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Note and Comment

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NOTE AND COMMENT

BOYCOTT—CLAYTON ACT.—In *Duplex Printing Press Company* v. *Deering et al.* (January 3, 1921); 41 S. Ct. 172, the facts were:

The plaintiff, a Michigan corporation, manufactures at Battle Creek, and sells throughout the United States, especially in and around New York City, and abroad, very large, heavy and complicated newspaper printing presses. Purchasers furnish workmen, but ordinary mechanics alone are not competent to do this, and so they are supervised by specially skilled machinists furnished by plaintiffs. The plaintiffs have always operated on the "open shop" plan, without discrimination against union or non-union labor, either at its factory or at the place of installation of presses, but have not observed the eight-hour day nor the union scale of wages.

Defendants are members of the International Association of Machinists, and are sued individually and in various representative capacities. This association is unincorporated, with a membership of over sixty thousand in various districts and local unions throughout the United States. D and B are sued individually and as representatives of unincorporated District No. 15, composed of six local lodges of the association in New York City. N is

sued individually and as agent of unincorporated local lodge 328, of this district. Another N is sued individually and as agent of the unincorporated Riggers' Protective Union of workingmen engaged in handling, hauling and erecting machinery, with jurisdiction over all union men in that business in New York City.

It was also alleged that both the union machinists and union riggers were so affiliated with the Building Trades Council of New York City, including thirty different trades and over seventy-five thousand members, no one of which was allowed to work in or on a building where a non-union man was employed; that it was practically impossible to erect any building in New York where any non-union man was employed; that the whole machinery of the council would be put in operation to prevent plaintiff from exhibiting its presses at a pending exposition; that the Association of Machinists and its branches were combining and conspiring to monopolize the machinist's trade throughout the United States, and prevent the employment of any machinist who was not a member by any employer unless he would operate a closed shop and employ only machinists who were members of the union.

No one of the defendants is, or ever was, an employee of the plaintiff, nor a member or representative of any lodge or union not local to New York City.

The suit was to enjoin an alleged conspiracy by the defendants to restrain plaintiff's interstate commerce in printing presses, contrary to the common law and to the Sherman Anti-trust Act. It was begun before, but not heard until two years after, the Clayton Act was passed, the provisions of which were invoked by both parties.

Between 1909 and 1913 all of plaintiff's competitors had recognized and dealt with the Machinists' Union and conformed to its requests, but the plaintiff steadfastly refused. In 1913 two of these competitors notified the Union they should be obliged to terminate their agreements with it unless the plaintiff would accede to the union requirements. Because plaintiff refused to do this, eight months before suit was brought, the International Association of Machinists, with a view to compelling plaintiff to unionize its factory, enforce the "closed shop," adopt the eight-hour day and the union scale of wages, called a strike at plaintiff's factory. Only fourteen union machinists, including three who supervised the erection of presses by plaintiff's customers, left. This did not materially interfere with plaintiff's business and is not complained of in the suit.

The acts complained of relate solely to the interference with the installation and operation of presses by plaintiff's customers, by an elaborate, country-wide programme, adopted and carried out by the defendants and their organizations, to boycott plaintiff's products; by warning *customers* not to purchase, or, if purchased, not to install presses; by threatening them, if they did, with loss by strikes of their employees and sympathetic strikes in other trades; by notifying a *trucking company* not to haul presses, and threatening to incite their employees to strike if they did; by notifying

repair shops not to repair presses made by plaintiffs; by threatening *union men* with loss of union cards and being blacklisted as "scabs" if they helped install presses; by threatening an *exposition company* with a strike if it permitted plaintiff's presses to be exhibited; and, generally, by injuring and threatening to injure in various ways plaintiff's customers and prospective customers, and persons handling, hauling or installing the presses.

A typical illustration of the acts complained of is: The *Italian Herald* purchased a press; defendant D got to the *Herald* office before the press did; he told the *Herald* it had no right to purchase the press, and "we will make trouble as soon as it arrives"; this was made as promised; the trucking company was told to handle no more after that was delivered and it stopped; the owner of the building, then under construction, was told the union workmen on the building would be called off on a strike, and the completion of the building would be delayed, if the installation of the press by the *Herald* was not stopped. This was done until Saturday afternoon, night, and Sunday, when installation was completed while the union workmen were not at work on the building. Another illustration: Plaintiff sold a press to N in New York City. Y, a member of the Machinists' Union, was to supervise its installation; defendant D asked Y if he sided with the union or with the plaintiff; he replied he sided with the plaintiff, whereupon D said he would take his union card away from him and blacklist him as a "scab" all over the East. D then followed Y down to the office of the trucking company, where he told the truckman not to haul the machinery; it would make trouble for him if he did; the truckman accordingly refused. No actual violence was used or threatened, although some occurred which was not definitely connected with the defendants.

Manton, J., in the district court, after reviewing the testimony, says: "A careful reading of the entire record leads to the conclusion that if men have a right to strike and to endeavor to prevail upon others to fail to work for their employer, this is such a case as exemplifies careful, prudent, and lawful conduct on the part of employees. There is nothing in this record which warrants my granting the injunction."

On the other hand, Rogers, J., in the Circuit Court of Appeals, said the union men had been coerced by threats of taking away their cards and blacklisting them as "scabs"; customers have been intimidated by threats to call out men engaged in other trades or on uncompleted buildings; presses were not to be repaired, and threats to put them out of order were made; in one case defendants tried to obtain the cancellation of one of plaintiff's contracts.

These are fair illustrations of the different views persons—judges as well as others—take of the same facts in labor controversies. Some think the acts commendable; others think them criminal. See especially the variety of the views taken by the judges in the case of *Allen* v. *Flood*.[1]

Judge Manton of the district court held that under the common law of

[1] Allen v. Flood, [1898] A. C. 1; 1 MICH. LAW REV. p. 28. Also, DICEY: COMBINATION LAWS AS ILLUSTRATING THE RELATION BETWEEN LAW AND OPINION IN ENGLAND DURING THE NINETEENTH CENTURY, 17 HARV. LAW REV. 511, 532.

New York, where the suit was brought, the secondary boycott was lawful if not accompanied by malice, violence, or fraud,[2] and that there was no irreparable injury to any property right permitting an injunction under the Clayton Act.[3]

Hough, C. J., and Hand, D. J., in the Circuit Court of Appeals, held the acts were lawful under the Clayton Act; but Rogers, C. J., dissented. Hough and Rogers, C. JJ., held that by the common law of New York a secondary boycott was valid under the decisions referred to; but Rogers, C. J., claimed these only applied to a general boycott of all non-union mills and non-union-made materials, and not to a general boycott of a particular manufacturer for maintaining a closed shop, when others doing the same in the same industry were not so molested. Such was a malicious destruction of the good will of business of such manufacturers, and was not lawful in New York; and by the weight of authority elsewhere the boycott is unlawful.[4] Hough and Rogers, C. JJ., both were certain that the defendants "have agreed to do and attempted performance of the very thing pronounced unlawful under the Sherman Act by the Supreme Court before the Clayton Act."[5]

Manton, J., quoting from a former opinion of Hough, C. J., says: "I do not see any distinction which should make a legal difference between a lockout, a strike, and a boycott; all are voluntary abstentions from acts which normal persons usually perform for mutual benefits: in all, the reason for abstention is a determination to conquer by proving the endurance of the attack will outlast the resistance of the defense. For all, the New York law provides the same test: (1) Is the object legal? (2) Are the means used lawful?"

Rogers, C. J., however, says:[7] "A strike and a boycott are two quite distinct matters. A strike is an effort on the part of employees to obtain higher wages, or shorter hours, or a closed shop by stopping work at a preconcerted time. It is an attack made by employees upon their employer, by labor upon capital. But a boycott made by union labor against a product manufactured by non-union labor is an attack upon both labor and capital. It is the union employees on one side and non-union employees and the open shop employer on the other. The principles applicable to a boycott are not applicable to a strike. The strike in Battle Creek may be lawful, while the boycott of the product in New York may be unlawful. The use of the boycott is very generally held to be the use of unlawful means, and it is not material, where

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[2] Bossert v. Dhuy (1917), 221 N. Y. 342; Gill & Co. v. Doerr (D. C.), 214 Fed. 111.

[3] Oct. 15, 1914, C. 323, § 20, 38 St. L. 738; Comp. St. 1916, § 1243d.

[4] Citing State v. Stockford (1904), 77 Conn. 227; Purvis v. United Brotherhood of Carpenters (1906), 214 Pa. 348; State v. Stewart (1887), 59 Vt. 273; Wilson v. Henry (1908), 232 Ill. 389; Beck v. Railway & Union (1898), 118 Mich. 497; Quinn v. Leathem, [1901] A. C. 495.

[5] Loewe v. Lawlor (1908), 208 U. S. 274, 28 S. Ct. 301; Lawlor v. Loewe (1914), 235 U. S. 522, 35 S. Ct. 170.

[6] Gill Engraving Co. v. Doerr (C. C. 1914), 214 Fed. 111.

[7] 252 Fed. 733.

it is resorted to, whether the end sought—in this case the unionizing of the shops in Michigan—is lawful or not."

These statements are also typical of the difference among judges as to the legal aspects of labor controversies.

Both the District Court[8] and the Circuit Court of Appeals[9] held the Clayton Act forbade an injunction, although, but for that act, one should have been granted. The Supreme Court reversed this, Mr. Justice Pitney delivering the opinion for the majority, Mr. Justice Brandeis delivering a dissenting opinion concurred in by Holmes and Clarke, JJ.

All agreed that the lower courts were right in giving effect to the Clayton Act, but they disagreed as to whether the proper effect was given.

Justice Pitney held that Section 16 of the Clayton Act gave a private relief by injunction for threatened loss by a violation of the anti-trust laws, which a private party did not have before;[10] that, by Section 1 of that act, the Sherman Act was defined as an anti-trust law; that plaintiff's right to manufacture and sell presses in commerce is a property right; that unrestrained access to the channels of interstate commerce is necessary to its success; that the facts showed a widespread combination by defendants to obstruct this, resulting in substantial damage and threatening irreparable loss; that by the Sherman Act every conspiracy in restraint of trade or commerce among the states is illegal; that a conspiracy is a combination to accomplish an unlawful purpose, or a lawful purpose by unlawful means;[11] that the substance of the matters complained of constitute a *secondary boycott*—i e., a combination not merely to refrain, or peacefully to advise or persuade plaintiff's customers to refrain, from dealing with it ("primary boycott"), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from plaintiff through fear of loss to themselves if they deal with it; that the distinction between primary and secondary boycott is material in the proper construction of the Clayton Act, but it is only of minor importance whether either is unlawful at common law in determining the right to an injunction under the Sherman Act; that by the decisions under this act peaceable persuasion is as much prohibited as force or threats of force, and is not justified even if the participants have some object beneficial to themselves or their associates.[12]

The majority of the Circuit Court of Appeals held that under Section 20, in conjunction with Section 6 of the Clayton Act, no injunction could be granted. Section 6 provides: "The labor of a human being is not a com-

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[8] Duplex Printing Co. v. Deering (D. C., 1917), 247 Fed. 192.

[9] Duplex Printing Co. v. Deering (C. C. A., 1918), 252 Fed. 722.

[10] Paine Lumber Co. v. Neal (1917), 244 U. S. 459, 471.

[11] Pettibone v. United States (1892), 148 U. S. 197, 203. This is the usual definition ever since *The Tubwomen's Case*, in 1664, cited in King v. Journeyman Tailors (1721), 8 Mod. 11,320, and King v. Starling, 1 Keb. 650, 655, 675, 1 Sid. 174, pl. 6, 83 Eng. R. 1164, 1167, 3 COL. L. REV. 447 (1903).

[12] Loewe v. Lawlor (1908), 208 U. S. 274; Eastern States Lumber Asso. v. United States (1914), 234 U. S. 600; Lawlor v. Loewe (1915), 235 U. S. 522, 534.

modity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor organizations, instituted for the purposes of mutual help * * * or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws."

This only declares that nothing in the anti-trust acts shall be construed to forbid labor organizations or their members from *lawfully* carrying out their *legitimate* objects, and does not authorize any unlawful activity or illegal conspiracy in restraint of trade.

Section 20 provides: "No injunction shall be granted * * * in any case between an employer and employees * * * involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right. * * * And no such injunction shall prohibit any person or persons, singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor or persuading others by peaceful means so to do; from peacefully persuading any person to work or abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from persuading others by peaceful and lawful means so to do; * * * or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."

All of the judges, in all the courts, agreed that the acts of the defendants amounted to a secondary boycott, of a coercive but not violent character. The controversy was as to the meaning of the "blindly drawn" provisions of the Clayton Act, and especially of the words "employers," and "employees," and "others," in Section 20. The Circuit Court of Appeals held that "employers" and "employees," as used in Section 20, referred to the *business class*, to which the litigants belonged; and that the union and each of its sixty thousand members, although no one of them had ever been employed by the plaintiffs, having first created a labor disturbance by calling a strike at plaintiff's factory, thereafter had such an interest in the matter as to justify the union in calling strikes of the employees of other employers, between whom there was no dispute, and which employers had no business relations with plaintiff except by purchasing presses in the ordinary course of interstate commerce.

Mr. Justice Pitney says: "We deem this construction altogether inadmissible." The act imposes an extraordinary restriction on the equity powers of courts in the nature of a special privilege to a particular class; it would violate all the ordinary rules of construction to extend the privilege by loose construction beyond those who are proximately and substantially, not merely sympathetically, interested in "a dispute concerning terms or conditions of employment"; Congress had in mind particular disputes, not a class war; labor organizations are not mentioned in Section 20, and to extend a dispute directly affecting a few actual employees to all the members of the

union would so enlarge the meaning as to be inconsistent with Section 6, which limits activity to *lawfully* carrying out the *legitimate* objects thereof; "ceasing to patronize" is limited to pressure on a "party to such dispute," by "peaceful and *lawful*" influence on neutrals, not by threats of strikes of their employees, to compel withdrawal of patronage of plaintiff to induce him to yield.

Justice Pitney in support of this view quoted from the explanatory statements made by the spokesman of the House of Representatives Judiciary Committee, who had charge of the bill when it was under consideration, such being a proper aid in ascertaining the legislative intent,[13] as to the meaning of Section 20. This was unequivocally to the effect that the section "was carefully prepared with the settled purpose of excluding the secondary boycott; it was the opinion of the committees that it did not legalize it; it was not their purpose to authorize it, and not a member of the committee would vote to do so." By the construction given by the court below, an ordinary labor controversy in a manufacturing establishment justifies a nation-wide ockade of interstate commerce in its products by sympathetic strikes and boycotts against its customers, to the incalculable damage of innocent people remote from, unconnected with, and having no control over the actual dispute, constituting the general public, and having a vital interest in unobstructed commerce, which the anti-trust acts were to protect.

Plaintiff has a clear right to an injunction under the Sherman Act as amended by the Clayton Act, and it is unnecessary to consider what the result would be under the common law or local statutes.

Mr. Justice Brandeis, dissenting, says as to the common law: Defendants' justification is self-interest; they support the strike at the factory by a strike elsewhere against its product, not maliciously but in self-defense; plaintiff's refusal to deal with the union and observe its standards threatened not only the interests of its members at the factory but even more of all the affiliated unions employed by plaintiff's competitors, whose more advanced standards plaintiff was, in reality, attacking; the contest between the plaintiff and the union involves vitally the interest of every person whose coöperation is sought. May not all with a common interest join in refusing to labor on articles whose very production constitutes an attack upon this standard of living and the institution which supports it? Yes, by common law principles, if in fact they have a common interest. At first strikes were held illegal.[14] Later, the obvious self-interest of the laborer in the improvement of his wages, hours and conditions of work constituted a justification.[15] Then some courts held the mutual interest of members of a union, in the union, was *not sufficient self-interest* to justify a strike to force the unionization of the

[13] Binns v. U. S. (1904), 194 U. S. 486, 495; Pennsylvania R. R. Co. v. International Coal Co. (1913), 230 U. S. 184, 198; United States v. Coco Cola Co. (1916). 241 U. S. 265, 281; U. S. v. St. Paul Ry. Co. (1918), 247 U. S. 310, 318.

[14] COMMONS, HIST. OF LABOR, Vol. 2, Ch. 5.

[15] Pickett v. Walsh (1906), 192 Mass. 572.

shop.[16] Other courts, viewing the same facts differently, held otherwise.[17] Later, when centralization of business brought corresponding centralization in labor organizations, a single employer might, as here, threaten the standards of the whole organization, and then naturally the union would protect itself by refusing to work on his materials wherever found; here again some courts held the intervention of the purchaser broke the direct relation between employer and employee, and a strike against the materials was a strike against the purchaser by unaffected third parties.[18] Other courts, better appreciating the facts of industry, recognized the unity of interest throughout the union, and in refusing to work on such materials the union was only refusing to aid in destroying itself.[19] On the question of fact, I would say, as the lower courts said, the defendants and those from whom they sought coöperation had a common interest, and under the common law of New York the plaintiff had no cause of action.[20]

The Clayton Act was the result of twenty years' agitation to equalize before the law the position of the employer and employee, as industrial combatants. The chief sources of dissatisfaction were the use of the injunction and the doctrine of "malicious combination"; this made an act otherwise *damnum absque injuria,* as a result of trade competition, actionable as malicious, if done for a purpose the judge considered socially or economically harmful. Great confusion existed among the judges as to what purposes were lawful and what unlawful. By 1914, it was thought Congress, and not the judges, should declare how the inequality and uncertainty of the law should be removed and what damages could be inflicted on an employer in an economic struggle without liability, instead of leaving the judges to determine this according to their own economic and social views. This was the idea presented by the committees reporting the Clayton Act. Certain acts committed in the course of an industrial dispute, and which before were declared unlawful whenever the courts disapproved the ends for which they were performed, were declared not to violate any law of the United States; that is, the opinion of Congress as to the propriety of the purpose was substituted for that of differing judges; that relations between employers and workingmen were competitive; that organized competition was not harmful, and that it justified injuries necessarily inflicted in its course. The minority and majority reports of the house committee indicated such to be the pur-

[16] Plant v. Woods (1900), 176 Mass. 492; Lucke v. Clothing Cutters (1893), 77 Md. 396; Erdman v. Mitchell (1903), 207 Pa. St. 79.

[17] National Protective Assn. v. Cumming (1902), 170 N. Y. 315; Kemp v. Division No. 241 (1912), 255 Ill. 213; Roddy v. United Mine Workers (1914), 41 Okla. 621.

[18] Burnham v. Dowd (1914), 217 Mass. 351; Purvis v. United Brotherhood (1906), 214 Pa. St. 348; Booth v. Burgess (1906), 72 N. J. Eq. 181.

[19] Bossert v. Dhuy (1917), 221 N. Y. 342; Cohn & Roth Elect. Co. v. Bricklayers (1917), 92 Conn. 161; State v. Van Pelt (1904), 136 N. C. 633; Grant Construction Co. v. St. Paul Building Trades (1917), 136 Minn. 167; Pierce v. Stablemen's Union (1909), 156 Cal. 70, 76.

[20] Bossert v. Dhuy (1917), 221 N. Y. 342; Auburn Draying Co. v. Wardwell (1919), 227 N. Y. 1. Compare Paine Lumber Co. v. Neal (1917), 244 U. S. 459, 471.

pose. If the act applies to this case, then the acts cannot violate "any law of the United States, and so not the Sherman Act." Congress did not restrict the provisions to employers and workmen *in their employ*. By including "employers and employees," and "persons employed and seeking employment," it showed that it was not merely aiming at a legal relationship between a specific employer and his employees. The contention that this case is not one arising out of a dispute concerning the conditions of work of one of the parties is founded on a misconception of the facts.

Judge Brandeis adds that, because he concluded that both the common law of a state and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, "I do not wish to be understood as attaching any constitutional or moral sanction to the right. * * * Above all rights rises duty to the community. The conditions of industry may be such that those engaged in it cannot continue their struggle without danger to the community. It is not for the judges to determine whether such conditions exist, nor their function to set the limits of permissible contest. This is the function of the legislature."

One can hardly refrain from the remark, from the variety of views of the judges who pronounced opinions in this case, that it is about as easy for courts to determine what justice demands under certain conditions as to determine the meaning of an act of Congress. It would seem that Justice Pitney's quotations from the statements made in the house at the time of the report of the Judiciary Committee are the best evidence of what that committee meant to do and thought it had done, and that was to exclude the secondary boycott from the things declared to be lawful. Soon after the Clayton Act was passed similar acts were passed in several states.[21] The interpretation of many of these has often accorded with the majority opinion in this case.[22]

There is no doubt that there has been the trend and confusion in judicial decisions indicated by Justice Brandeis, and many more cases could be cited. So, too, there is no doubt that the common law of New York is as pointed out by him; and scarcely any doubt that the weight of authority elsewhere is otherwise, as indicated by Judge Rogers. Scarcely any English cases were cited. From the time when John Mewic would not let Matilda's tenants till her land in 1200,[23] and the bailiffs of Shrewsbury proclaimed no one in the town should sell merchandise to the Abbott of Lilleshull in 1225,[24] to *Quinn* v. *Leathem*[25] and *Pratt* v. *Medical Association*,[26] boycotting has been unlawful in the English law, although it did not get its name until about 1880, when Captain Boycott, representing Lord Earne, in Connemara, Ireland, gave notice to the lord's tenants to vacate, whereupon the people for miles around

[21] See 20 COL. L. REV. (June, 1920), p. 696.
[22] *Ibid.*, p. 697.
[23] SELECT CIVIL PLEAS, Vol. 1, p. 3, pl 7, 3 Selden Society.
[24] SELECT PLEAS OF THE CROWN, Vol. 1, p. 115, p. 178, 1 Selden Society.
[25] [1901] A. C. 495.
[26] [1919] 1 K. B. 244, 18 MICH L. REV. 148 (Dec., 1919).

resolved to have nothing to do with him, nor allow anyone else to; so his laborers fled, he got no food, and no one would speak to him, until the Ulsterites came to his rescue, and civil war followed, which the government had to put down by the soldiers.[21] There is also no doubt that, under the Sherman Act and the decisions of the Supreme Court before the Clayton Act, the defendants' acts were illegal. H. L. W.

DISQUALIFICATION OF JUDGES BY PREJUDICE.—Under the provisions of Section 21 of the Federal Judicial Code, Victor Berger and others, who had been indicted under the Espionage Act in the Northern District of Illinois, filed an affidavit charging Judge Landis with personal bias and prejudice against them as German-Americans, and moved for the assignment of another judge to preside at their trial. The motion was overruled by Judge Landis, and he himself presided at the trial, and the defendants were convicted and sentenced. The Supreme Court of the United States, to which the matter came on certificate, held, three justices dissenting, that Judge Landis could not, under the statute, pass upon the truth of the facts alleged in the affidavit showing prejudice, but that upon the filing of an affidavit sufficient on its face, he was incapacitated from further proceeding with the case. *Berger* v. *United States*, No. 460, decided January 31, 1921.

This decision seems in harmony with the evident purpose of the statute, and is reassuring to all who feel that the courts cannot too strictly guard themselves from any suspicion of hostility or favoritism toward litigants. The common law was probably too indifferent on this matter. Blackstone says that "in the times of Bracton and Fleta, a judge might be refused for good cause; but now the law is otherwise, and it is held that judges and justices cannot be challanged." 3 COMMENTARIES, 362. But the obviously just rule that a man cannot be judge in his own case, now universally recognized, would seem to extend itself in principle over every suit where a judge, by reason of prejudice and the consequent partisan interest which he develops, has made himself morally a party to the action. The section of the Federal Judicial Code on which the objection to Judge Landis was based undertook to put this principle into operation. Upon the filing of the affidavit Judge Landis undoubtedly became a party to a controversy over his own fitness, and he insisted on deciding the merits of the case in which he was a contestant. The Supreme Court thought him qualified to decide the legal sufficiency of the showing made, but not to pass upon the truth of the accusation.

Under a somewhat similar statute in Montana it has been held that the filing of a proper disqualification affidavit *ipso facto* deprives the judge of further authority to act. *State ex rel.* v. *Clancy*, 30 Mont. 529; *State ex rel.* v. *Donlan*, 32 Mont. 256. Under the California statute a similar result follows in justice court cases, *People* v. *Flagley*, 22 Cal. 34, and in superior court cases where no counter affidavits are filed, *People* v. *Compton*, 123 Cal.

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[21] LAW AS TO BOYCOTT, WYMAN (1903), 15 Green Bag, 208-215.

403. The "salutary rule" of relieving the judge from the "very delicate and trying duty of deciding upon the question of his own disqualification" received the warm approval of the California court in the case last cited.

The *Berger* case effectually disaffirms the doctrine of *Ex parte N. K. Fairbanks Co.*, 194 Fed. 978, where Judge Jones, in the Middle District of Alabama, held, in a long and elaborate opinion, that Congress could not, under the Constitution, "lawfully enact that a judge, who is in truth qualified, is in law disqualified because a suitor makes an affidavit to that effect, and make that *ex parte* statement conclusive proof of the disqualification and cut off all judicial inquiry as to the judge's competency." He contended that the disqualification of a judge to try a particular case must rest upon facts which unfit him, and the existence of such facts must be determined as a judicial question by some judicial tribunal; that if the filing of the requisite affidavit operated to prevent the judge from further acting in the litigation we should have a situation where "the affidavit maker in fact, though not in name, puts on the judicial robes and excludes the presiding judge and all other judicial authority from any voice in determining the matter, and by the mere filing of an affidavit renders judgment of disqualification and executes it," citing *Mabry* v. *Baxter*, 11 Heisk. (Tenn.) 689, 691, and *Sanders* v. *Cabanniss*, 43 Ala. 173, in condemnation of such a procedure as an illegal assumption by the legislature of judicial power.

Although two dissenting opinions were filed in the *Berger* case, written by Justices Day and McReynolds, neither of them suggests that the construction of the statute given by the majority of the court involves any unconstitutional interference with the judicial power vested in the courts.

E. R. S.

ACCIDENT IN WORKMEN'S COMPENSATION.—The interpretation of workmen's compensation statutes has caused the courts a great deal of difficulty. The usual statute provides for compensation for an "accident arising out of and in the course of the employment." Such a type of statute has made it necessary for the courts to inquire into what constitutes an accident, what is an accident arising out of the employment, and what is an accident arising in the course of the employment. Each one of these inquiries has been the source of much litigation, and it has now become fairly well settled as to what accident "arises out of and in the course of the employment." See 12 MICH. L. REV. 614, 688; 14 MICH. L. REV. 525; 15 MICH. L. REV. 92, 606; 16 MICH. L. REV. 179, 462; 18 MICH. L. REV. 72, 162. The question as to what constitutes an accident is still the subject of many varied decisions. The problem was involved in the recent case of *Prouse* v. *Industrial Commission* (Colo., 1920), 194 Pac. 625, where the court (two judges dissenting) held that a coal miner was not injured by accident where a germ disease had proved fatal because he had become weakened by foul air and dioxide gas which came from an inclosed entry that the miners had broken into.

One of the principal reasons for the variety of decisions in regard to the word "accident" is that the word is used in many different senses, and

there are times when a liberal interpretation is called for and others where a strict construction is demanded. The courts, in interpreting accident insurance policies, generally hold that if the death is caused by a previously diseased condition of the body, without which the death would not have followed the injury, it is not an accidental death. *National Masonic Assn.* v. *Shyrock*, 73 Fed. 774. In workmen's compensation cases, however, it is generally held that anything contributing directly or indirectly to incapacity following an injury is sufficient within the compensation laws. *Indian Creek Mining Co.* v. *Calvert*, 119 N. E. (Ind. App.) 519; *Robbins* v. *Gas Engine Co.*, 191 Mich. 122.

A disease contracted by gradual process, commonly known as an industrial or occupational disease, is not an accident within the compensation laws. *Liondale Bleach, Dye and Paint Works* v. *Riker*, 85 N. J. L. 426; *Adams* v. *Acme White Lead and Color Works*, 182 Mich. 157; *Paton* v. *Dixon*, [1913] 6 B. W. C. C. 882; *Evans* v. *Wood*, [1912] 5 B. W. C. C. 305. The usual reasoning of the courts is that an accident must have definite time, place, and circumstances. Other courts take the view that the important characteristics of an accident are that the injury be unexpected and unintentional. *Fidelity and Casualty Co.* v. *Commission*, 177 Cal. 614; *Indian Creek Mining Co.* v. *Calvert*, *supra*. These two lines of reasoning show that the courts which adhere to the first view adopt the layman's interpretation of an accident, while the others have used the word in a special legal sense. Under either line of reasoning, a man slowly acquiring lead poisoning while working in a mine is not injured by accident; but should there be a caving-in of a wall which held back poisonous fumes, and the workman should, as a consequence, acquire lead poisoning suddenly, there would be an injury by accident.

The situation of the English law is, at present, in this position. Where a workman gradually contracted eczema while employed at dipping rings in a chemical, it was held not to be an accident. *Evans* v. *Wood*, *supra*. But recovery was allowed in *Alloa Coal Co.* v. *Drylie*, [1913] Sess. Cases 549, where a water pump burst and the workman died from pneumonia (a germ disease) contracted from standing in the cold water. In the case last cited, Lord Dundas delivering the majority opinion, said that the disease was attributable to some particular event or occurrence of an unusual and unexpected character incidental to the employment, and could fairly be termed an accident. Lord Salverson, rendering a dissent in the same case, said that if the deceased's legs had become inflamed from standing in the cold water, or if the water had been corrosive in its character, there would have been an injury by accident. This English case and the recent Colorado case are similar in that the workman in each case died from a germ disease resulting from his weakened condition. The cases are, however, by no means analogous and the facts are sufficiently different to warrant opposite results. Poor air in a mine is to be expected, but the bursting of a water pipe is unexpected; and if the English court were to decide the Colorado case and were to apply the reasoning used in the *Alloa Coal Co.* case, it would in all

probability reach the same conclusion that the majority reached in the Colorado case.

The situation in the Wisconsin court is much the same as that in England. In *Vennen* v. *New Dells Lumber Co.,* 161 Wis. 370, it was held that a laborer contracting typhoid fever by drinking impure water was injured by accident because the affliction was attributed to the undesigned and unexpected presence of bacteria in the drinking water. The principal difference between the majority and the dissenting opinions seems to be that the latter emphasized the fact that no external violence occurred. The Wisconsin Industrial Commission has held that a gradually acquired occupational disease is not an accidental injury within the meaning of the act. *Derkindern* v. *Rundle Mfg. Co.,* Rep. Wis. Indus. Comm. (1914-15) 16.

The California court expressed the reason for the many conflicting views on the subject when it said that in workmen's compensation cases it gave the phrase "sustained by accident" a broad construction in harmony with the spirit of liberality in which the statute was conceived. *Fidelity Co.* v. *Commission,* 177 Cal. 614. This spirit of liberality is described in *Ross* v. *Erickson,* 89 Wash. 634, where the court said that injustice to the laborer and hardships to the industries of the state alike called for some plan that would relieve the servant of the necessity of pursuing his remedy in the courts and subjecting himself to all the harassments, vexations, and uncertainties attending a trial. The laws are designed to protect the workman, but the courts will not allow them to be used to mulct the employer and the public. It is for this reason that vocational diseases are not included within the statutes, because the cause of the injury is not traceable with reasonable certainty by any reliable method of proof. To allow such speculative claims would be to encourage fraudulent practices and would contribute to defeating the broad purposes underlying the compensation laws. The question whether the cause of the injury is traceable by any reliable method of proof should, therefore, determine whether recovery should be allowed under the "sustained by accident" clause. It is by this test that it must be decided whether an unexpected and unintentional injury constitutes an accident or whether actual physical violence is necessary. See 14 COL. L. REV. 563, 648. C. G. B.

LICENSES—ORDINANCE AUTHORIZING COMMISSIONER TO REVOKE SOFT DRINK LICENSE INVALID.—The city of Tacoma passed an ordinance creating a license department in the department of public safety, which provided for licensing and regulating soft drink and candy stores. The ordinance arranged for the means of securing such a license and then enacted: "The license of any business mentioned in this section may be revoked by the commissioner of public safety in his discretion for disorderly or immoral conduct or gambling on the premises, or whenever the preservation of public morality, health, peace or good order shall in his judgment render such revocation necessary. Such revocation shall be subject to appeal to the city council, to be prosecuted by filing a written notice with the council within

ten days after the revocation. Upon receipt of such appeal the council shall appoint a day for hearing the appeal, giving the appellant at least three days' prior notice in writing thereof. The decision of the council shall be final." M, being the possessor of a duly issued license under this ordinance to carry on the business of selling soft drinks and candy, had established such a business. The commissioner of public safety, being of the opinion that the business as conducted by M had become a menace to "the preservation of public morality, health, peace, and good order," assumed to revoke the license. M challenged the validity of the act. *Held,* the ordinance is unconstitutional. *State ex rel. Makris* v. *Superior Court of Pierce County,* (Wash., 1920), 193 Pac. 845.

The court held that the effect of this ordinance was to place in the hands of the commissioner of public safety, and in turn in the hands of the city council upon appeal from the commissioner, the arbitrary power, uncontrolled by any prescribed rule of action, to decide who may and who may not engage in and carry on the lawful business of selling soft drinks in the city.

It is submitted that from what appears in the report of the case the decision is wrong. In the lower court a trial was had on the merits, which resulted in the court denying relief to the plaintiff. It must, therefore, have been found that the commissioner did not act arbitrarily, and that he did not discriminate against the plaintiff. The evidence must have satisfied the court that the plaintiff conducted his business in such a way as to be a menace to "the preservation of public morality, health, peace, and good order." It is to be noticed that there is no allegation or evidence that the commissioner acted arbitrarily or with the intention of unjustly discriminating against the plaintiff.

It is also interesting to notice that the court cites the leading case of *Yick Wo* v. *Hopkins,* 118 U. S. 356, in support of its decision. This case is frequently cited by courts and text writers as an authority for the proposition that an ordinance which vests a purely personal and arbitrary power in the hands of a public official is a denial of due process of law. That case involved an ordinance which required all persons desiring to establish laundries in frame houses to obtain the consent of certain officials. Yick Wo, a native of China, who had conducted a laundry in a wooden building for twenty-two years, and who had complied with all existing regulations for the prevention of fire and the protection of health, was refused such consent, upon his application; and he was convicted and imprisoned for conducting his laundry without such consent. His petition for a writ of *habeas corpus* was denied by the state supreme court and he appealed to the United States Supreme Court. It is difficult to tell from the report just what the court decided. There is some language in the opinion to justify the conclusion that the court held the ordinance unconstitutional on the sole ground of vesting an arbitrary discretion in a public official. The court says: "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoy-

ment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." In regard to the ordinances the court says: "They seem intended to confer and actually do confer, not a discretion upon consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. * * * The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

The effect of the above passage is weakened somewhat as the evidence in the case showed that the ordinance in actual operation had been directed exclusively against the Chinese. The evidence showed "an administration directed so exclusively against a particular class of persons as to warrant the conclusion that, whatever may have been the intent of the ordinances so adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the law which is secured to the petitioner as to all other persons by the broad and benign provisions of the Fourteenth Amendment." The court then goes on to say: "Though the law be fair on its face and impartial in appearance, yet if it is administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

However, it is submitted that a careful analysis of the case shows that the court did not declare the ordinance unconstitutional, either because it vested an arbitrary power in the hands of a public official or because the evidence showed a wanton and wilful discrimination by the persons charged with its administration against a particular class of persons. It merely decided that the petitioner could not be punished under the ordinance. But as the Supreme Court has never been called upon since to determine exactly what was decided by the court in *Yick Wo* v. *Hopkins,* there must be more or less speculation about it.

Two years before the decision in *Yick Wo* v. *Hopkins, supra,* the Supreme Court decided in *Barbier v. Connolly,* 113 U. S. 27, that an ordinance of the city of San Francisco providing that no person should carry on the business of a public laundry within certain limits without a certificate from the health officer, and another certificate from the Board of Fire Wardens, was valid. The Connecticut court in *Ex parte Fiske,* 72 Conn. 125, reconciles these cases by saying: "A correct understanding, however, of the extent to which that case goes (*Yick Wo* v. *Hopkins*) can be had only by considering that the proof, which the court looked into, showed that the ordinance there under review was so administered as to exclude the subjects of the emperor of China, and no others, from the business of keeping a laundry. * * * It is evident from the language that the decision

rested mainly upon the admitted discrimination against a class of persons in the public administration of the ordinance. The decision, therefore, as an authority, goes no further than to hold that, under a state of facts similar in character to the facts of that case, an ordinance similar in character to the one there passed on would be invalid."

There are no such facts in the principal case. There is no evidence that there was any discrimination in the administration of the ordinance against the plaintiff. On the contrary, the case was tried on its merits, and the trial court refused to grant the plaintiff any relief. It is true that under the ordinance in question the commissioner is given considerable discretion in determining what was a menace to "the preservation of public morality, health, peace, and good order." But could the legislature prescribe a more definite rule of action? It seems obvious that the legislature could not define all the circumstances and conditions which would be a menace "to the preservation of public morality, health, peace, and good order." It seems that in the very nature of things the determination of what conditions come within the general rule must be left to an administrative officer.

The cases are in conflict on this question of the validity of statutes and ordinances conferring unrestrained discretion. Many courts have upheld ordinances similar to the one in the principal case. In *Wilson* v. *Eureka City*, 173 U. S. 32, the court upheld an ordinance which forbade any person moving a frame building owned by him without the written permission of the mayor. The court approves the summary of cases in *Re Flaherty*, 105 Cal. 558, in which unrestrained discretion is sustained, and declare that discretionary power is "based on the necessity of the regulation of rights by uniform and general laws—a necessity which is no better observed by a discretion in a board of aldermen or council of a city than in a mayor." In *Williams* v. *Mississippi*, 170 U. S. 213, it was held that no relief could be granted against a law merely because it confers a discretion readily susceptible of abuse, if no actual discriminatory administration is shown. In *People* v. *Van De Carr*, 199 U. S. 552, after citing a number of cases sustaining a delegation of discretion to a board, the court says: "These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the Fourteenth Amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of the federal court," citing *Yick Wo* v. *Hopkins*, *supra*. In *Davis* v. *Massachusetts*, 167 U. S. 43, an ordinance of the city of Boston providing that "no person shall, in or upon any of the public grounds, make any public address," etc., "except in accordance with a permit from the mayor," is valid. These cases would seem to indicate that the Supreme Court of the United States is committed to the doctrine that administrative

officers may be given discretionary power to act according to their own unrestricted judgment, and that an ordinance or law granting this authority is not, upon its face, void. In *Commissioners of Eaton* v. *Covey*, 74 Md. 262, an ordinance was sustained requiring a permit from the commissioners for the erection of a building in the city; in *Kessinger* v. *Hay*, 52 Tex. Civ. App. 295, 113 S. W. 1005, an ordinance was upheld requiring hackmen to secure a license to use the streets as a public stand, reserving to the municipal authorities the discretion to say who shall and who shall not have permits; in *Ex parte Bogle* (Tex.), 179 S. W. 1193, an ordinance giving the city authorities discretionary power to grant or refuse a license for operating a jitney was upheld; in *Laurelle* v. *Bush*, 17 Cal. App. 409, 119 Pac. 953, an ordinance giving the police commissioner power to grant or refuse a permit to operate a moving picture show was upheld, although it did not prescribe methods for its application. The court said: "It is a well recognized rule of statutory construction that a general grant of power, unaccompanied by specific direction as to the manner in which the power is to be exercised, implies a right and a duty to adopt and employ such means and methods as may be reasonably necessary to a proper exercise of the power. * * * Tested by this rule, it cannot be said that the board of police commissioners is vested with an undefined and whimsical discretion in the matter of granting or refusing a permit."

Not every act giving an arbitrary discretion to an administrative officer should be upheld, but in passing upon questions of this character practical considerations and the necessity of administrative efficiency should be considered. In these days, when the extent of governmental functions has become so great and complicated, it seems that about all the legislature can do is to declare the general policy of the law, and leave its enforcement and application to the discretion of some official. It is presumed such discretion will be exercised honestly. It seems reasonable that the courts should interfere with the exercise of such discretion only when it is alleged and proved that this discretion has been abused. See 19 MICH. L. REV. 211; also, FREUND, POLICE POWER, Secs. 642-655. A. G. B.