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NOTES

CONTRACTS—CONSTRUCTION AND OPERATION—OPTION TO RENEW OR TERMINATE.—The rights which accrue under contracts in which there is an option to terminate will be treated in this note. The problem has many phases and for the sake of convenience the contracts will be considered first as to the legal rights arising from them and then as to the equitable rights.

In *Louisville Tobacco Warehouse Co. v. Zeigler*,[1] the plaintiff was employed to purchase tobacco for the defendant, and, by the terms of the contract, the defendant had the right to control the amount to be purchased. The defendant terminated the contract a short time later and this action for damages was brought. A five thousand dollar award in the lower court was reversed by the Kentucky Court of Appeals because the damages claimed were not actually incurred under the contract. The court held that the defendant had the right of termination at pleasure which, if exercised, as it was, destroyed the plaintiff's right

[1] 196 Ky. L. Rep. 414, 244 S. W. 899 (1922).

to enforce liability for the unexecuted portions. The court states the rule as follows: "A power, reserved to one of the parties to terminate a contract at any time according to his pleasure, destroys its mutuality and renders all unaffected portions of it ineffectual." Thus, the court holds that where the contract is one in which one party has the right to terminate, damages may not be had for the breach of any unexecuted portion of it, although damages may be recovered for unpaid amounts accruing under the executed part of the contract.

The same rule is announced a little more fully in a recent Kentucky case, *Ford Motor Co. v. Alexander Motor Co.*[2] In this case, which involved a dealer contract, both parties had the right to terminate at will upon giving written notice. The Ford Co. gave notice of its intention to terminate and now the Alexander Co. sues, claiming that this was a breach. The court refused to allow damages, since all damages claimed arose after the Ford Co. had exercised its right to terminate. After holding that the parties may lawfully enter into a contract terminable at will, the court declared that contracts terminable at will are binding on both parties until the right to cancel is exercised, but that after this right is exercised, no more rights and liabilities can spring from the agreement. The rule thus laid down seems to be the prevailing one in regard to the rights at law under one of these terminable contracts. See *Maddox Motor Co. v. Ford Motor Co.*,[3] a Texas case in which damages were allowed.

There arises, in connection with the problem of the effect on a contract of the option to terminate, the correlative problem of consideration. This problem is taken up in the case of *Meurer Steel Barrel Co. v. Martin.*[4] Here the defendant had been granted a license to use the plaintiff's patent for $5,000 a year. The plaintiff had the right to terminate the license upon giving sixty days notice. In this case, the plaintiff is suing for $10,000 for failure to pay two of the yearly installments. As a defense, the defendant maintains that the plaintiff's right to terminate rendered the contract void for want of mutuality. A decision of the lower court upholding this defense was reversed by the Circuit Court, the latter holding that a suit at law for breach of contract could be maintained. The rule was stated thus:

> "There is a recognized difference in law between the validity of a contract containing a provision for its termination by notice and the enforcement of such a contract in equity. The cases hold generally that a contract terminable on notice (if otherwise valid) is not for that reason void for want of mutuality, and for breach thereof an action will lie at law, although the same contract may not, because of such provision, be enforceable in equity."

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2 233 Ky. L. Rep. 16, 2 S. W. (2d) 1031 (1928).
3 23 S. W. (2d) 333 (Tex. 1930).
4 1 Fed. (2d) 687 (1924).

As authority the court cites: *McCall v. Wright*;[5] *Philadelphia Ball Club v. Lajorie*;[6] *Cincinnati Exhibition Co. v. Marsano*.[7] In all of these cases, which were in equity, terminable contracts were held to be valid.

From the *Meurer* case, it will be noticed that whether a suit at law may be had on one of these terminable contracts for damages for breach thereof depends, not on mutuality of rights under the contract, but upon whether the contract itself is valid. And this brings in the problem of consideration. If, by the terms of the contract one party binds himself to do nothing, the contract is void and consequently a suit at law may not be maintained thereon for a breach. The obvious basis for this rule is that one of the essentials of a valid contract, namely consideration, is missing. And a terminable contract which is so worded as to negative any consideration moving from the party having the right to terminate is void at law and unenforceable at equity. The *Meurer* case and numerous citations are authorities for this rule. It is thus stated in *Velie Motor Car Co. v. Kopmeir*,[8] and *Bernstein v. W. B. Mfg. Co.*:[9] "If for any reason the promise of one party is not binding upon him, it is not sufficient consideration for the promise of the other and the contract is void for want of consideration."

The relation between the right to terminate and consideration is roughly pointed out in the above quotation from the *Velie* case. Numerous problems may enter at this point. In the *Meurer* case, the option to terminate was not absolute, for the plaintiff was required to give a sixty day notice. Hence, as far as that contract was concerned, there was consideration moving from the plaintiff for he promised to continue the contract for at least sixty days. But the same result will generally be found where immediate notice may be given: the contracts are still valid, for the parties promise to perform until the option is exercised.[10] Thus it seems that the length of the notice does not make a difference as to the validity of these terminable contracts, although rights accruing under a contract requiring a thirty day notice before termination naturally may differ from those in which the right to terminate may be exercised immediately after giving notice.

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5 198 N. Y. 143, 91 N. E. 576, 31 L. R. A. (N. S.) 249 (1910).

6 202 Pa. 210, 51 A. 973, 58 L. R. A. 227 (1902).

7 216 Fed. 269 (1914).

8 194 Fed. 324 (1912).

9 238 Mass. 589, 131 N. E. 200 (1921).

10 Ford Motor Co. v. Alexander Motor Co., 233 Ky. L. R. 16, 2 S. W. (2d) 1131 (1928); Louisville Tobacco Co. v. Zeigler, 196 Ky. L. R. 414, 244 S. W. 899 (1922); Maddox Motor Co. v. Ford Motor Co., 23 S. W. (2d) 333 (Tex. 1930).

So far only the legal aspects of the terminable contract have been considered. Next a brief treatment will be made of the equitable angle of these contracts. It may be announced as a general principle that the equitable forms of relief, specific performance and restraint of breach, will not be given a party to a terminable contract.[11] The reason the courts usually give is that one party could nullify any relief granted by exercising his power to terminate. And even though the person having the option is the one asking for equitable aid, the courts still refuse to enforce such contracts. In other words, neither party can enforce such a contract. In *Marble Co. v. Ripley*,[12] the court said: "When a contract is incapable of being enforced against one party, that party is incapable of enforcing it specifically against the other." At the basis of the rule is the equitable maxim, "A court of equity never interferes when the power of revocation exists." [13]

The problem is not so simple as the maxim infers. Some courts are reluctant to flatly accept the maxim. In the case of *Thompson v. Shell Petroleum Corp.*[14] there was a lease for five years giving the lessee the right to terminate upon giving the lessor fifteen days notice and paying him one hundred dollars. Thompson, the lessor, threatens to breach the lease and the Shell Co. asks the court to restrain the breach. The court granted the relief, upholding the contract. It followed the rule of *Singer Sewing Machine Co. v. Buttonhole Co.*[15] holding that the objection of lack of mutuality would not prevent the enforcement of the contract "so long as it was actually kept alive by the plaintiff's continued performance." That this result is the truly equitable one and therefore the desirable one is very probable. The plaintiff had made considerable investment and consequently evinced an intention to continue. *Philadelphia Ball Club v. Lajorie*,[16] and *Cincinnati Exhibition Co. v. Marsano*,[17] are in accord. There is, however, a split of authority on the subject of granting equitable relief in the terminable contracts. Where both parties have the right to terminate at will as in *Peru Wheel Co. v. Union Coal Co.*,[18] the court will probably deny relief, for one of the parties could turn around and nullify the court's decree by exercising

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11 Peru Wheel Co. v. Union Coal Co., 295 Ill. App. 276, 14 N. E. (2d) 998 (1937); Marble Co. v. Ripley, 77 U. S. 339 (1870).

12 77 U. S. 339 (1870).

13 Southern Express Co. v. Western N. C. R. Co., 99 U. S. 191, 25 L. Ed. 319 (1879).

14 130 Fla. 652, 178 So. 413 (1938).

15 22 Fed. Cas. 220, No. 12, 904.

16 202 Pa. 210, 51 A. 973 (1902).

17 216 Fed. 269 (1914).

18 295 Ill. App. 276, 14 N. E. (2d) 998 (1937).

the option to terminate. But where the party trying to enforce it is the only one enjoying the option, some courts and authorities are in favor of granting relief. Like the Florida court in the *Shell Co.* case, Mr. Pomeroy is in favor of upholding the contract. In his work on Equity Jurisprudence Mr. Pomeroy believes that the rule should be that as long as the plaintiff shows an intention of continuing the contract he should be given that privilege.[19] He says that the opposite result reached by courts has come from a superficial, blind application of the mutuality test. A digest of what Mr. Pomeroy has to say on the subject, numerous citations on both sides of the question, and a valuable quotation from 32 C. J. 297, are to be found in the *Shell Co.* case. It may be restated, however, that the general rule is as stated in the Supreme Court case: Contracts entitling one or both parties to terminate will not be given equitable relief.

There are certain classes of contracts in which the problem most frequently arises. One of the most numerous is the requirements contract in which situation a buyer has usually bargained with a seller of goods to take some of those goods, or all of them, or as much as he needs in his business. Courts usually hold these contracts to be good if the parties bind themselves to do something. In other words, there must be consideration. If the contract is so worded that the buyer will purchase all the needs he may desire, the contract is said to be "lacking in mutuality" and therefore unenforceable.[20]

Contracts indefinite as to time, such as lease and service contracts, are frequently interpreted as contracts in which one or both of the parties has the option to terminate at will. A Federal district court of Pennsylvania held in *Bassick Mfg. Co. v. Riley,*[21] that a contract between a manufacturer and a distributor for no definite time is terminable at will. A similar result was announced in *Dover Copper Mining Co. v. Doenges;*[22] *Warden v. Hinds;*[23] *American Merchant Marine Ins. Co. v. Letton;*[24] *Boatright v. Stenite Radio Corp.*[25] The *Stenite* case mentioned that the fact that the rate of pay is fixed at a week, month, or year does not, in the absence of a stipulated time, alter the terminability of the contract. Similarly in regard to leases, absence of a statement as to the length of the tenancy renders the lease terminable at will. It was held in *Norman v. Morehouse* [26] that a lease of certain premises for as long as any of the defendants should be in a certain

19 5 POMEROY'S EQUITY JURISPRUDENCE, 2d ed. 744.

20 Peru Wheel Co. v. Union Coal Co., 295 Ill. App. 276, 14 N. E. (2d) 998 (1937). Also see: 14 A. L. R. 1301, 74 A. L. R. 467, 11 N. D. L. 227.

21 9 Fed. (2d) 138 (1925).

22 40 Ariz. 349, 12 P (2d) 288 (1932).

23 163 Fed. 201, 25 L. R. A. (N. S.) 529 (1908).

24 9 Fed. (2d) 799 (1926).

25 46 Fed. (2d) 385 (1931).

26 243 S. W. 110 (Tex. 1932).

business was a tenancy at will and terminable at the option of either party. In *Barman v. Vinzen* [27] the court decided that a covenant at the end of a six year lease giving the lessee the option to renew the lease was unenforceable because of the uncertainty of time as to length of the renewal. Once the contract has been classified as a lease or service or requirement contract that is terminable at the will of one or both of the parties, the rights accruing to those parties may be determined from the principles set out in the first part of the paper.

William P. Mahoney.

DOUBLE JEOPARDY — MODERN TENDENCY TOWARDS INCREASED LIBERALIZATION OF THE RULE.—The doctrine of former jeopardy is a guarantee provided for not only in the fifth amendment to the Constitution of the United States, but also in all state constitutions: protection is thus offered in both federal and state jurisdictions. "Jeopardy is said to attach when a legally constituted jury charged with the deliveration of the accused has been impaneled and sworn." [1]

The fifth amendment reads: " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ." [2] Therefore once jeopardy attaches a defendant may not be retried for the same offense.

The history of the doctrine is indeed quite interesting. It has passed through various stages of liberalization and no doubt will pass through further stages if justice indicates a need for such relaxation.

At ancient Common Law the rule was extremely stringent, especially so in cases of life or member. If for any reason the jury, having been properly impaneled, was discharged by the court, the plea of double jeopardy would be available to the defendant when the new trial was called. Such a plea would invariably be successful.[3] It has never been decided as to whether this ruling would be carried to its full, if not ridiculous extent, which, as one case put it, entailed: " . . . the confinement of jury till death if they did not agree." [4] However as the number of capital offenses decreased and the law became more humanitarian in its punishment, this strict rule became correspondingly less absolute, and in the time of Blackstone it had relaxed sufficiently to

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27 16 N. Y. S. 342 (1891).

1 Scott v. State, 110 Ala. 48, 20 So. 468 (1896); Harp v. State, 59 Ark. 113, 26 S. W. 714 (1894); Ex parte Fenton, 77 Cal. 183, 19 Pac. 267 (1888); Joy v. State, 14 Ind. 139 (1860).

2 U. S. Const. Amend. V.

3 Co. Litt. 277.

4 Winsor v. Regina, L. R. 1 Q. B. 394 (1896).

recognize that juries in criminal cases might be discharged in circumstances of "evident necessity".[5] With the years "evident necessity" included an increasing number of specific justifications.

It is now quite generally conceded that in presence of certain circumstances amounting to necessity the court may at his discretion, halt a trial even in capital cases. These circumstances fall under several headings: 1. The consent of the respondent.[6] 2. Illness of the court,[7] a member of the jury [8] or of the respondent.[9] 3. The absenting from the trial of a member of the jury [10] or of the respondent.[11] 4. Where the term of the court is set and its expiration is reached before the verdict.[12] 5. Where the jury cannot agree.[13]

It may be seen that these situations are purely physical. There are also several hazily defined moral conditions which also have been recognized as justifying dismissal of the jury before verdict, so that a plea of former jeopardy will not prevail at the new trial.[14] This paper shall be limited to a phase of this latter classification: the question of whether circumstances tending to prejudice the jury, so sufficiently warrant a dismissal of the panel, over defendant's objection and before verdict is returned, as to make a later plea of double jeopardy unavailable. The dilemma is somewhat novel and there is a comparative scarcity of litigation on the subject, however its perplexities as a problem do not render it less interesting as a stepping off point toward a more intelligent administration of justice.

Two recent cases indicate a backward tendency of the judiciary passing on them, and they do not seem to be in accord with the preponderance of recent judicial weight. The first of these, *Armentrout v. State*,[15] a recent Indiana case is especially impractical. In it the special judge in a murder trial, dismissed the jury after the latter had been properly impaneled and sworn. It appears that the defendant's counsel in his opening remarks to the jury commented on the unwillingness of the complaining witness to testify against her father. He said, to the jury, in effect, that she had been intimidated by the State and was testifying out of fear for her own safety and well being. The court told the jury to disregard the references and warned the defendant that he

5 4 BLACKSTONE'S COMMENTARIES 361, Lewis's Edition (1897).

6 People v. Nash, 15 Cal. App. 320, 114 Pac. 784 (1911).

7 State v. Vernado, 124 La. 711, 50 So. 661 (1909).

8 Mixon v. State, 55 Ala. 129 (1876).

9 Fails v. State, 60 Fla. 8, 53 So. 612 (1910).

10 People v. Ross, 85 Cal. 383, 24 Pac. 789 (1890).

11 State v. Battle, 7 Ala. 259 (1845).

12 Wright v. State, 5 Ind. 290 (1854).

13 Lester v. State, 33 Ga. 329 (1862).

14 Nolan v. State, 55 Ga. 521 (1875); Andrews v. State, 174 Ala. 11, 56 So. 998 (1911).

15 15 N. E. (2d) 363, Ind. (1937).

would call a mistrial if counsel's remarks continued along this prejudicial line. Counsel refused to desist and the court dismissed the jury over the objection of the defendant. On appeal of a conviction in the second trial it was held that the dismissal constituted former jeopardy, and the defendant was freed.

A similar ruling is to be found in Utah, where in a recent case[16] the court becoming incensed over defendant counsel's insistence that the court's remarks be included in the record and fearing that some of his own comment might influence the jury, called a mistrial. A conviction was obtained in the second trial, and on appeal it was held that the court was not correct in dismissing the jury. The reasons for his action were held to be arbitrary and hence the defendant's plea of double jeopardy was sustained.

The first of these cases would seem to contradict principles of justice in allowing the guilty party to take advantage of his own misconduct, and by such advantage escape further trial for the offense. Perhaps it would have been wiser to uphold the judge's discretion in both appeals.

The federal courts were the first to allow judicial discretion in regard to jury dismissal. In *Simmons v. United States*[17] the defendant's counsel wrote a letter, and this letter was read by a member of the jury. It was of such a nature as to perhaps influence the decision. The judge indeed believed such an effect quite possible and dismissed the panel. On review before the United States Supreme Court on the plea of double-jeopardy it was held that the circumstances created such a need that the judge was justified in dismissing the jury, since he believed it impossible for them, after seeing the letter to render an independent and unbiased verdict. For this reason the double jeopardy appeal from the retrial was dismissed.

Perhaps the first state case exhibiting the modern tendency towards a liberalized policy of judicial discretion is the New York case, *People v. Fishman.*[18] In this case it was held that a conversation between the foreman of the jury and the complaining witness was a sufficient ground for the judge's dismissal of the jury before verdict. On the appeal of the second trial it was held that there was no double jeopardy amounting to an acquittal.

Similarly Maine relaxed its rule in 1919. In *Maine v. Slorah,*[19] the panel was permitted to view the scene of the murder, and the defendant who accompanied the jury, as he approached the locality exclaimed, "Take me away or I will go insane again!" The judge fearing this con-

16 State v. Whitman, 93 Utah 557, 74 Pac. (2d) 696 (1937).

17 142 U. S. 148 (1891).

18 64 Misc. Rep. 256, 119 N. Y. S. 89 (1909).

19 118 Me. 203, 106 Atl. 768 (1919).

duct on the part of the defendant would prejudice the jury against him, dismissed the jury. On appeal it was held that the judge had properly exercised his discretion and there was no former jeopardy even though the jury had been properly impaneled and sworn, and the defendant objected to the dismissal.

It will be noted that the cases of these states took a broader view in 1909 and 1919 respectively than the Indiana and Utah cases do today, and are perhaps less susceptible to criticism.

Two Michigan cases in 1925 indicate that this state falls in line with the new judicial policy. In *People v. Diamond*[20] the jury had been sworn and charged with delivery, and during a lunch period two of its members ate with the daughter of one of the defendants. During the meal remarks involving the case passed between them. Upon hearing of the irregularity the judge discharged the jury. Upon a retrial and subsequent appeal therefrom, it was held that the court did not abuse its discretion in dismissing the jury, and the defendants were not entitled to their plea of double-jeopardy. The rule of the state was declared to be that unless the judge clearly abused his discretion in the matter there could be no valid plea of double jeopardy, on appeal from the retrial.

The counsel for the defendant in the second case, *People v. Davis*,[21] read testimony given at a preliminary hearing which exonerated others allegedly involved in the manslaughter of which the present defendant was one of the accused. Though the defendant was not therein exonerated, in reading it counsel gave the jury that impression. After ascertaining that this was the inference of the jury, the court called a mistrial. It was held that in so doing he did not abuse his sound discretion in the matter and therefore the defendant's plea of double jeopardy was invalid.

By inference we may say that South Carolina reached a similar rule in 1930 when in a trial in that jurisdiction,[22] the indictment was accidentally lost in the jury room. The judge, hearing of this, declared a mistrial even though the jury had already reached a verdict. In the appeal of the retrial it was held that the judge had abused his discretion in dismissing the jury for this cause, and the defendant was set free. We may infer from the court's statement that the trial judge had abused his discretion that he *had* at least a limited discretion, although he did abuse it in the particular instance.

Illinois first applied the liberal rule in a decision of 1931. In *People v. Simos*[23] after the jury had been sworn in with the knowledge that one of its members had known George Carmichael, formerly associ-

20 231 Mich. 484, 204 N. W. 105 (1925).
21 233 Mich. 29, 206 N. W. 522 (1925).
22 State v. Bilton, 156 S. C. 324, 153 S. E. 269 (1930).
23 345 Ill. 226, 178 N. E. 188 (1931).

ated with the district attorney's office, the latter walked in and slapped one of the defendants on the back, shook hands with him, and turning to his acquaintance in the jury-box waved to him. Though this conduct was not shown in any way to be the fault of the defendant's, the court at the request of the prosecution called a mistrial. It was held that the circumstances justified the judge in declaring a mistrial, and that he had not misused his discretion in so declaring. The rule stated in the opinion is that a court may discharge the jury whenever in the court's opinion there is manifest necessity for such act or the ends of public justice would otherwise be defeated.

The federal rule first laid down in 1891 [24] was reaffirmed in 1937 in *United States v. Giles*.[25] A federal judge, commenting on a case he was trying, involving a charge of fraudulent administration of the Federal Emergency Relief Act, said that he questioned the good faith of the prosecution and queried as to why more had not been prosecuted. He then recessed the court and the newspapers gave his statements publicity. Seeing the effect he dismissed the jury. The reviewing court held that he did not abuse his discretion and stated the rule in federal courts as being: "The Federal Courts may discharge a jury and order a new trial by another jury whenever in their opinion there is a manifest necessity for the act, or whenever the ends of public justice would otherwise be defeated."

It would seem from the cases of recent date that they point to an increasing emphasis on judicial discretion as to what constitutes necessity for discharging a jury. The general rule would seem to be that the discretion of the trial judge in such matters will not be disturbed on appeal unless there exists an obvious abuse of such discretion. More emphasis is put upon the preservation of justice and fewer cases of successfully raised technicalities are evidenced. This is undoubtedly a healthy tendency since the laws of today are much less stringent as to punishment than in the past, and instances of pardon and mitigation of punishment are much less infrequent.

Jack Hynes.

LABOR ESPIONAGE.—Section (8) of the National Labor Relations Act provides:

> "It shall be an unfair labor practice for an employer:
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> 1. To interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section (7).
>
> Section 7. Employees shall have the right to form, join, or assist labor organizations, to bargain collectively through rep-

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24 *Supra* note 17.

25 19 Fed. Sup. 1009 (1937).

> resentatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." [1]

Our question is whether or not labor espionage is an unfair labor practice. By labor espionage we do not mean methods of intimidation such as used by the "strike breakers", but rather a system whereby an employer learns of all the activities of the employee by making use of undercover men, special agents, operatives, spies, etc.

An investigation by the Senate Sub-committee on Education and Labor revealed that such a system, according to the facts disclosed, is repugnant to American principles. This investigation, however, sought and disclosed but one phase of the activity, that is, the interference with the right to organize. One group, and the only one from whom the committee obtained a complete report, had 1,288 of its agents scattered throughout industry as members of unions. In some incidents their agents held important executive positions. From such facts as these it is not a wonder that capital maintained its control and influence over labor.

The National Labor Relations Board has ruled that such a practice is illegal as a violation of Section 8 (1) of the Act. In each instance the facts prove beyond a doubt that the activity was directed against the rights of labor to organize. In several instances the employees were discharged for union activity as a result of the reports rendered by undercover agents.[2] So far there has been only one case in which the board has refused to entertain charges of espionage, and that has been on the ground of lack of evidence.[3] Spying in any form is condemned by the rulings of the board. *In re Friedman* and *In re Amalgamated Clothing Workers of America,*[4] the employer and the superintendent were observing a union meeting in order to see who attended; this was considered illegal. Again, *In re Protective Motor Service Co.*[5] and *In re Freuhauf Trailer Co.,*[6] the ruling made illegal the attendance at a union meeting in disguise.

Upon construction therefore, of Section 8 (1) of the National Labor Relations Act, we may say that labor espionage is unfair in so far as it will tend to interfere, or coerce the employee desiring to join a labor

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1 U. S. C. A. 29 § 157.

2 Agwilines, Inc. et al, 2 N. L. R. B. 1; aff'd 87 F. (2nd) 146 (1936); Consolidated Edison of N. Y., 4 N. L. R. B., No. 10 (1937); Consumers Research, Inc. 2 N. L. R. B. 57 (1936); Crucible Steel Co., 2 N. L. R. B. 298 (1936); Federal Bearings Co., Inc., 4 N. L. R. B., No. 66 (1937); Knoxville Glove Co., 5 N. L. R. B., No. 99 (1938); Washington Manufacturing Co., 4 N. L. R. B., No. 120 (1938).

3 Uxbridge Worsted Co., Inc., 6 N. L. R. B. No. 109 (1938).

4 1 N. L. R. B. 411 (1936).

5 1 N. L. R. B. 639 (1936).

6 1 N. L. R. B. 880 (1936).

organization. At any rate, until there is further legislation on the subject there does not appear to be any further objection to it.

In considering such a topic we must endeavor to understand just what is public opinion. The very name "labor spy" seems to connote to some persons something low and degrading almost verging on the occupation of degenerates. This is due to the fact that the truth of the situation is usually kept from the public view either by purpose or by necessity. If we are to consider as public opinion the various articles and other sources of information that appear, then such a system is opposed to our public policy.

Perhaps it would be well to investigate a little further into the history of labor espionage. The practice started in the United States about 1870 when the Pinkertons were hired to investigate the activities of the Molly Maguires.[7] This organization was originally a group for the protection of the Irish immigrants into this country. It was not long however, before it soon became the tool of a group of criminals. The members engaged in all kinds of crimes in order to obtain their end which was to have only members of their organization working in the mines of Pennsylvania. If one of their members was discharged, the leaders would immediately, by means of terrorism, force the foreman to take back that individual. Murder was a common occurrence and it was only by means of this system of undercover work that the evidence could be gathered to bring about a conviction of the leaders of this group. Many of us can recall the bombing of the home of ex-Governor Steunenberg of Idaho. Private agencies were again called upon to investigate, and they traced the origin of the crime into the inner circle of the Western Federation of Miners. Although there was not a conviction in the case, the leader of this group soon became a notorious figure and one of the executives of the *International Workers of the World.* The terrorism and destruction of both private and public property by this group is now history, but the primary cause of its disintegration was the work of labor spies.

In considering the articles against labor espionage and also the Senate Investigation, which was too limited in its scope, one should keep these occurrences and results in mind so as to be able to have a clearer insight of the subject.

The current works of today point with scorn at the amount of money spent by General Motors and other leading corporations[8] for use in espionage work, while others insist that these persons are thugs.[9] Such activity is called anti-unionism by R. R. R. Brooks in his work, *When*

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7 For a complete history of the Molly Maguires' downfall see ROWEN, PINKERTON'S A DETECTIVE DYNASTY.

8 For a complete list of these corporations see, *Report Senate Investigation Committee on Education and Labor*, pt. 3, p. 92.

9 DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY (1936), p. 638.

Labor Organizes. Mr. Brooks portrays for us the methods used by the organizer to obtain membership in a union. The usual method is to send an individual to a town and have him observe the possibilities of the situation. If in his judgment the people of the town are in favor of the union his task is very simple since those who are in favor of organization will convince the others of the benefits of unionism. The author fails to point out what methods were used to convince. If on the other hand he meets with disinterest on the part of the employees, he goes about the town making inquiries as to the disposition of certain individuals toward unionism. With those that are in favor of it and in sympathy with the movement, the organizer forms a working unit. There is a long period of undercover work and the membership is increased until finally a majority of the men are union employees. They bide their time until such time as they know that the employer will have to accede to their demands, for if they are not, a strike is called, perhaps in the middle of a large order. All this is considered as unionism and at no time is it thought to be an unfair practice toward the employer.

Works of this nature give us an excellent history of the struggle of labor against the unfair practices of capital but the story narrated is prejudicial to the opposite side. The Molly Maguires are mentioned along with the disintegration of the I. W. W. based upon evidence obtained by labor spies, which evidence was, we may infer from the author's statement, perjured.[10] There is no doubt that this attitude is partly the fault of capital and those engaged in the activity. But to publicize the system would do away with its usefulness and may also have other serious consequences.

Labor itself is naturally against such a system. So is capital against anything that seeks to curtail its activities. It is unfortunate that the parties concerned cannot trust each other. If they could, there would not be any need for the kind of activity that seeks to learn the secrets of either group. Some accept labor espionage as a necessary evil that must be contended with. As stated by Herman L. Weckler, vice-president and general manager of the De Soto Corporation, himself a one-time worker,

> "It (labor espionage) has been a practice that has been in existence for years. It is a practice that we have grown up with." [11]

Others maintain that the system creates a strained attitude between employer and employee. Still on the other hand, paternalistic corporations such as, The Endicott-Johnson Shoe Company of New York, General Electric Company, and Bell Telephone Company, all have made use of labor espionage at some time or other in their plants.[12]

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10 BROOKS, WHEN LABOR ORGANIZES, p. 50.

11 Report, Senate Subcommittee on Education and Labor, pt. 4, p. 1219.

12 ibid, pt. 3, p. 80.

It is possibly true that to permit the employer to have labor espionage at his disposal, such employer has too much advantage over labor. But as we have seen from what has gone before this was the only method that could be utilized at a time when labor was allegedly the cause of unrest. It is merely a case of fighting fire with fire. It is an unfortunate condition but nevertheless will exist until such time as legislation can be adopted that will bring about a more amiable relationship between the parties. The National Labor Relations Act has failed in this respect, and instead the Act has created a more antagonistic relationship as a result of its prejudicial characteristics toward the employer.

Our final consideration will be the morality of labor espionage. First of all, if the end is to prevent labor from organizing it cannot be morally justified since this would be helping to perpetuate unjust conditions and so itself be unjust. If the end is just, we may possibly find a moral justification. For example, if an employer utilizes a spy in order to learn of the activities of a labor group that seeks, by means of sabotage to destroy his business, then he has a just end in view. Surely no one will question the good obtained by the destruction of the Molly Maguires and the I. W. W., for in so doing an unjust condition was alleviated.

Given a just end we can say an activity is moral provided the means are just. The clandestine character of espionage lays it open to objection from a moral point of view, but this objection is to the individuals and not to spying as such. If the persons engaged in the practice make false reports, have an antagonistic attitude, seek with a vengeance to destroy another, then such a means is unjust and regardless of the end cannot be morally justified. On the other hand a spy seeking information for a just end may use every means that are at his disposal provided that they are not intrinsically wrong.

Some object to espionage on the grounds that it violates the right of secrecy. This is true if the organization is seeking a just end but once their end is wrong the organization is stripped of such right and therefore under given conditions there cannot be any violation of such right.

Labor espionage is an unfair labor practice both legally and morally in so far as it violates the right of labor to organize as defined by Section 8 (1) of the National Labor Relations Act. It is likewise unmoral if either the end or means are unjust. Finally, since the true facts of the system are entirely unknown we cannot definitely condemn the practice as a violation of public policy.

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