹ the corporation was controlled by German refugees in France who had not been interned, and in *Spielman, Herman et Spielman, Ernst*,³² the principal stockholders were Austrian refugees who were no longer connected with their former Viennese firm and were resident in neutral countries. On the other hand, in *Societe Somatex*,³³ enemy character was given to a corporation whose controlling interest was in two German nationals who had returned to Germany when war began. Here the test was not stock ownership, the court placing its decision on the fact that the Corporation had a capitalization of 50,000 francs, but was indebted to a German creditor in the amount of 1,000,000 francs, payment for which had never been asked. The French have adopted a realistic attitude toward corporations, formerly friendly, but controlled by persons in occupied territory. Instead of declaring them enemies, they have recognized that these French corporations no longer depended on any effective control from abroad.³⁴

German doctrine of control were the most liberal, the nationality of shareholders being only one of many criteria employed in the determination of enemy character. Sufficient control could also be shown by long term loans, contracts of sale and other factual considerations wherein a material influence might have been exercised in the management of the corporation. On the other hand, a domestic corporation under enemy control was not an enemy under German law since it "belongs to the economic sphere of the Reich and a major part of its profits remains in the German economy."³⁵ Instead, the corporation was placed under the special administration of an officer of the

²⁹ 13 Australian L. J. 425 (1940) (High Court of Australia, December 16, 1939).

³⁰ Dalloz. Hebd. 1940, 11 (November 16, 1939); Recuil Gazette du Palais 1939, II 360.

³¹ Dalloz Hebd. 1940, 35 (January 3, 1940); Recuil Gazette Palais 1940 I 78.

³² Recuil Gazette Palais 1940 I 370 (March 7, 1940).

³³ Dalloz Hebd. 1940, 22 (November 3, 1939); Recuil Gazette Palais 1939 II 338.

³⁴ Decrees of May 2, 1940 (Journ. Off. May 3, 1940, p. 3230) and June 1, 1940 (Journ. Off. June 3, 1940, p. 4183).

³⁵ 23 Hanseatische Rechts und Gerichtszeitung B. 115, 123 (1940).

government.³⁶ While the determination of enemy character is in the courts, in most countries, in Germany it was in the conclusive determination of the Reich Minister of Justice.³⁷ The administrative determination of enemy character has been adopted to some extent in this country, also, executive orders under the Trading with the Enemy Act giving the Secretary of the Treasury,³⁸ and the Alien Property Custodian³⁹ the right to determine, for the purposes of their offices, the enemy character of persons, including corporations.

Jurisdiction of Courts.—As was shown above, the United States Trading with the Enemy Act does not regard the control of the corporation as a factor in determining enemy character of corporations. The courts of this country have adopted a similar rule for the determination of nationality and citizenship in peace-time cases. Although the majority of the decisions on this problem arise under determination of diversity of citizenship involving American corporations, the rule has been inflexibly applied to other types of cases. Notable among these is the *Amtorg Corporation v. United States* cases.⁴⁰ Here the plaintiff was a corporation organized under the laws of New York, engaged in importing matches from Soviet Russia. All the stock in plaintiff corporation was owned by agencies of the Soviet government. Defendants contended that jurisdiction in the Federal court should be denied because, at that time, the government of the United States had not recognized the Union of Socialist Soviet Republics. It was the position of the defendants that this corporation was an instrumentality of the Soviet government, and, since that government was not recognized by ours, to allow it to appear in our courts would be to extend the court's authority beyond that of the Department of State. The court agreed that the Soviet government or one of its agencies could not sue, but held that this corporation was a citizen of the State of New York, and thus entitled to maintain the action. This is a strict application of the United States rule which states that "for the purposes of jurisdiction, the stockholders are conclusively presumed to be citizens of the state of incorporation."⁴¹ A glance at the history of this rule may show how it has developed and the extent to which such an application as the above is a perversion of it.

Originally, the rule was that the nationality of the corporation depended on the nationality of its stockholders, and in order to remain

³⁶ *cf.* Federal Supreme Court of the Reich (Reichsgericht), July 10, 1934, *Juristische Wochenschrift* 1934 p. 2969 No. 1.

³⁷ Sec. 12(2) of the decree of January 15, 1940, *Reichsgesetzblatt* I, p. 191; *cf.* Hefermahl, *Das feindliche Vermoegen*, 10 *Deutsches Recht* p. 1217, 1220 (1940).

³⁸ Executive Order No. 8389 in sec. 5E, April 10, 1940, 5 *Fed. Reg.* 1400 (1940).

³⁹ Executive Order No. 9095, in sec. 10 (a).

⁴⁰ 71 F. (2d) 524 (1934).

⁴¹ *Marshall v. Baltimore & Ohio Railway Co.*, 16 *How.* 314, 14 *L. Ed.* 953 (1853).

in the Federal courts it was necessary for the corporation to show that none of its stockholders were citizens of the same state as the opposite party.⁴² As a practical result, it was almost impossible for a corporation to get into the Federal courts. To correct this situation, the rule was formulated that the corporation would be considered a citizen of the state of incorporation.⁴³ This proved only partially satisfactory, as lawyers soon grasped upon the technicality that a corporation can not be a citizen within the meaning of the United States Constitution. Finally, apparently in desperation, the court proposed the present rule which conclusively presumes that all the stockholders are citizens of the state of incorporation.⁴⁴ For the purpose for which it was formulated, that is for the purpose of fixing the status of corporations in determining their nationality for purposes of jurisdiction in the Federal courts in cases involving diversity of citizenship, the rule is admirable. The difficulty arises when this rule, with its limited scope and definite purpose, is extended to situations which were not considered by the formulators of the rule and to factual relations which have no relation to that upon which the rule was predicated.

In fact, not only has this rule been blindly applied by the courts in such cases as *Amtorg Corporation v. United States*, discussed above, but it has, by its weight been carried over into the statutory law of our country, as has been shown in the section of this paper dealing with Trading with the Enemy Acts. There, where it was shown that our courts, in time of war, ignore the patent enemy character of a corporation and regard only the place of incorporation, the distortion of the purpose of the rule was even more obvious.

Occasionally a court rebels at this rule and applies one which it considers more just and logical. Notable is the case of *Doctor v. Harrington*.⁴⁵ Plaintiffs were residents of New Jersey and stockholders in defendant, a corporation under the laws of New York. The action was brought in equity to set aside and vacate a judgment obtained by the influence of the majority stockholder, the plaintiffs maintaining that the judgment was based on his illegal action. The defendant insisted that the Federal court was without jurisdiction, since the plaintiffs must be considered citizens of the state of incorporation of defendant, and that therefore the requisite diversity of citizenship was lacking. Happily, the court refused to adopt this view, and, after discussing the background of the rule, decided that the presumption was valid only when necessary to do justice. Here, the court pointed out that an application of such an artificial rule would be unjust. If the action had

⁴² *Bank of United States v. Deveaux*, 5 Cranch. 61, 3 L. Ed. 38 (1809); *Hope Insurance Co. v. Boardman*, 5 Cranch. 57, 3 L. Ed. 36 (1809).

⁴³ *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497, 11 L. Ed. 353 (1844).

⁴⁴ *Marshall v. B. & O. R. Co.*, *supra*, n. 41

⁴⁵ 196 U. S. 579, 25 S. Ct. 355, 48 L. Ed. 606 (1905).

been at law, what would the result have been? The court would probably have felt itself bound to apply the rule regardless of the question of justice.

In *Far Eastern Recreation Grounds, Limited, v. Metropolitan Sporting Association, Incorporated*,⁴⁶ a case brought before the United States Court for China, the action was dismissed when it was shown that the corporation, although organized under American law, was actually controlled by aliens, and had only a nominal American interest.

The *I'm Alone* case⁴⁷ involves a similiar disregard of the United States rule. The *I'm Alone* was a ship of Canadian registry. During the era of prohibition in this country the *I'm Alone* was sighted off the Eastern coast of the United States by a revenue cutter which immediately gave chase. As a final result, the ship was sunk and the Canadian Department of State protested, alleging that at the time the chase started the *I'm Alone* was outside the territorial limits of the United States and that the doctrine of "hot pursuit" had been violated. A joint committee for reparations was chosen and refused to enforce the Canadian claims because the ship, although of Canadian registry, was owned and controlled by Americans. These isolated instances are the only ones encountered by the writer in which the United States rule has not been strictly applied. In both the Chinese case and the *I'm Alone*, the proceedings had more of a diplomatic and less of a judicial character, and it is probably this fact that accounts for the results. At any rate, the only noted exceptions to the United States rule seem to fail as true exceptions. In one, the rule was disregarded by a court of equity because its application would be grossly unjust. In the other, the diplomatic character of the proceedings served to fend off the rule. In no case of a suit at law, however, had the rule been disregarded.

Applicability of Tax Statutes.—In the United States the law is well settled on this subject. A corporation may be taxed in any state in which it does business to the extent of the business carried on. The only problems arising under this doctrine, those being what constitutes doing business in a certain jurisdiction and how the extent of business done is to be calculated, are not within the scope of this paper. The English courts, in distinguishing between residence for income tax purposes and for the purpose of "serving a writ,"⁴⁸ have adopted the same view. In the leading case on this subject,⁴⁹ a corporation in-

⁴⁶ 195 (n.s.) North China Herald (June 19, 1935) 492 (1935).

⁴⁷ Joint Final Report of the Commissioners (Jan. 5, 1935) Department of State, Arbitration Series 2(7) (1935).

⁴⁸ *Calcutta Jute Mills v. Nicholson; Cesana Sulphur Co. v. same* (1876) 1 Ex. D. 428.

⁴⁹ *De Beers Consolidated Mines, Ltd. v. Howe* (Surveyor of Taxes) A. C. 455 (1906); cf. *Egyptian Delta Land and Investment Co., Ltd. v. Todd* A. C. 1, (1929).

incorporated under the laws of the Union of South Africa was being sued by the British government for income tax. The corporation carried on most of its business in England, and this was held to be the determining factor, the court holding that the corporation was liable for the tax. The logic of such a position is unquestionable.

Eligibility for Consular Protection in Foreign Countries.—As was shown in discussing the *I'm Alone*⁵⁰ and *Far Eastern Recreation Grounds*⁵¹ cases, our Department of State does not feel itself bound by the United States rule as to determination of corporate nationality if the question involved is of a diplomatic nature. This attitude may be more clearly shown by reference to some diplomatic communications. In a communication from Secretary Hughes to the Consul General at Shanghai, it is stated;⁵²

“The Department considers that under the law a corporation organized in the United States is to be regarded as a citizen of the United States regardless of the American financial interest involved and for jurisdictional purposes in China is ordinarily to be treated as such. The question, however, as to the extent to which this Government should afford such a corporation assistance in a foreign country is one which may properly be governed in a large measure by the nature and extent of the American interest involved.”

A similar view is reflected in other communications of the Department of State.⁵³ This more practical view is advisable in the circumstances in which it applies. A corporation applying for United States protection in a foreign country should contain a substantial American interest. The consequences of protecting corporations merely because they are incorporated under American laws, and with complete disregard for the actual interests involved are obviously undesirable.

Status Under Treaties.—The question of the status of corporations under treaties is largely one of construction. In the event the treaty does not specifically speak of the rights of corporations, as such, and only speaks generally of citizens or nationals, then it is necessary for those applying the treaty to ascertain what rights and privileges were intended to be bestowed upon corporations.⁵⁴

By way of summary, it may be stated that the fundamental problem of how to establish the nationality of a corporation may be attacked in two ways. One way is to adopt one rule and apply it inflexibly to

⁵⁰ *Supra*, n. 47.

⁵¹ *Supra*, n. 46.

⁵² MS. Department of State, file 893.05/45, Dec. 13, 1924.

⁵³ This subject is discussed in II Hackworth, Digest of International Law, p. 567 *et seq.*

⁵⁴ On this question see III Hackworth, Digest of Internal Law, p. 429 *et seq.*

all cases in which the question of corporate nationality arises. The other method is to classify the various problems involved, and then to apply to each the rule which seems the most logical in application. The United States has attempted to adopt the first method, applying to all cases the rule originally evolved for the purpose of allowing corporations to get into the Federal courts under the diversity of citizenship requirement. The results of this course of action have been noted. Whether the fault lies in the rule applied or in the single minded approach to the problem, the fact is that it does not work. England, on the other hand, has adopted the second approach to the problem, applying different rules to the different situations as they arise. An examination of the decisions in the two countries has shown that the English view, which is shared by the majority of nations, leads to results more in harmony with established economic, political, and even legal aims. The criticism may be made that under the English rule there is no standard, and that the tendency is for the matter to be left entirely to the discretion of the judge, the result being that status of the corporation is unpredictable and depends upon judicial whim. This is the standard criticism of pragmatic law, and is a sound one. There must be a balance between the fluidity of judicial discretion and the rigidity of a rule of law. The problem has been argued before, and will arise again.

John H. Merryman.

CONSTITUTIONAL LAW — TRANSPORTATION OF PAROCHIAL SCHOOL PUPILS.—A problem of comparatively recent origin has arisen from an issue as old as the nation. The problem is whether or not the state may provide transportation for the students of private and parochial schools. The issue, upon which many of the solutions have been based, is that of public aid to sectarian institutions. The mere stating of the question connotes its importance from the viewpoints of constitutional law, the welfare of the children affected, and that philosophical attitude of the people which determines public policy. Consequently a brief glimpse of the various opinions, legislation, and adjudication on the point is not without merit.

For purposes of orientation it is advisable to note the American legal position with regard to religion. The first act of lasting legal significance by the colonies acting in unison was the issuing of the Declaration of Independence. In this keystone document they predicated their act of separation upon all men's "unalienable rights" with which they are "endowed by their Creator." The sole reason given for government was "for the protection of these rights." Thus, from the beginning these states were dedicated to the implementation of nature's law,

which is the law of nature's Creator, with "a firm reliance on Divine Providence." Just thirteen years later, at his first inauguration, George Washington said,

"It would be peculiarly improper to omit, in this official act, my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aid can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States. . . ."

The true significance of this dedication lies in that it typifies the opinions of the political leaders of the time. Those who subscribed to the Declaration and those who framed the federal Constitution instituted a governmental system unique to the history of man in that it was based upon a recognition of the God-given and consequently inviolable character of man's rights. Of the original thirteen state constitutions, the federal constitution¹ and the thirty-five later state constitutions none omit a reference, either direct or indirect, to the religious influence in all human affairs and its necessity to the well-being of society.² And the expression of a reliance on God is not a practice of historical lore, only, the youngest state, Arizona,³ in the preamble to its constitution wrote "We, the people of Arizona, grateful to Almighty God. . . ."

As a consequence of their none too savory experience with state churches of Europe the Americans developed a system which would simultaneously protect the freedom of religious practice and guarantee a separation of the church from the state. A representative state constitutional provision for the assurance of the first goal, as included in the Bills of Rights, is that "no person shall be deprived of any of his rights, privileges or capacities * * * in consequence of his opinions on the subject of religion."⁴ The second goal was provided for when it was decided⁵ that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Thus it was assured that the government could neither destroy or attack the churches by direct opposition (as recently in Germany), nor by subvention turn them to its own aims (as currently in Russia). This is the American legal position on religion. As has been said,⁶ although church and state, as such, are separate, "we are judicially, and seem in fact committed to the propositions that Christianity is a part of

1 U. S. Constitution, 1st Amendment.

2 12 Marq. L. Rev. 206.

3 Arizona, admitted Feb. 14, 1912.

4 Iowa Constitution, Art. I, Sec. 4.

5 U. S. Constitution, 1st Amendment.

6 12 Marq. L. Rev. 206.

the law of the land and that Christian ideals and conduct are the necessary predicate of a democratic government."

Upon this foundation of law regarding religion the vast majority of the people agree. Most of the state constitutions have specific prohibitions upon the granting of money or aid to churches or institutions thereof. Since certain of the religions in this country, notably Catholic, Lutheran, and Episcopalian, maintain denominational or parish schools, there is a controversy as to just what constitutes public aid to these schools. These parochial schools are erected, maintained, and operated at the expense of the parishioners so that their children may be taught the principles of their particular faith. These people are not relieved of the tax for the public schools. With the advent of automobiles and buses transportation has become at once a boon and a threat to the child in rural areas who must travel some distance to school. Public school authorities met the problem, in most districts, with a system of school buses. Private and parochial school authorities, with their limited funds, were in large measure stymied. In many instances the pupils of the parochial establishments began to ride the buses provided by the school district. This and similar attempted solutions gave rise to governmental action, principally judicial and legislative, turning on the right of the school boards to allow the use of public funds by those attending a non-public school. It is suggested by some that such a practice is an aid to these parochial schools which conflicts with our constitutional provisions prohibiting governmental aid to churches and thus endangers our concept of the separation of church and state.

There is a split of authority on this question. The question has usually been posed in the form of a challenge to the constitutionality of statutes granting state aid to the school children of these schools for transportation. In cases where it has been upheld as an exercise of the state's police power in providing for the health, safety and convenience of the children affected, it has been observed that the incidental benefit to the private institution is immaterial, the prime beneficiaries being the children.⁷ In that most of the states have compulsory education statutes, it has been held that appropriations for the pupils' transportation, even to parochial schools, is merely "an aid to children in their compliance with the compulsory law."⁸ In its broad aspect the question of what constitutes illegal "aid" to sectarian institutions one must consider state appropriations to such institutions as hospitals and orphanages many of which are operated by the Church. "In the normal run of cases involving private corporations conducting public services, the view taken is that the appropriation was not made for the agency itself but for the object which it serves, and that it is proper for the legislature to employ a private agent to perform its duties where it does

⁷ Board of Education of Baltimore County v. Wheat, 174 Md. 314 (1938).

⁸ 16 N. Y. L. Q. R. 143.

not possess facilities of its own for doing so.”⁹ This description of the attitude toward such projects, when applied to schools, immediately suggests the query of whether the school district has adequate facilities to properly teach all the children. In many localities the answer is obviously “no.” But this, while perhaps provocative of further investigation, is off the point. The discussion by those upholding the right of private school pupils to public transportation centers on what has been called the “child benefit” theory. In practice this is, as the Attorney General of New Hampshire said, regarding the constitutionality of a proposed amendment (later passed) to the state’s education code,¹⁰ “the constitutional limitation * * * relates to aid to such schools and institutions as distinguished from the pupils thereof and does not in any way prohibit aid to a pupil getting to and from school.” He added, “the institution must be considered as aided only incidentally.” This rule, established in *Board of Education v. Wheat*,¹¹ in 1938, was upheld¹² in Maryland in 1942 and in Kentucky¹³ in 1946.

In support of this rule a California statute¹⁴ allows students of parochial schools, who are entitled to attend public schools, to use the transportation provided on the same terms as the other pupils. The courts upheld the constitutionality of this legislation¹⁵ as a proper exercise of police powers only indirectly beneficial to the school attended by the children. Illinois has a similar statutory provision,¹⁶ as do Indiana¹⁷ and Kansas.¹⁸ Oregon allows such transportation by statute authorization.¹⁹ In Washington in 1943 a statute authorizing the transportation was declared void,²⁰ whereupon a new statute²¹ was passed to the same end. Its constitutionality is *pendente lite*. A Wyoming opinion of the Attorney General agreed with the Illinois rule. In Massachusetts a similar statute²² was declared constitutional by the Attorney General. The Minnesota Attorney General’s opinion upheld the statute²³ as constitutional, “if the school district

⁹ Board of Education of Baltimore County v. Wheat, 174 Md. 317 (1938), cited *supra* Note 7.

¹⁰ REVISED LAWS OF NEW HAMPSHIRE, Ch. 135, Sec. 9 (1942).

¹¹ 16 N. Y. L. Q. R. 143, cited *supra* Note 8.

¹² Adams v. St. Marys County, 26 A (2d) 377 (1942).

¹³ Nichols v. Henry, 301 Ky. 655, 191 S. W. (2d) 930 (1946) upholding K. R. S. 158, 115 Ch. 156 of 1944 Acts of G. A.

¹⁴ CALIF. EDUCATION CODE, Sec. 16.624.

¹⁵ Bowtizer v. Baker, 167 P. (2d) 256 (1946).

¹⁶ SCHOOL CODE OF ILLINOIS, Ch. 122, Sec. 29-7 (1946).

¹⁷ BURNS IND. STATUTES, Sec. 28-2805 (1933).

¹⁸ SUPPLEMENT TO GENERAL STATUTES, Sec. 72-606 (1943).

¹⁹ SCHOOL CODE, OREGON COMPILED LAWS ANN., Sec. 111-874.

²⁰ Mitchell v. Consolidated School Dist. No. 201, 135 P. (2d) 79 (1943).

²¹ Ch. 28, Sec. 13, LAWS OF 1933, as amended by Ch. 77, Sec. 1, LAWS OF 1943.

²² Ch. 390, Statutes 1936.

²³ Minn. Statutes, Sec. 2861 (1937).

expends no funds thereon." A New Jersey statute allowing such transportation was held to conform to the constitution by the highest state court but is now on the docket of the Federal Supreme Court on an appeal involving the First Amendment to the Constitution of the United States. The question also involves another point that is present in much of the litigation, namely the right of taxation for what is alleged, by one of the parties to the action, to be "private purposes" instead of "public purposes." The adjudication of this case may do much in the solution of this problem.

In 1938 the highest New York Court held a statute extending aid to private and parochial school students to be unconstitutional, in the much quoted case of *Judd v. Board of Education*,²⁵ whereupon the constitution of the state was amended²⁶ to specifically provide for the free school bus transportation of parochial school children. This cue to a solution was taken by Wisconsin which in November of 1946 voted on an amendment to change their constitution. The result was against the amendment in Wisconsin. This vote for a constitutional amendment became necessary after the state's statute to provide such transportation was held²⁷ in 1923 to be repugnant to the constitution. In the interim a new statute has been passed and held constitutional by a Circuit Court. It is being tested now before the Supreme Court of the State. Wyoming has likewise provided transportation for all of its school children, the Attorney General ruling²⁸ that non-public school pupils may be transported if the bus is not filled.

On a parallel problem of similar principles, the providing of free text books to the students of parochial schools, the Supreme Court of Louisiana held²⁹ such use of state tax money was constitutional in that there was a public purpose served in lending books to the pupils for their personal use. An appeal was taken to the Supreme Court of the United States³⁰ where the decision was affirmed. In the majority opinion Chief Justice Hughes subscribed to the "child benefit" theory quoting the Louisiana court,

"One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The ap-

²⁴ "School Bus Transportation Laws in the United States" by National Catholic Welfare Conference, Legal Dept., p. 144.

²⁵ 15 N. E. (2d) 675 (1938).

²⁶ N. Y. Constitution, Art. XI, Sec. 4.

²⁷ State *ex rel* VanStraten v. Milquet, 192 N. W. 392 (1923).

²⁸ "School Bus Transportation Laws in the United States" by National Catholic Welfare Conference, Legal Dept., p. 257.

²⁹ Borden *et al.* v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655 (1929).

³⁰ Cochrane *et al.* v. Louisiana State Board of Education, 74 L. ed. 913, 281 U. S. 370 (1930).

propriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them * * * The school children and the state alone are the beneficiaries."

On the basis of this, the Chief Justice of the United States wrote,

"Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interests are safe-guarded."

Iowa currently affords a good example of the importance of an early solution of this problem. In Iowa the question of the constitutionality of allowing transportation of parochial school children at public expense has been presented to the office of the Attorney General on five occasions. Four of the opinions sustained the "school aid" theory and one the "child benefit" theory. Although the state Supreme Court has never ruled on the question, the District Court, in 1946, dismissed an action³¹ by a consolidated school district which sought a declaratory judgment determining its legal rights and duties, relative to the transportation of children who lived within the district and attended a parochial school, and its right to be reimbursed by the state. Upon its interpretation of constitutional and statutory provisions, the court followed the "school aid" theory. The opposite opinion³² has been made that "when you ride downtown to see a movie or a ball game the theatre or the baseball corporation does not receive a single cent of what you pay to go from your home to the movie house or the stadium." Thus, some conclude, the individual child and not the school gets the benefit of the free bus ride. Feelings as a result of the court's action were so aroused that, to avoid violence, the parochial school at Mallard, Iowa, was closed by its director. The effect of the consequence of the "school aid" theory was that eighty-four students transferred to the public schools in this area. Since the average per pupil cost of schooling in Iowa is \$104.74, the district tax burden was at once upped by \$8,798.16.³³ This case is now on the docket of the Supreme Court of Iowa. The necessity of an early and equitable adjustment of this problem is readily apparent.

The Iowa situation is typical of many. The majority of the Appellate Courts that have ruled on this question have held that such public transportation is an aid to a sectarian institution and thus is

31 Opinion of Dist. Ct. of Palo Alto County, Equity No. 15631, p. 32.

32 "Comment," Catholic Messenger, Rev. L. M. Boyle.

33 "Comment," Catholic Messenger, Rev. L. M. Boyle, cited *supra* Note 32.

not to be allowed. The Delaware court held³⁴ that such a statute³⁵ to provide transportation is repugnant to the state constitution. In Idaho, although the judiciary has never considered the question, the opinion³⁶ of the Attorney General was that such legislation is not constitutional. South Dakota has held in court³⁷ that such aid to these school children is not provided for by the educational statutes. In Missouri the Attorney General has ruled that such transportation is permissible but a statute is being considered by the Congress which would deprive children in parochial schools of the right to ride the free buses.³⁸ In Montana the children may ride on the "free" bus only if they pay their fare.³⁹ In the instance of *Gurnsey v. Ferguson* in 1941,⁴⁰ the Oklahoma Supreme Court held as unconstitutional a statute⁴¹ which made parochial students "entitled equally to the same rights, benefits, and privileges as to transportation * * *."

Many of the states, Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, and West Virginia, as well as the District of Columbia, have no judicial decisions on the point here discussed. The question is *pendente lite* in Texas.

The position of those jurisdictions denying the school bus to parochial school students is that it is of benefit to the school rather than to the children. It is contended that free transportation will induce attendance at a school and enlarge its enrollment, bettering its fortune. Where, they ask, is the line to be drawn; will not the providing of transportation lead to the providing of free text books, teachers and other accommodations? Another point of discussion which has apparently been controlling in many states is the interpretation of the phrase "public purpose." Since public funds are acquired largely by taxation of the public, the law is settled that they must be employed exclusively for a public purpose. To use them otherwise is a perversion of the government's taxing power constituting a taking of private property without due process of law, which is, of course, repugnant to the Federal⁴² as well as the State constitutions. If it is not shown that transporting these children is a public purpose then it appears to be a naked subsidy to someone, perhaps the school. Just

³⁴ State *ex rel.* Taub *et al.* v. Brown *et al.*, 36 Del. 181 (1934).

³⁵ LAWS OF DELAWARE, Ch. 142, Sec. 3, of Vol. 38.

³⁶ "School Bus Transportation Laws in the United States" by National Catholic Welfare Conference, Legal Dept., p. 41.

³⁷ Schiltz v. Picton, 282 N. W. 519 (1938).

³⁸ "School Bus Transportation Laws in the United States," by National Catholic Welfare Conference, Legal Dept., p. 158.

³⁹ LAW OF 1941, Ch. 152, Sec. 8.

⁴⁰ 122 P. (2d) 1002 (1941).

⁴¹ Article II, Ch. 34, S. L. (1939).

⁴² U. S. Constitution, 14th Amendment.

what constitutes public purpose is not easy of definition, but that Government can tax only for a public purpose is well settled. In fact, "It was to curb governmental expenditures that the doctrine of public purpose was first used in the state courts."⁴³ Therefore, the courts construe the term strictly. The strict rule also reflects the courts' insistence that the states maintain nonsectarian schools. Despite these arguments, the fact that highways are extremely dangerous, particularly for children, induces many jurists to reason that an effort by the state to protect all children is a valid exercise of the police powers. In actual practice at least sixteen states provide transportation for parochial school pupils.⁴⁴ Others find a contradiction in the rulings on "public purpose" on the one hand, and the rulings, on the other, that a parent may send his child to a parochial school,⁴⁵ that it is a proper legislative act to tax for school buses,⁴⁶ and that the helping of these parochial school pupils is not contrary to the constitution,⁴⁷ particularly when the state courts which made the former rulings and the United States Supreme Court, which made the latter, are presumably governed by essentially the same basic law.

Apparently the admirable alertness of the judiciary to the necessity of maintaining church and state each unfettered by the other had been the basis for many of the rulings. But that a union of church and state is either sought or desired by any person or group of importance is difficult to believe. It is the Catholics of the United States who are most widely affected by the present "bus rules." Regarding the position of the Church on the relations of church and state, one of her spokesmen, Cardinal Gibbons explained:⁴⁸

"The separation of church and state in this country seems to Catholics the natural, the inevitable, and the best conceivable plan, the one that would work best among us, both for the good of religion and of the state. * * * American Catholics rejoice in our separation of church and state, and I can conceive no combination of circumstances likely to arise which should make a union desirable either to church or state."

The transportation of private and parochial school children by the state is only one of the phases of what, in every sense, is an educational problem in this country. But it is a typical example of the question

⁴³ 18 Col. L. Rev. 137.

⁴⁴ Argument of W. H. Speer, before Supreme Court of the United States, 20 Nov., 1946.

⁴⁵ *Governor of Maryland v. Hill Military Academy*, 268 U. S. 510, 69 L. ed. 1070, 45 S. Ct. 571, 39 A. L. R. 468 (1925).

⁴⁶ *Cochrane v. Board of Education*, 281 U. S. 370, 74 L. ed. 913, 50 S. Ct. 335, (1930) cited *supra* Note 30.

⁴⁷ *Borden et al. v. Louisiana State Board of Education*, 168 La. 1005, 123 So. 655 (1929) cited *supra* Note 29.

⁴⁸ "Retrospect of Fifty Years."

of how to provide the best education to all the children. At the moment the problem is in the hands of the individual states. But their handling of it, if not satisfactory, will inevitably lead to an attempted assumption of the question by the federal government. As an example of the inequities of the situation as it existed just ten years ago, one of the states was spending exactly thirty-two (32c) cents per negro child for every one hundred (\$100) dollars per white.⁴⁹ Progress has been slow. That those who prepare our children for life's work are inadequately compensated, in many states, is notorious. If these infamous inequities are not remedied some extra-local means will be employed, this means federal aid — which implies a measure of federal control — for education. At least one bill⁵⁰ to that end is now in Senate committee. Federal aid, to even sectarian schools, is by no means unprecedented. It dates back to the Ordinance for the Government of the Northwest Territory, adopted by the Continental Congress, which made Lot 16 of each township available for schools and Lot 29 available for "purpose of religion," observing that "religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged."⁵¹ Today federal aid is accomplishing great things under the G. I. Bill of Rights, aiding students, many of them in attendance at denominational institutions.

This, then, is the problem, one of vital importance to our society. To solve it sage tolerance will be required. To ignore it is negligent indifference to our best interest.

John E. Cosgrove and Edward J. Flattery.

LABOR LAW — USE OF THE INJUNCTION WITH REFERENCE TO LABOR UNIONS.—A general discussion of the use of the injunction with reference to labor disputes, the right to injunctive relief in labor disputes, the acts enjoined, and the practice and procedure in a suit for such relief will here be considered. In cases involving labor disputes, the injunction did not secure recognition as a possible remedy until 1888¹ even though resort to an injunction had been made as early as 1868.²

⁴⁹ "Opportunity of Education for All" by American Federation of Labor (1945).

⁵⁰ Report of Executive Council of A. F. of L. to the 65th Convention, 7 Oct., 1946; S. 717, H. R. 3002.

⁵¹ "Opportunity for Education for All" by American Federation of Labor (1945).

¹ Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307 (1888).

² See opinion of Brandeis, J. dissenting in Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254 (1920).

The past half-century has seen an ever-increasing use of the injunction in cases of contest between employer and employee, and it now seems settled that, except as otherwise provided by statute, such injunction is the appropriate remedy for unjustifiable interference in one's business by acts done in pursuance of a labor dispute, where irreparable injury is likely to ensue and a continuance of the unlawful interference is threatened.³ The inadequacy of the legal remedy and the prevention of a multiplicity of suits are the principal grounds upon which equitable jurisdiction is assumed even though Federal courts have, in some instances, caused injunctions to be issued on the ground that the acts enjoined amount to an interference with interstate commerce.⁴

Power of the court to punish a violation of an injunction by fine or imprisonment renders an injunction an effective remedy in labor disputes.⁵ The basis for such injunctions against labor unions is that the right to carry on a lawful business without obstruction is a property right and its protection is the proper object for the granting of an injunction.⁶ Since property rights are involved it is not an obstacle to injunctive relief that the acts to be restrained are of a criminal nature, and that to punish them as contempts amounts to an assumption of criminal jurisdiction without the intervention of a jury.⁷

The substantive rights of the parties involved in a Federal action for an injunction with reference to a labor dispute are governed by the law of the state in which the acts complained of occurred.⁸ The power of the Federal court to grant relief, however, depends upon the jurisdiction conferred upon the court by the statutes of the United States.⁹ Because of this distinction, the question as to what constitutes a "labor dispute" within the meaning of the state statute, the interpretation of the state supreme court should be binding upon the Federal courts.

It is generally agreed that the right to carry on a lawful business without obstruction is a property right which the courts will protect by means of an injunction in a proper case. This is also applied when the employees are deprived of access to the employing market. In

³ *Coeur d'Alene Consol. Min. Co. v. Miners' Union* (C. C.) 51 F. 260, 19 L. R. A. 382 (1892); *Auburn Draying Co. v. Wardell*, 227 N. Y. 1, 124 N. E. 97 (1919); *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077 (1896); *Beck v. Railway Teamsters Protective Union*, 118 Mich. 497, 77 N. W. 13 (1898).

⁴ *Toledo A. A. & N. M. R. Co. v. Pennsylvania Co.*, (C. C.) 54 F. 730, 19 L. R. A. 387 (1893).

⁵ *Vitter Mfg. Co. v. Humphrey*, 132 Wis. 587, 112 N. W. 1095 (1907).

⁶ *St. Germain v. Bakery & C. Workers International Union*, 97 Wash. 282, 166 P. 665 (1917).

⁷ *State ex rel. Hopkins v. Howat*, 109 Kan. 376, 198 P. 686 (1921).

⁸ *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 58 S. Ct. 578 (1938).

⁹ *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 58 S. Ct. 578 (1938).

such an instance, it has been held that they are deprived of a property right.¹⁰ An employer may seek and obtain an injunction against a combination of laborers in violation of the Federal Anti-Trust Act even though he may not at the time of bringing the suit have suffered actual injury. It is enough that an intent to restrain interstate commerce be shown to justify an injunction on the ground that there is a dangerous probability that such injury will happen.¹¹

As we have seen, it is settled that the courts may enjoin acts or words of striking employees or members of a labor union which will operate to intimidate the customers of a person from dealing with or laborers from working for him even though such acts may constitute a violation of the criminal law. Persons may be prevented by injunction from attempting, by intimidation and threats of violence, to coerce employees to leave their work and join a strike.¹² In similar manner, where former employees resort to force, coercion, or intimidation to prevent others from taking their places, it is the duty of the courts to interfere and to discontinue such abuses by means of an injunction.¹³ It is a common use of the injunction to prevent strangers to a valid contract for personal services from inducing a breach thereof. In accordance with this principle, an employer may procure an injunction against the act of a union or its members in inducing employees to serve for a definite time when attempts are made to have them break these contracts.¹⁴ A statute providing that an employment having no specified term may be terminated at the will of either party on notice to the other does not preclude the issuance of an injunction against the inducement of employees to quit in violation of their contracts for employment, even though such employment is terminable by either party even upon seven days notice.¹⁵ A labor union may be enjoined from interfering with the performance of existing contracts by calling a strike to force an employer to unionize his labor, and from placing his name on a blacklist which will hamper him in securing the help necessary to such performance.¹⁶

Despite the numerous restrictions which may be placed upon labor unions through use of the injunction, an injunction will not lie to prevent workmen from combining and endeavoring to persuade other employees to join them in order to secure a legitimate object, such as an increase in wages, in the absence of acts amounting to intimidation

¹⁰ *A. T. Stearns Lumber Co. v. Howlett*, 260 Mass. 45, 157 N. E. 82 (1927).

¹¹ *Bedford Cut Stone Co. v. Journeymen Stone Cutters Assoc.*, 274 U. S. 37, 47 S. Ct. 522 (1927).

¹² *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212, 32 S. W. 1106 (1895).

¹³ *George Jonas Glass Co. v. Glass Bottle Blowers' Assoc.*, 77 N. J. Eq. 219, 79 A. 262 (1911).

¹⁴ *Folsom v. Lewis*, 208 Mass. 336, 94 N. E. 316 (1911).

¹⁵ 84 A. L. R. 92.

¹⁶ *W. A. Snow Iron Works v. Chadwick*, 227 Mass. 382, 116 N. E. 801 (1917).

or the like.¹⁷ Both Federal and state legislation have declared contracts with employees not to join unions to be unlawful and such agreements therefore do not have to be considered here. Injunctions do not lie to prevent members of a labor union from striking to advance their own interests, although they thereby inflict injury upon the business of an employer of nonunion labor, and they contemplate and intend such a possible effect.¹⁸ A court may, however, enjoin union employees of one company having no controversy with their employers from striking or threatening to strike as a means of compelling their employers to injure another employer of non-union labor.¹⁹

The general rules governing injunctive relief preclude the use of the injunction in order to prevent a breach of contract for services. Thus in the case of cessation of work by employees who are under contract, a court of equity will not restrain the violation of the contract and compel the affirmative performance of services. A different rule obtains in the case of a combination or conspiracy to procure an employee or body of employees to quit service in violation of a contract of service; for in that case, injunctive relief may be had if the threatened injury would be irremediable at law as we have already noticed.

Most frequent application of the injunction in labor disputes has come in the past with reference to the picketing by the employees or members of the labor union of the employer who cannot otherwise be persuaded to comply with their demands. Courts upholding the right to picket will not grant an injunction against the use of peaceful persuasion to prevent persons from working for or patronizing the employer, but they will not hesitate to interfere where the acts or spoken words are intimidative or tend to coerce compliance with their request.²⁰ To grant an injunction in such cases would not violate the constitutional guarantees of free speech, free press, and the right of peaceable assembly.

Striking employees cannot be enjoined from using persuasion to prevent other workmen from taking their places, or to induce those who have done so without making a definite contract to quit work, unless the strike itself is illegal, so as to authorize relief against any acts in the furtherance thereof.²¹

While there have, in some cases, been injunctions granted against the display of bannered a place of business, such is not generally the case save in instances where such is done by third persons not having

¹⁷ 5 L. R. A. (N. S.) 1097.

¹⁸ Cohn & Roth Electric Co. v. Bricklayers, M. & P. Local Union, 92 Conn. 161, 101 A. 659 (1917).

¹⁹ International Brotherhood, E. W. v. Western U. Teleg. Co., (C. C. A. 7th), 6 F. (2d) 444, 46 A. L. R. 1538 (1925).

²⁰ Jones v. Van Winkle Gin & Mach. Works, 131 Ga. 336, 62 S. E. 236 (1908).

²¹ Barnes v. Chicago Typographical Union, 232 Ill. 424, 83 N. E. 940 (1908).

an industrial dispute with the owner of the business. No injunction can be granted under statutes generally against the peaceable displaying of placards.²²

It was only when the use of the injunction became extensive and conspicuous, that there arose storms of protest against it and statutes were enacted to restrict the practice. Chief among the acts passed by legislative bodies are the Clayton Act and the Norris-LaGuardia Act which were enacted by the Congress of the United States and which govern disputes in federal jurisdictions. A number of similar statutes based in whole or in part upon these parent enactments have been passed by the legislatures of the several states and made into law. A more detailed discussion of these two important federal pieces of legislation governing labor and the use of the injunction will now be considered.

THE CLAYTON ACT.—As we have seen, the history and development of the labor injunction has been attended by great confusion and conflict. Rather than an alleviation, Congress has produced a burden, not only upon the labor unions, but upon the judiciary, whose task is to infer a legislative intent from the various enactments.

The Clayton Act (29 USCA No. 52) was the most important piece of labor legislation since the Sherman Act of 1890. This became law by President Wilson's signature on October 15, 1914. Congress relied mainly upon the idea to curb what it and others considered the enthusiasm for judicial interpretation of the Sherman Act with regard to injunctive relief concerning labor situations. Thus Section 6 reads in part: "The labor of a human being is not a commodity or article of commerce . . ." The passage of the law was the result of an intensive campaign begun shortly after the decision handed down in the case of *Loewe v. Lawlor*.²³ This campaign had two main purposes: (1) the abolition of such ambiguous and equivocal terms regarding labor rights; and, (2) legislation relieving labor combinations from the application of the anti-trust laws. At the time it was popularly supposed that the act was the perfect answer to both demands.

The newly-made law was welcomed most heartily by organized labor, especially because Section 20 (this is the section which deals with injunctive relief) specifically pointed out what activities were to be characterized by such word-definitions as "lawfully" and "peacefully," and as such, were declared not to be in violation of any federal law. Samuel Gompers cheerfully described it the "Industrial Magna Charta."

However the Clayton Act proved to be the keenest disappointment ever suffered by organized labor. Instead of mitigating attacks upon

²² *Fenske Bros. v. Upholsterers International Union*, 358 Ill. 239, 193 N. E. 112 (1934).

²³ *Loewe v. Lawlor*, 208 U. S. 274, 28 S. Ct. 301 (1908).

the activities of labor unions and minimizing the use of injunctions in labor disputes, it led to more assaults than had occurred before its passage. Section 6 was judicially construed to exempt labor combinations from the anti-trust laws only in cases where its activities were deemed to constitute an incidental restraint upon interstate trade.²⁴ Where the court believed that the combinations were primarily intended to restrain such trade, their activities were held to be unlawful.²⁵ Obviously, then, the Clayton Act was not deemed to have legalized such collective labor action which the court otherwise had regarded as unlawful.²⁶

In one respect the position of organized labor was more in jeopardy after the passage of the Clayton Act than before. Prior to 1914 only the federal government could obtain an injunction against alleged violations of the Sherman Act; whereas after the passage, any private person injured by any restraint of interstate trade might maintain an injunction proceeding against the wrongdoer, in accordance with Section 16 of the Clayton Act.²⁷

From the passage of the Clayton Act until the first adjudication of it by the Supreme Court in 1921,²⁸ at least thirteen cases were considered in which Section 20 was applied.²⁹ In most of these cases the statute was not considered to be a bar to an injunction. One court held that it did not change the preexisting law.³⁰ To refuse to work upon non-union construction was deemed a strike "for a whim," and therefore such a strike was enjoined.³¹ Thus we see that the hos-

²⁴ United Leather Workers International Union v. Herkert & Meisel Trunk Co., 265 U. S. 457, 44 S. Ct. 623 (1924); United Mine Workers v. Coronado Coal & Coke Co., 259 U. S. 344, 42 S. Ct. 570 (1922).

²⁵ Coronado Coal & Coke Co. v. United Mine Workers, 268 U. S. 295, 45 S. Ct. 551 (1925).

²⁶ American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 42 S. Ct. 72 (1921).

²⁷ Rotwein on LABOR, p. 70.

²⁸ Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 S. Ct. 172 (1921).

²⁹ Injunction Granted: Alaska Steamship Co. v. International Longshoremen's Association, 236 F. 964 (1916); Tri-City Central Trades Council v. American Steel Foundries, 238 F. 728 (1916) (modified later on appeal, *op. cit.*); Stephens v. Ohio State Telephone Co., 240 F. 759 (1917); Kroger Grocery & Baking Co. v. Retail Clerks' International Protective Association, 250 F. 890 (1918); Montgomery v. Pacific Electric Railway Co., 258 F. 382 (1919); Dail-Overland Co. v. Willys-Overland Co., 263 F. 171 (1920); Langenberg Hat Co. v. United Cloth Hat and Cap Makers of North America, 266 F. 127 (1920); Herkert & Meisel Trunk Co. v. United Leather Workers International Union, 268 F. 662 (1920) (reversed later on appeal, *op. cit.*).

Injunction Denied: Puget Sound Traction Light & Power Co. v. Whitley, 243 F. 945 (1917); Duplex Printing Press Co. v. Deering, 247 F. 192 (1917) (reversed later on appeal, *op. cit.*); Kinloch Telephone Co. v. Local Union No. 2 of International Brotherhood of Electrical Workers, 265 F. 312 (1920).

³⁰ Stephens v. Ohio State Telephone Co., 240 F. 759 (1917).

³¹ Vonnegut Machinery Co. v. Toledo Machine & Tool Co., 263 F. 192 (1920).

tility toward picketing was too deeply ingrained in the minds of the judges to permit of a more liberal interpretation of the Clayton Act. In one case the court said; "Practical people question the possibility of peaceful persuasion through the practice of picketing."³²

In the *Duplex* case³³ an injunction was sought to restrain the unions concerned from interfering by inducing their members not to work for the Duplex Company, or its customers, in connection with the hauling, installation and repair of printing presses made by the Company. There was a strike pending against the Company to secure the closed shop, an eight-hour day, and a union scale of wages. After a District Court and Circuit Court of Appeals both had ruled in favor of the labor unions, the case came before the highest court in the land in 1921. In a six to three decision, the Supreme Court reversed the dismissal of the bill, concluding that the instigation of a strike against an employer who was at peace with his own employees, solely to compel such employer to withdraw his business from the plaintiff (with whom the unions were disputing) can in no wise be considered a persuasive activity lawfully and peacefully according to the definitions set out in Section 20 of the Clayton Act. Thus, whatever vestige or labor protection which was apparently in the Clayton Act disappeared completely after the decision in the *Duplex* case. In short, the Clayton Act did not legalize labor actions which before its inception were illegal. More federal injunctions were issued after its passage than before. Therefore it failed to serve the purpose for which it was evidently enacted, and the enthusiasm with which it was greeted by organized labor was grounded upon hopes and assumptions.

NORRIS-LA GUARDIA ANTI-INJUNCTION ACT.—Labor, as well as other persons or industries, had learned the actual operation of an act depends on its construction by the Courts. Dissatisfaction with the limited effect given Section 20 of the Clayton Act by the Courts resulted in the enactment of the Norris-LaGuardia Anti-Injunction Act of 1932, which prohibits the issuance of injunctions in Federal Courts in cases involving or growing out of labor disputes, as therein defined, except in strict accord with its provisions.

The purpose of this Act was very aptly described in the opinion of Mr. Justice Roberts of the United States Supreme Court in *New Negro Alliance v. Sanitary Grocery Co.*,³⁴ in which he said: "The legislative history of the Act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by Federal Courts and to obviate the results of the judicial construction of that Act. It was intended that peaceful and orderly dissemination of information by those defined as

³² *Ibid.*

³³ *Duplex Printing Press Co. v. Deering, op. cit.*

³⁴ *New Negro v. Sanitary Grocery Co.*, 58 S. Ct. 703, p. 707 (1938).

persons interested in a labor dispute concerning terms and conditions of employment in an industry or a plant or a place of business should be lawful; that, short of fraud, breach of the peace, violence or conduct otherwise unlawful, those having a direct or indirect interest in such terms of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully persuade others to concur in their views respecting an employer's practices."

The important sections of the Norris-LaGuardia Act with reference to the injunction affecting unions and their activities will be discussed.

Section 4 of the Act very definitely limits and deprives the Courts of the United States of jurisdiction to issue restraining orders, either temporary or permanent, in cases involving or growing out of a labor dispute, preventing the acts therein enumerated. Section 4 of the Act reads as follows:

No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

- (a) Ceasing or refusing to perform any work or to remain in any relation of the employment.
- (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 3 of this Act.
- (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other things of value.
- (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State.
- (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling or by any other method not involving fraud or violence.
- (f) Assembling peaceably to act or to organize to action promotion of their interests in a labor dispute.
- (g) Advising or notifying any person of an intention to do any of the acts heretofore specified.
- (h) Agreeing with other persons to do or not to do any of the acts heretofore specified.

- (i) Advising, urging or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 3 of this Act.

Section 13 of the Act defines a labor dispute and who is interested or involved in a labor dispute in the following language:

When used in this Act, and for the purposes of this Act . . .

- (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers and employees; where such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employees or associations of employees; (3) between one or more employees or associations of employees and one or more employees or association of employees; or when the case involves any conflicting or competing interests in labor disputes of "persons participating or interested" therein.
- (b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft or occupation in which such dispute occurs, or as a direct or indirect interest therein, as a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.
- (c) The term "labor dispute" includes any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, firing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

Just what is a labor dispute has been clearly established by the United States Supreme Court in the *New Negro Alliance* case³⁵ which stated that there can be a "labor dispute" within the meaning of the Norris-LaGuardia Act in the absence of relation of employer and employee, and even when the "petitioners are not engaged in any business competitive with that of the respondent and the

³⁵ *Supra.*

officers, members, or representatives of the petitioners are not engaged in the same business or occupation as the respondent or its employees." Therefore, it is not necessary for the workers or persons involved to be in the same or competitive industry.

In the case of *Cinderella Theatre Co. v. Sign Writers Local Union*,³⁶ an injunction was sought to prevent picketing for the purposes of compelling the plaintiff to discharge a non-union sign writer. The Court in holding that a labor dispute was involved sustained its position because it is a "controversy concerning terms or conditions of employment" and because it is a "controversy concerning the association of persons in seeking to arrange terms or conditions of employment." A unionization campaign in an effort to unionize employees of a plant has been held a labor dispute in *L. L. Coryell & Son v. Petroleum Workers Union*.³⁷

Similarly, a strike for a closed shop is a labor dispute even though none of the employees of the employer are members of the striking union. In the case of *Lauf v. Shinner*,³⁸ the Supreme Court of the United States held specifically that an employer's suit to enjoin picketing by a labor union and its members, which picketing was for the purpose of coercing the employer to adopt the closed shop and accept the union as a bargaining unit of its employees, involves a "labor dispute" within the meaning of the Norris-LaGuardia Act, although none of the employees were members of the union and although all of the employees had actually refused to join the union.

Since the Courts have generally acknowledged the right of the employee to picket peacefully, the question arises as to what is peaceful picketing and what is unlawful picketing. What is peaceful picketing will depend upon the facts and circumstances in each case. Section 4(E) of the Norris-LaGuardia Act has a distinct relation to the acts of pickets in that one of the acts of picketing and one of the main purposes of picketing is giving publicity in accordance with that section. It would therefore seem that peaceful picketing, to begin with, must be carried on without fraud or violence. In like manner, there must also be an absence of intimidation and physical obstruction.

An interesting statement on the type of picketing that is unlawful is found in the *Goldfinger v. Feintuch* case³⁹ in which the Court discussed the proposition in the following language:

"Picketing is not peaceful where a large crowd gathers in mass formation or where there is shouting or the use of loud speakers in front of a picketed place of business, or the sidewalk or en-

³⁶ *Cinderella Theatre Co. v. Sign Writers Local Union*, 6 F. Supp. 164 (1934).

³⁷ *L. L. Coryell & Son v. Petroleum Workers Union*, 19 F. Supp. 749 (1936).

³⁸ *Lauf v. Shinner*, 58 S. Ct. 578 (1938).

³⁹ *Goldfinger v. Feintuch*, 276 N. Y. 281, 11 N. E. (2d) 910 (1937).

trance is obstructed by parading around in a circle or lying on the sidewalk. Such actions are illegal, and are merely a form of intimidation . . . Nor is it legal to threaten to ruin the custom or trade generally or to accost or interfere with customers at the entrance to the store. Disorderly conduct, force, violence, or intimidation by pickets should be sternly suppressed by the police and administrative authorities.”

An important section of the Act relates to the liability of officers and members of a Union for unlawful acts. It reads as follows:

“No officer or member of any association or organization and no association or organization participating or interested in a labor dispute shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of such acts, or of ratification of such acts after actual knowledge thereof.”

The section is intended to prevent responsibility being cast upon the union for acts of persons where there is no clear proof that such persons were authorized or that such acts were ratified by the union. The words in the Norris-LaGuardia Act are not to be given a strained and unnatural construction in conflict with its declared purpose.⁴⁰ The act does not confer jurisdiction previously exercised in controversies between employers and employees.⁴¹

PRACTICE AND PROCEDURE

Procedural questions have formed the vortex of numerous and important storms concerning the use of injunctions with reference to labor unions. If a union is incorporated, it may be a party to the suit in its own name. However, in the case of an unincorporated union which has a large membership, it is impracticable to bring all the members before the court, therefore, a suit may be brought in the name of some of the members suing in behalf of all, by the officers of the association, or by a committee appointed or authorized to prosecute such suit.⁴²

The common law rule that a voluntary association is not a legal entity and cannot be sued in its common name distinct from that of its members has been applied to unincorporated labor unions. In an action at law against a labor union, the general rule, unless statute otherwise provides, is that every member of the union must be joined as a party defendant, if objection is properly taken. The foregoing rules have been held to be applicable in suits of equity. However, where the

⁴⁰ *Virginian R. Co. v. System Federation*, 57 S. Ct. 592 (1937).

⁴¹ 97 A. L. R. 1339.

⁴² *Carpenters Union v. Citizens Committee to Enforce the Landis Award*, 333 Ill. 225, 164 N. E. 393 (1928).

members of a labor organization are numerous, a suit in equity may be instituted by simply joining as defendants a few members who, because of their position, may be deemed sufficient to represent and protect the interests of the entire membership, proper allegations being made in the bill that such persons are made defendants as representing all others of the same class — that is, as standing for the union.⁴³

Federal procedure differs however in that the Supreme Court of the United States has included labor unions in that group of organizations which may sue or be sued as an organization. This conclusion as to the suability of labor unions is confirmed by the words of Sections 7 and 8 of the Anti-Trust Law. The persons who may be sued under Section 7 include "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country."⁴⁴ This language is very broad, and the words, given their natural signification, certainly include labor unions. They are associations existing under the laws of the United States, of the territories thereof, and of the states of the Union. Congress was passing drastic legislation to remedy a threatening danger to the public welfare, and did not intend that any persons or combinations of persons should escape its application. Their thought was especially directed against business associations and combinations that were unincorporated to do the things forbidden by the act, but they used language broad enough to include all associations which might violate its provisions recognized by the statutes of the United States or the states or the territories or foreign countries as lawfully existing; and this, of course, includes labor unions, as the legislation referred to shows. Thus unincorporated associations are made parties to suits in the Federal courts under the Anti-Trust Act.⁴⁵ This opinion settled the question of actions being taken against an unincorporated union, as such, in the Federal courts. In effect it held that the development of labor unions and centralization of power and property in one central body, with the right to absolutely control even the individual organizers and officers of local unions, was of such a corporate nature that public policy demanded that, having acquired protection and benefits under the laws of the United States, they should also be required under some circumstances to respond in Federal courts.⁴⁶

An employer, of course may sue or be sued in the legal capacity of the business concern of which he is a member for injunctive relief with

⁴³ 31 Am. Jur., Section 310.

⁴⁴ July 2, (1890), 26 Stat. at L. 210, Chap. 647, Comp. Stat., Sec. 8830, 9 Fed. Stat. Anno. (2 ed.) p. 726.

⁴⁵ *United Mine Workers of America v. Coronado Coal Company*, 259 U. S. 344, 66 L. ed. 975, 42 S. Ct. 570 (1924).

⁴⁶ *Bartling v. Congress of Industrial Organizations*, 40 F. Supp. 366 (1941).

respect to labor disputes when striking employees or members of labor unions exceed the permissible bounds to his injury.

An injunction may be granted against striking employees and also against strangers participating in illegal acts of intimidation, threats, and coercion directed at customers or employees of an employer. A court may also enjoin such acts on the part of the members of a labor union. However, an injunction will not lie against a union because of threats made by individual members for which the union is not shown to be responsible, whereas an injunction order may be directed against the union which formed and maintained the picket line in order to make a strike effective, although it did not consent to or acquiesce in the unlawful acts of the pickets.⁴⁷

A complaint or bill for injunctive relief must state a cause of action, in accordance with the general rules. It must not deal wholly in generalities, presumptions, and conclusions, nor omit to state specific overt acts. Likewise the injunction granted should not be broader than is justified by the facts in the case; it should not restrain the commission of acts not embraced within the averments of the complaint or bill. An injunctive order granted in a case involving a labor dispute should specifically point out the offenses that properly come within it. For example, an injunctive order against a strike should describe distinctly what it intends to restrain.

While it has been held that an injunction against "boycotting," as such, is too broad, picketing may be enjoined by the use of the specific term because its meaning is clearly understood in the sphere of the controversy by those who are parties to it. The decree, however, should be couched in language sufficiently definite to inform the defendants to what extent they may carry on picketing activities. The extent of relief granted and the number of pickets which may be allowed are to be governed by circumstances and rest in the discretion of the judge. To enjoin picketing "in a threatening or intimidating manner" is inadequate because it leaves compliance largely to the discretion of the picket.⁴⁸ The injunction granted in an action involving a labor dispute may run to named parties and also to classes of persons through whom they may act, such as agents, servants, employees, aiders, abettors, etc.; even though they are not parties to the action. Thus an absolute stranger to the action may be punished for contempt if he contravenes the terms of the injunction, provided, of course, he had notice of the injunction. However, the authorities differ on this question; there is interpretation to the effect that a mere picket is not guilty of contempt in violating an injunction when it does not appear that he was a party to the action, was a member of the union, or had any connection with

⁴⁷ 31 Am. Jur., Sec. 380.

⁴⁸ 31 Am. Jur., Sec. 390.

any of the enjoined parties, and this is true even though he may have had actual notice of the injunction.

Also, of course, labor unions, themselves, may be punished for contempt in violating an injunction. They may be held to be guilty of conspiracy after the issuance of the injunction, for the purpose of violating it, notwithstanding the statement of their officers that they advised the members of the union to be orderly and to obey the law.⁴⁹ Unquestionably labor leaders who direct the violation of an injunction will be subject to punishment for contempt.⁵⁰

The Clayton Act is silent as to the venue in contempt proceedings for the violation of an injunction granted, but leaves it as before; the contempt, therefore may be punished in the division of a district in which the order was passed, although disobedience occurs elsewhere.⁵¹ The Norris-LaGuardia Act, however, provides that, in cases arising thereunder, the person charged with contempt shall have a right to be tried in the state and district in which the contempt shall have been committed. Accordingly, contempt proceedings in a case within the act must be tried in the district where the alleged contempt took place.⁵²

In seeking an injunction in a labor dispute, however, jurisdiction is not strictly construed. Where the alleged threatened damage exceeds the requisite jurisdictional amount, the court has jurisdiction of a suit to restrain strikers from damaging or destroying the plaintiff's property, and it is not necessary to the acquisition of jurisdiction that property worth such amount should have been destroyed. When the right for which protection is sought is the right to conduct one's business without unlawful interference and the value of such right, because of its intangible character, cannot be calculated in money, the court will refuse to entertain jurisdiction.⁵³

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⁴⁹ 31 Am. Jur., Sec. 395.

⁵⁰ General Electric Co. v. United Electrical Radio & Machine Workers of America, 67 N. E. (2d) 802 (1946).

⁵¹ Myers v. United States, 26 U. S. 95, 69 L. ed. 577, 44 S. Ct. 272 (1924).

⁵² 31 Am. Jur., Sec. 401.

⁵³ 31 Am. Jur., Sec. 374.

WORKMEN'S COMPENSATION — SUNSTROKE AS A COMPENSABLE INJURY.—There has been considerable controversy as to whether the several compensation acts should be held to contemplate injuries caused by excessive heat, cold, or other meteorological phenomena.¹ This survey will concern itself primarily with those cases arising as a result of injury or death caused by excessive heat. The words "sunstroke" and "heatstroke," as used in this treatise, are synonymous and mean a sudden prostration resulting from exposure to such excessive heat, regardless of the source from which the heat emanates.² Heatstroke or sunstroke is regarded by both medical authorities and the courts as a serious and frequently disastrous condition, often resulting in death or disability and when proven is held by a majority of the courts to be compensable.³

The usual phraseology of the compensation acts provides for an award of compensation for "personal injury or death by accident arising out of and in the course of the employment."⁴ Not infrequently, the wording of the statute is varied, but the general purport is the same. This clause has given rise to many and varied interpretations, and opinions under the statute have, if such a thing were possible, intensified the common law maze of apparently conflicting and often unintelligible statements, observations and reasonings.⁵ The Massachusetts court comes closest to giving a comprehensive definition of said clause in the *McNicol's* case, where it is said that the injury, in order to warrant a payment of compensation,

" . . . must both arise out of and also be received in the course of employment . . . Neither alone is enough . . . An injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment when there is . . . a causal connection between the conditions under which the work is required to be performed and the resulting injury . . . If the injury can be seen . . . to have been contemplated by a reasonable person familiar with the whole situation . . . then it arises 'out of' the employment . . . The causative danger must be peculiar to the work, and not common to the neighborhood . . . It need not have

¹ L. R. A. 1918F 936.

² *Mather v. London Guarantee & Accident Co.*, 125 Minn. 186, 145 N. W. 963 (1914).

³ *Fidelity & Casualty Co. v. Adams*, 70 Ga. App. 297, 28 S. E. (2d) 79 (1943); *Malone v. Industrial Comm.*, 140 Ohio St. 292, 43 N. E. (2d) 266 (1942); *Douglas v. Riggs Disler Co.*, 122 N. J. L. 379, 5 A. (2d) 873 (1939); *Oklahoma Gas & Electric Co. v. Maloney*, 184 Okla. 465, 88 P. (2d) 363 (1939).

⁴ JONES ILL. STAT. ANN., Sec. 143.17 (1936); BURNS IND. STAT. ANN., Sec. 40-1202 (1933); MICH. STATS. ANN., Sec. 17.151 (1937); THOMPSON'S LAWS OF NEW YORK, Chap. 67, Art. 1, Sec. 2 (1939); PURDON'S PENN. STATS., Tit. 77, Sec. 411 (1936).

⁵ 28 R. C. L., Workmen's Compensation Acts, Sec. 88.

been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.”⁶

In the recent Indiana case of *L. W. Dailey Construction Co. v. Carpenter*,⁷ the Appellate Court sustained a ruling of the Industrial Commission awarding compensation to the wife of the decedent, who suffered heatstroke while engaged in pouring and leveling concrete in forms in the construction of gutters and curbs. The court was especially liberal in its interpretation of the Workmen’s Compensation Act as respects cases arising from sunstroke. The court sustained three important propositions which will be discussed in relationship to attitudes taken by courts in other states and in England. The first of these is the “exposure beyond that of the general public” rule, the second is the “fellow-worker exposure” rule, and third is sunstroke classified as either an accident or an occupational disease.

In the earlier Indiana case of *Townsend and Freeman Co. v. Taggart*,⁸ the court took judicial notice that on a hot day, when the sun is shining brightly, it is warmer on a gravel roadway than surrounding country, and that a rider of one horse of a four-horse team would receive heat from the horse he was riding and, too, from the other horses. It was held that at the time the rider received the sunstroke he was *exposed to a hazard beyond that of the general public*, and that his disability, which resulted therefrom (sunstroke), was due to an accident arising out of his employment. The test, manifestly relied on by the court, was whether the employee was subject to a greater hazard than that to which the general public would have been exposed.⁹

The appellant (L. W. Dailey Construction Co.), in the principal case, seems entirely justified in examining and basing his case on the circumstances that surround the employee’s death by sunstroke in the light of past decisions rendered by Indiana and other state courts on cases similar on the facts presented. Appellant cites a case involving an employee of a cemetery association whose death from sunstroke was held not compensable on the grounds that although the day was hot and humid, there was nothing arising from the work in which he was employed to increase the danger of heatstroke above that which was sustained by his fellow workers or the people living in the same immediate area.¹⁰ The lawn mower which he used could not be compared with any implement that produced an appreciable amount of

⁶ *In re McNicol*, 215 Mass. 497, 102 N. E. 697 (1916).

⁷ 114 Ind. App. 522, 153 N. E. (2d) 190 (1944).

⁸ 81 Ind. App. 610, 144 N. E. 556 (1924).

⁹ *Ibid.*

¹⁰ *Thompson v. Masonic Cemetery Association*, 103 Ind. App. 74, 5 N. E. (2d) 145 (1936).

artificial heat, as cited in another interesting case.¹¹ In the case under discussion, we find a similar situation in which the tool used by the deceased, Carpenter, is a wooden handled spade which could not contribute any artificial heat to that produced by the sun's rays. The point on which the case seems to turn and which has apparently influenced the court's decision is brought out in the leading Minnesota case of *State ex rel. Rau v. District Court Ramsey Co.*¹² The conditions surrounding the decedent, Rau, at the time of his injury exposed him to the direct rays of the sun, in addition to the humid atmosphere emanating from the wet, sandy street. The test applied by the Supreme Court of Minnesota in this case was succinctly stated, thus:

"Was decedent exposed to something more than the normal risk to which men in general engaged in manual labor on the streets are subject in hot weather? If he was, then he was exposed to an extra danger arising out of his employment, and if that contributed to the accident, then the accident arose out of the employment."

Carpenter was working along an oil surfaced roadway and combined with the water used in wetting down the cement curbing, these factors seem to have contributed the necessary artificial heat element. Thus we have what seems to be satisfaction of the requirements of accidental death under the Indiana Workmen's Compensation Act.

In Michigan an entirely different approach is taken regarding the compensability of workmen stricken by heat prostration. Sunstroke is not a compensable accident in the meaning of the Workmen's Compensation Act of Michigan and at most may be regarded as an occupational disease, not within the scope of the act.¹³ Michigan favors a strict policy because the Michigan court has declared that, as the Compensation Statute is in derogation of the common law it must be construed strictly.¹⁴ An example of this strict view is the case of an employee who while doing brick work around a boiler, was overcome by the intense heat generated by an adjoining boiler, and fell from heatstroke, suffering injuries which led to his death. The Supreme Court of Michigan by a six to two decision reversed the award of the Industrial Accident Board, and held that the employee Roach was doing the work which he and his associates were employed to do, exactly in the manner they expected to do it.¹⁵ Thus the court followed an earlier decision which denied compensation to a workman who ruptured himself while lifting an iron bar in his usual manner,

¹¹ Chapman Price Steel Co. v. Bertels, et al., 92 Ind. App. 634 (1931).

¹² 138 Minn. 250, 164 N. W. 916, 15 N. C. C. A. 679 (1917).

¹³ 13 A. L. R. 981 (1918).

¹⁴ *Ibid.*

¹⁵ Roach v. Kelsy Wheel Co., 200 Mich. 299, 167 N. W. 33 (1918).

because it was not in the nature of an accidental injury.¹⁶ The manner in which it is done is the gauge of whether or not an accident has occurred. A second Michigan case illustrating much the same opinion resulted when a police patrolman was denied compensation for a death resulting from heatstroke while in the course of his duties.¹⁷ The families of both of these men undoubtedly would have received benefits under the Indiana Compensation Act because they were subjected to far more exposure than the general public, but the nature of their sunstroke was classified as occupational disease and not as accidental injury suffered in the course of employment.

A New York court advances still another rule in determining whether sunstroke is compensable or not in a case in which the deceased employee, Campbell, died of heat prostration after a prolonged period of excessive heat. He was a driver of a brewery wagon and had delivered ninety-one half barrels of beer between seven o'clock in the morning and three o'clock in the afternoon. He stopped his horses about this hour, alighted from his wagon and after walking around for about ten minutes, he dropped dead. The commission which investigated this case found that Campbell's death was an accidental injury which arose in the course of employment but that it did not arise out of the employment, therefore no compensation could be allowed.¹⁸

In examining the English decisions we find a clear cut distinction made between prostration caused by the rays of the sun and prostration caused by artificial heat. The former cases deny compensation while in the latter, the employment is considered as the source of the injury. The leading English case granting compensation from death arising out of and in the course of employment is *Ismay, Imri and Co. v. Williamson*.¹⁹ A workman, who was starving, applied to a mission for work and obtained employment raking ashes from a furnace. He fell down in a faint while working at this job and died later in the day. Because of his low vitality and the heat of his occupation his case was deemed compensable. A plumber, also a man of impaired vitality, was at work laying and joining pipes in a trench along a road when he was overcome by sunstroke, but his death was held not an accident arising out of his employment.²⁰ Referring once again to the question of the heat of the sun's rays we shall notice two English cases: A seaman on duty on a blackened steel deck for some hours in the blazing sun with no shade, and the temperature standing at 108° to 120°, suffered blindness which was held compensable,²¹ and

¹⁶ *Kutschman v. Briggs Mfg. Co.*, 197 Mich. 146, 163 N. W. 933 (1917).

¹⁷ *Doyle v. City of Saginaw*, 258 Mich. 467, 243 N. W. 27 (1923).

¹⁸ *Campbell v. Clausen-Flannagan Brewery*, 183 N. Y. App. Div. 490, 171 N. Y. Supp. 522 (1918).

¹⁹ 77 L. J. C. P. 107, 1 B. W. C. C. 232 (1908).

²⁰ *Davies v. Gillespie*, 28 T. L. R. 6, 56 Sol. J. 11, 5 B. W. C. C. 64 (1911).

²¹ *Morgan v. S. S. Zenaida*, 25 T. L. R. 446, 2 B. W. C. C. 19 (1909).

a workman who was ordered to paint the side of a ship, on a hot day was seized by sunstroke, and the injury was deemed compensable because the direct and indirect rays of the sun on the water and the ship's side, created a greater than normal danger.²²

In summing up the various propositions advanced in our states and in England, we find that when the industry through the agency of man combines with the natural elements to produce an employee's injury this accidental injury is regarded as compensable. It is clear that the injury should be charged to industrial hazards but it is an open question whether the industry should be charged with injuries resulting from the so called "acts of God." If every instance of heat-stroke that occurs during working hours is compensable, benefits under the compensation acts are mere equivalents of benefits under ordinary health insurance policies, and the door is opened to interpreting said acts as a kind of general social insurance.²³

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RENOI IN AMERICA.—The problem of *renvoi* is stated by Lorenzen to be this: "Whether the rules of the form should be interpreted as adopting the foreign law in its totality, including its rules of the conflicts of law, or whether they should be deemed to incorporate only the foreign *internal* law."¹ Or, in the words of Schreiber, "When the Conflict of Laws rule of the forum refers a jural matter to a foreign law for decision, is the reference to the corresponding rule of the Conflict of Law of that foreign law, or is the reference to the corresponding rule of internal rules of law of the foreign system; i.e., to the totality of the foreign law, minus its Conflict of Laws rules?"² A literal translation of the word *renvoi* means "sending" before a court. It has two classifications: (a) *remission*, or reference back to the law of the forum, and (b) *transmission* or reference *on* by the law of the forum.

When the court of the forum does adopt the foreign law in its totality, including its conflict of laws law, it is using *renvoi*. What actually happens is that the matter is remitted back to the law of the forum by the conflict of laws rules of the foreign jurisdiction.

²² Robson, *Eckford & Co., Ltd. v. Blakey*, 49 Sc. L. R. 254, 5 B. W. C. C. 536 (1912).

²³ *Ciocca v. National Sugar Refining Co.*, 124 N. J. L. 329, 12 A. (2d) 130 (1940).

¹ Lorenzen, *The Problem of Renvoi*, 20 *Columbia L. Rev.* 247 (1920).

² Schreiber, *The Doctrine of Renvoi in Anglo American Law*.

The *Datur* case³ constitutes an instance where the Michigan court of the forum applied *renvoi*. The facts were as follows:

A Michigan married woman, Clara A. Price, signed a note in Michigan, as surety for her husband, mailed the note to Chicago where subsequently a loan was made in Illinois by an Illinois corporation. Suit arose in Michigan on the security note and the question was whether the woman was liable. To understand fully how the court arrived at its decision it is well here to examine the law of both Illinois and Michigan as it existed at the time of the *Datur* case:

Illinois Law

1. Illinois *Internal* law says that a woman *has* the capacity to sign notes binding her separate estate.
2. Illinois *Conflicts of Laws* law says that the capacity of a woman to contract is governed by the law of the *place of execution* of the instrument. *Burr v. Beckler*.⁴

Michigan Law

3. Michigan *Internal* law says that a woman *has not* the capacity to sign notes binding her separate estate.
4. Michigan *Conflicts of Laws* law says that the capacity of a woman to contract is governed by the laws of the *place of contracting*.

Now the first thing that the court did was to ascertain from the facts that the *place of contracting* was Illinois, where the loan was made. The next thing it did was to refer to the law of Illinois, but it referred to the *Conflict of Laws* law of Illinois (No. 2 above). This bounced the matter right back into Michigan because, by analogy to the Illinois case of *Burr v. Beckler, supra*, Michigan was the *place of execution*. At this point the Michigan court applied the *Internal law* of Michigan (No. 3 above), and decided the case in favor of Clara A. Price. She was not liable. The Michigan court used *renvoi* when it referred to the *Conflict of Laws* law of Illinois (No. 2 above) instead of to the *Internal law* of Illinois (No. 1 above).

There was a very strong dissent to the case by Justices Sharpe and Butzel. They claimed that the law of the forum should control on the question of *lex loci contractus*. They maintain that it was absurd for the Michigan court to use the Illinois case of *Burr v. Beckler, supra*, as an indication that the place of execution was Michigan. Justice Butzel said, "Were we not to be controlled by our own law and obliged each time to ascertain what a foreign state would have held under similar circumstances, our decisions would be in hopeless confusion, and it would be necessary each time to examine the decisions

³ *University of Chicago v. Datur*, 277 Mich. 658, 270 N. W. 175 (1936).

⁴ 264 Ill. 230, 106 N. E. 206 (1914).

of other states in determining the *lex loci contractus*." The great weight of authority in this country is certainly in accordance with this view of Butzel. See *The Theory of Qualifications and Conflict of Laws*, Professor Lorenzen,⁵ in which he says, "Where two states, agree for example that the place of performance governs the validity of a contract but they differ as to what constitutes place of performance, the only way out is for the law of the forum to decide the place of performance." It would be the same with the place of contracting: "The law of the forum controls in determining the *lex loci contractus* of a contract made by correspondence," Lorenzen.⁵

It seems, therefore, that it would have been better if Michigan had referred itself only to the Internal Law of Illinois and hence have decided that Clara A. Price was liable, under Illinois Internal Law. There would have been no *renvoi* then.

Another objection to Michigan's use of the *renvoi* would be that once Michigan had decided to apply the Conflict of Laws rule of Illinois, why should it not, on the return to Michigan law from Illinois, be consistent and apply the Michigan Conflict of Laws rule thus referring it back to Illinois again? To be consistent this would be the only alternative and the result would be an endless tossing of the question back and forth, a *circulus inextricabilis*.

A further observation upon the *Datur* case reveals two interesting facts:

1. Had the Michigan court rejected the *renvoi* doctrine, judgment would have been *against* the woman.
2. If the suit had been brought in the Illinois courts, and they too rejected *renvoi*, judgment would be *for* the woman.

In the case of *Wooley v. Lyon*⁶ the court used *renvoi* as an excuse to bolster up and support its decision: "If, therefore as counsel contend, the law of the place where the indorsement was made, the law of Illinois, governs the sufficiency of the notice of dishonor in this case, that notice was good, for it was sufficient under the law of Canada where the note was payable, and the law of Illinois was that in a case of this character the law of the place where the note was payable governed the time and manner of giving the notice of dishonor."

The case that without doubt has led the trend against *renvoi* in the United States is that of the *Matter of Tallmadge*.⁷ Held in the Surrogate's court of New York, it clearly disposed of the matter of *renvoi* in the State of New York and served as a model for the other states to follow when similar situations presented themselves. The facts were

⁵ 20 Columbia L. Rev. 247 (1920).

⁶ 117 Ill. 248, 250 N. E. 885.

⁷ 109 Misc. 698, 181 N. Y. S. 336, Surr. Ct. (1919).

these: Coster Chadwick died a citizen of New York, domiciled in France. Under the French Civil Code the testator's aunt, Mrs. Tallmadge, would receive the entire residuary estate but if the will were construed under New York law, the aunt would share with the testator's brother. Section 47 of the New York Decedent Estate Law requires that the disposition of a decedent's property be governed by the law of his domicile; but an expert on the French law testified that the French courts would apply the national law of the testator, which in this case would be the law of New York.

The referee, Winthrop, said, "The courts and writers sanctioning *renvoi* would insist that in such a case as that at bar the New York court, acting under section 47, must apply the French law, meaning not the territorial law of France, but the totality of French law, including its method of determining questions of conflict of laws, and that therefore it will apply the New York law, for the French view of the conflict of laws refers the construction of the will to the national law of the testator. Under this view the New York court would accept the reference." And he goes on to say, "But logically, why should the inquiry stop with the internal law of New York on the reference from the French court?" . . . "The *renvoi* doctrine is not supported by reason. It inconsistently requires either the application of internal New York law after the reference by the French law, although the first reference had been from New York to the French Conflict of Laws rule, or the endless reference back and forth, which has been called a *circulus inextricabilis*."

Winthrop made the point that the New York court was created and exists for the purpose of enforcing the New York law, including the state's own rules as to the Conflict of Laws. And further "If *renvoi* be no part of the New York law, even though it be a part of the law of France, a New York court will apply French internal or territorial law according to the provisions of section 47." He then went on to say that in his opinion *renvoi* is no part of New York law and that therefore the French internal or territorial law should apply to the case and the entire estate should go to Mrs. Tallmadge. In analyzing the reasons for his decision he said, "The naked question is that stated by Labbe, 'When a lawgiver abandons to a foreign system of law the determination of a legal question, does he ask this system of law to decide what law is applicable, or does he seek in this system the solution which the legal question ought to receive?'" And, "As already stated, it is a part of the Anglo-Saxon jurisprudence that a will be construed according to the law of testator's domicile and this principle is embodied in the section 47 of the Decedent Estate Law. This is the New York rule on the Conflict of Laws in reference to this question. For a court to hold that the Legislature meant that the French Conflict of Laws rule is to apply the New York internal law to be en-