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titioner, but by the present plan men of such type are being added to that court.

Only recently the *Kansas City Star*, speaking editorially of the plan, said:

> "It has not succeeded in removing all unqualified persons from the bench. But those who have reached the bench through the nonpartisan court system have proved to be good judges. On the average those who held over from the political era have been better judges. No longer does the shadow of the political boss fall across the bench."

So we find the people like the plan, the press approves it, the lawyers are for it, and the judges like it.

Labor Injunctions Under The Colorado Labor Peace Act

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The labor injunction plays an important part in the scheme evolved by the thirty-fourth General Assembly for the control and regulation of labor unions known as the Colorado Labor Peace Act.[1] The Act itself is an omnibus piece of legislation designed to exercise a far-reaching control over all phases of labor union activity. Briefly, the over-all objectives of the Act may be summarized as follows:

1. To confine labor disputes to the employees of a single employer.
2. To control the internal affairs of labor unions and prohibit their political activity.[2]
3. To restrict the processes of collective bargaining with reference to certain types of contracts.
4. To limit the use of strikes, boycotts, and picketing and to prohibit their use completely in some cases.
5. To restore the power to courts of equity to issue labor injunctions.

This article is confined to a discussion of the use of injunctions under the Act. Prior to the passage of the Act in 1943, Colorado had what properly could be called a "little Norris-LaGuardia Act"[3] which limited the issuance of injunctions in labor disputes to cases involving physical injury to person or property with which the law enforcement authorities were unable to cope. The term "labor dispute" was defined broadly enough to include organizational disputes—that is, attempts by a union to organize the workers of a non-union plant.[4]

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[1] Chap. 131, 1943 Session Laws of Colorado.

[2] This feature of the Act was declared unconstitutional by the Colorado Supreme Court in *American Federation of Labor v. Reilly*, 113 Colo. 90, 155 P. (2d) 145, 160 A.L.R. 873.

[3] Chap. 59, 1933 Session Laws of Colorado.

[4] Ibid. Sec. 12; *Denver Local Union v. Perry Truck Lines*, 106 Colo. 25, 101 P(2) 436, *Denver Local Union v. Buckingham*, 108 Colo. 419, 118 P(2) 1088.

Narrowing the Definition of Labor Dispute

Under the 1943 Act many of the provisions limiting the jurisdiction of courts to issue injunctions in labor disputes are retained, but the definition of a labor dispute is drastically altered. Only where there is a "controversy between an employer and such of his employees as are organized in a collective bargaining unit" does a labor dispute exist within the meaning of the Act.[5] The "collective bargaining unit" referred to is a union selected by a majority of the employees in an election conducted by the Industrial Commission.[6]

It is this narrow definition of a labor dispute that opens wide the doors of courts of equity to plaintiffs seeking injunctions against labor unions. Underlying this definition was the belief on the part of the legislators that the scale of wages paid by one employer has no effect upon, and is therefore no concern of, the workers in other plants in the same industry.

Unfortunately, this theory of economic isolation does not jibe with the basic facts of industrial life. Many years before the passage of the Wagner Act, the United States Supreme Court, speaking through Chief Justice Taft, stated: "Labor unions . . . were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer . . . Union was essential to give laborers opportunity to deal on equality with their employer . . . *To render this combination an all effective employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood.*"[7] (Italics added). This

But the General Assembly was of the opinion that while under certain circumstances it might be proper for employees to combine to secure better wages and working conditions from their own employer, they should not be permitted to engage in any activity aimed at improving the lot of their fellow workers in the plant across the street. Accordingly, courts were given full power to grant injunctions in any case not within the narrow confines of a statutory labor dispute, and it was expressly provided that "nothing herein shall prevent the pursuit of equitable or legal relief in courts of competent jurisdiction, nor shall it be any ground for refusal of such relief that all of the administrative remedies provided in this Act before the Commission shall not have been exhausted."[9]

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[5] Sec. 2(7).

[6] Sec. 2(6).

[7] *American Steel Foundries v. Tri-City Council*, 257 U. S. 184, 209; 42 S. Ct. 72, 78; 66 L.Ed. 189; 27 ALR 360.

same basic fact was again recognized by the United States Supreme Court in *Senn v. Tile Layers Protective Assn.*[8]

[8] 301 U. S. 468; 57 S.Ct. 857; 81 L.Ed. 1229.

[9] Sec. 8(1).

The Substantive Basis

Having given the green light to the courts to issue injunctions in labor disputes, the General Assembly next turned to the task of providing the substantive provisions to serve as a basis for equitable relief. These are found in Sec. 6(2) (g), which makes it an unfair labor practice on the part of an employee acting individually or in concert with others "to engage in a secondary boycott, or to hinder or prevent, by threats, intimidation, force, coercion, or sabotage, the obtaining, use or disposition of materials, equipment or services, *or to combine or conspire to hinder or prevent, by any means whatsoever, the obtaining, use or disposition of materials, equipment or services.*" (Italics added.)

In view of the criminal penalties provided for the violation of any provision of the Act,[10] there would appear to be grave doubt as to constitutionality of Sec. 6(2) (g) because of its generality, if for no other reason.[11] The section is a catch-all provision which could be construed to prohibit just about any type of customary union activity. The italicized words, given their literal meaning, would ban all strikes, boycotts, and picketing in any form and under any circumstances, since the object of such activity is usually to hinder or prevent the employer from obtaining, using or disposing of materials or services. In the case of a strike, the purpose is to deprive the employer of the services of his employees. A boycott is designed to prevent the employer from disposing of his products through sales to the public. A picket may be for the purpose of implementing either a strike or boycott. So under Sec. 6(2) (g) all of these forms of customary union activity are proscribed even where there is a labor dispute as defined by the Act. Few would contend for the literal enforcement of this provision. Such application, assuming its constitutionality, would deprive workers of the only means by which they can improve their working conditions. It had been hoped that this section would receive judicial clarification by the Colorado Supreme Court when the occasion arose so that unions, employers, and lawyers would have some idea as to what acts were included within the scope of Sec. 6(2) (g). Although the issue has been presented to the Court on four different occasions, there is still no indication as to the proper interpretation of this section.

Supreme Court Fails to Clarify

In the case of *American Federation of Labor v. Reilly*,[12] the Court, after invalidating the provisions of the Act requiring the incorporation of labor unions, held that the question of the constitutionality of other sections of the Act was not ripe for decision.

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[10] Sec. 23.

[11] *Cline v. Frink Dairy Co.*, 274 U. S. 445; 47 S.Ct. 681; 71 L.Ed. 1146.

[12] *Supra*, note 2.

The later case of *Denver Milk Producers v. International Brotherhood of Teamsters* [13] was a consolidation of five separate actions for injunctions. Four of the cases were concerned with the efforts of the teamsters' union to organize the employees of motor carriers transporting milk into Denver. To accomplish this, the members of the union who were employed by the Denver dairies refused to unload the milk transported by non-union drivers. The fifth case was concerned with the attempt of the union to organize the employees of Beach, a Denver dairy. The union engaged in a peaceful picket at the Beach plant and threatened to place pickets in front of certain retail grocery stores which sold Beach products. As a result of the picket at the Beach plant some bricklayers who were engaged in construction work for Beach left their work. A temporary restraining order had been issued in the Beach case. The five cases were consolidated for trial. The District Court found "that the objectives of the defendants and the means used to secure those objectives were lawful"[14] Supreme Court.)
and granted defendants' motion to dismiss. On appeal, the Supreme Court reversed the trial court and remanded the case with "instructions to reinstate the restraining order and make the same permanent, and for further proceedings with respect to damages and otherwise as may be necessary, such proceedings to be in harmony with the views herein expressed."[15]

The Court did not set aside the finding of the lower court that the acts of the defendants were lawful, nor did it remand the case to the lower court for further findings. The District Court was ordered to reinstate and make permanent the temporary restraining order although the defendants had never had an opportunity to file an answer and there had been no trial of the case on the question of a permanent injunction. At no place in the Court's opinion is it pointed out what conduct on the part of the defendants warranted injunctive relief, nor to what acts of defendants the injunction should extend.[16] The Court's opinion affords no means for distinguishing between permissible and prohibited activity in labor disputes. There is no attempt to distinguish between the acts of defendants which were of a primary nature directed against the employer as against those of a secondary nature designed for the purpose of bringing pressure to bear upon third parties to cause them to cease doing business with the employer.

Decision Overlooks Main Point

The seeming effect of the Court's decision is to make illegal all labor union activity in the absence of a statutory labor dispute. Two dissenting justices, Stone and Hilliard, thought that the injunction should be confined

[13] 116 Colo. 389, 183 P. (2) 529.
[14] Folio 1842 of the original record. (This does not appear from the decision of the
[15] *Supra*, p. 425.
[16] The Court did order that the temporary restraining order be made permanent, but it was only in the Beach case that a temporary restraining order was issued, and its terms were inapplicable to the facts of the other four cases.

to such acts as constituted a secondary boycott.[17] The majority opinion did not indicate whether the injunction was ordered because defendants had committed an unfair labor practice under Sec. 6(2), or because the acts of defendants ran counter to some other statute or the common law, or for just what reason the injunction was being issued.

The Court's decision was based solely upon its finding that no labor dispute existed under the terms of the Act, and that therefore the District Court had jurisdiction to issue the injunction.

But the point that eluded the grasp of the Court was whether or not the trial court, having jurisdiction to issue the injunction, abused its discretion in refusing the relief prayed for. There was no holding by the Supreme Court that the lower court erred in finding that the acts of defendants were lawful. If this finding was supported by the evidence—and the Supreme Court did not hold otherwise—then it is difficult to see on what basis an injunction could be issued. Once having decided that no labor dispute existed, the Court jumped to the conclusion that an injunction must necessarily issue, without deciding (1) what acts of defendants were to be enjoined, or (2) whether such acts were protected by constitutional guaranties. Rather, the Court was content to quote at great length from an opinion of the Supreme Court of Washington.[18] But the Washington court recognized that peaceful picketing is an exercise of the constitutional right of free speech. It held that "when picketing ceases to be used for the purpose of persuasion—just the minute it steps over the line from persuasion to coercion—it loses the protection of the Constitutional guaranty of free speech. * * *"[19] As has already been pointed out, there was no finding by either the trial court or the Supreme Court that defendants were guilty of acts of coercion or any other wrongful conduct.

The dissenting justices gave an illuminating opinion construing the anti-picketing sections of the Act.[20] They held that none of the acts of defendants was wrongful except the the threat to picket the retail stores selling Beach products. As to this, it was pointed out that the retail grocery stores were not in the milk industry and were "strangers to the issue," and that the picketing of these stores would be an attempt to "conscript neutrals."[21] It was the opinion of Justices Stone and Hilliard that the picketing of the dairies did not constitute any violation of the Act. They relied on the decision of the United States Supreme Court in *Carpenters and Joiners Union v. Ritters Cafe*,[22] which held that a state could restrict "picketing to the area of the

[17] *Supra*, p. 431.
[18] *Swenson v. Seattle Central Labor Council*, 27 Wash. (2) 193, 177 P. (2d) 873.
[19] *Id.*, 177 P (2), at p. 880, quoted at p. 424 of 116 Colo., 183 P. (2) at p. 545.
[20] It should be noted, however, that the particular section referred to in the dissenting opinion, Sec. 6(2) (e), had already been declared inoperative by the Court in *American Federation of Labor v. Reilly, supra.*
[21] *Supra*, p. 431.
[22] 315 U. S. 722, 62 S.Ct. 807, 86 L. Ed. 1143.

industry within which a labor dispute arises."[23] The *Ritter* case recognized that peaceful picketing was an exercise of the constitutional right of free speech, but held that the states were not without power to delineate an area in which picketing was prohibited. Specifically, it held that it was within the power of the State of Texas to forbid the "disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose. We hold that the Constitution does not forbid Texas to draw the line which has been drawn here."[24]

The distinction between the *Ritter* case and the *Milk Producers* case is that the Colorado court makes no attempt to draw a line between permissible and forbidden picketing.

In the later case of *Amalgamated Meat Cutters v. Green*,[25] the Colorado Court followed its decision in the *Milk Producers* case, holding that since there was no labor dispute as defined by the Act, a temporary injunction restraining defendants from picketing was properly issued. As in the Milk Producers case, the Court did not consider whether the picketing under the circumstances was an exercise of the constitutional right of free speech. In neither the *Milk Producers* case nor the *Meat Cutters* case did the Court make any reference to the decisions of the United States Supreme Court holding that a state court may not enjoin peaceful picketing simply because there is no labor dispute as defined by state law.[26]. Nor did the Court undertake to

U. S. Supreme Court Rulings

In three decisions of the United States Supreme Court it has been firmly established that a state may not prohibit peaceful picketing by means of a narrow statutory definition of a labor dispute. The case of *American Federation of Labor v. Swing*[28] involved an unsuccessful attempt by the defendant union to organize the employees of a beauty parlor. Both the proprietor and his employees brought suit in an Illinois state court to enjoin the peaceful picket being carried on by the union in front of the shop. The United States Supreme Court, reversing the Supreme Court of Illinois, held that the picket distinguish or overrule its own previous decisions which had held peaceful picketing to be an exercise of the constitutional right of free speeech.[27]
was constitutionally protected even though there was no dispute between the proprietor and his employees. "A state cannot exclude working men from peacefully exercising the right of free communication by drawing the circle

[23] *Id.*, p. 728 of 315 U. S.
[24] *Id.*
[25] Reported in the Colorado Bar Association advance sheet for December 6, 1948.
[26] *American Federation of Labor v. Swing*, 312 U. S. 321; 61 S. Ct. 568; 85 L.Ed. 855; *Bakery and Pastry Drivers v. Wohl*, 315 U. S. 769; 62 S.Ct. 816, 86 L.Ed. 1178; *Cafeteria Employees Union v. Angelos*, 320 U. S. 293, 64 S.Ct. 126, 88 L.Ed. 58.
[27] *People v. Harris*, 104 Colo. 386, 91 P. (2) 989, 122 ALR 1034; *Denver Local Union v. Perry Truck Lines, supra.*
[28] *Supra*, note 26.

of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. * * * The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."[29]

The same conclusion was reached in *Bakery and Pastry Drivers v. Wohl.*[30] There the defendant union was seeking to compel certain bakery peddlers to hire relief help. The union picketed the wholesale bakery where the peddlers purchased their goods and threatened to picket retail dealers to whom they made deliveries. The New York Court of Appeals had held that an injunction should issue because the dispute with not within the statutory definition of a labor dispute. The United States Supreme Court held to the contrary, stating that "One need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."[31]

The New York Court of Appeals was again reversed in the case of *Cafeteria Employees Union v. Angelos*[32] because it had assumed "that if a controversy does not come within the scope of state legislation limiting the issue of injunctions, efforts to make known one side of an industrial controversy by peaceful means may be enjoined."[33]

Wide Scope of Colorado Injunctions

Although these decisions of the Supreme Court were all prior to the decisions of the Colorado court in the *Milk Producers* and *Meat Cutters* cases, they are referred to in neither decision. In both cases the Colorado Supreme Court assumed "that if a controversy does not come within the scope of state legislation limiting the issue of injunctions, efforts to make known one side of an industrial controversy by peaceful means may be enjoined."[34] In both cases the Colorado court was "concerned only with the question whether there was involved a labor dispute within the meaning of the Colorado statutes and assumed that the legality of the injunction followed from a determination that such a dispute was not involved."[35] In both cases the Colorado court "excluded working men from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and

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[29] *Id.*, p. 326 of 312 U. S., p. 570 of 61 S.Ct.
[30] *Supra*, note 26.
[31] *Id.*, p. 774 of 315 U. S., p. 818 of 62 S.Ct.
[32] *Supra*, Note 26.
[33] *Id.*, pp. 295, 296 of 320 U. S., p. 127 of 64 S.Ct.
[34] *Cf. Cafeteria Union v. Angelos, supra.*
[35] *Cf. Bakery and Pastry Drivers v. Wohl*, 315 U. S. 769, 774, 62 S.Ct. 816, 818.

workers so small as to contain only an employer and those directly employed by him."[36]

In the late case of *International Brotherhood v. Publix Cab Company*[37] the Court came to the conclusion that there was no dispute between the parties and upheld an injunction of the trial court which restrained defendants from striking or picketing. The case involved a strike by taxicab drivers and an accompanying picket. The cab company sought an injunction. All this would seem to be some evidence that there was a dispute of some nature, even if it was not clear to the Court what it was about.

The decision appears to be the first in which any court has attempted to decide for the workers whether or not they have a sufficient dispute with their employer to warrant their leaving their jobs.

The Court recognized that peaceful picketing is a constitutional right, but held that because of the "absence of negotiations" or a "statement of grievances . . . *we say that it is against the public interest to allow such picketing* . . ." (Italics added.)

Act Repugnant to 14th Amendment

If the exercise of a constitutional right is subject to restraint whenever the Court believes it to be contrary to the public interest, it is not a right at all, but a privilege which may be enjoyed only at the pleasure of the Court. Censorship is always invoked under the guise of "public necessity." *Cf. Schenck v. United States,*[38] in which the "clear and present danger" doctrine was enunciated by Justice Holmes.

There is little doubt that the Act as applied by the Colorado court is clearly repugnant to the Fourteenth Amendment of the Constitution of the United States as interpreted by the United States Supreme Court in the *Wohl, Swing* and *Angelos cases.* The United States Supreme Court noted probable jurisdiction in the *Milk Producers* case,[39] but subsequently dismissed the appeal "without prejudice to the determination in further proceedings of any questions arising under the Federal Constitution. *Cf. Rescue Army v. Municipal Court,* 331 U. S. 549."[40]

Since a statutory labor dispute can exist in Colorado only where a majority of the employees of a single employer have voted in favor of a particular "collective bargaining unit," the effect of the Court's decisions is

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[36] *Cf. American Federation of Labor v. Swing,* 312 U. S. 321, 326, 61 S. Ct. 568, 570.

[37] Reported in the Colorado Bar Association advance sheet for January 13, 1949.

[38] 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470.

[39] 68 S. Ct. 158.

[40] 334 U. S. 809, 68 S.Ct. 1015, 92 L.Ed. 984. The reason for the dismissal of the appeal may be gleaned from the language of the Court in the *Rescue Army* case, wherein an appeal from the Supreme Court of California was dismissed. "For we do not undertake to resolve the doubt which necessarily exists concerning the [California] court's meaning," 331 U. S. 549, 583, 584; 67 S.Ct. 1409, 1427, 91 L.Ed. 1666.

to deny to workers who happen to be in a minority the right to attempt to improve their working conditions by peaceful concert of action. The United States Supreme Court has said that "by peaceful picketing working men communicate their grievances,"[41] and it has also stated that "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[42] In Colorado it would seem that working men may exercise their constitutional rights only when they are in the majority.

Taft-Hartley Not As Objectionable

Even under the Taft-Hartley law, it was not considered advisable to permit private parties to seek injunctions for violations of that law, and this power was confined to the National Labor Relations Board.[43]

The evils of "government by injunction" were recognized in the report of the joint congressional committee established by the Taft-Hartley law to observe the effect of its provisions in actual operation. The committee stated:

> "If the 'era of government by injunction is being revived in labor disputes,' the committee would be among the first to do something about it, for we are unanimous in not wanting to return to that period of our history which preceded the enactment of the Norris-LaGuardia Act in 1932."[44]

The committee, after reviewing the injunction cases instituted by the General Counsel for the National Labor Relations Board, concluded: "The record on injunctions sought and obtained completely refutes the statement that the era of government by injunction has been revived in labor disputes."[45] The practical effect of this provision is to reduce the Industrial Commission

The Colorado act, unlike Taft-Hartley, specifically provides that the power vested in the Industrial Commission shall not "prevent the pursuit of equitable or legal relief in courts of competent jurisdiction, nor shall it be any ground for refusal of such relief that all of the administrative remedies provided in this act before the Commission shall not have been exhausted."[46] to an inert status so far as the Labor Peace Act is concerned, since it is more expeditious for a complainant to proceed directly in the district court rather

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[41] *Carpenters Union v. Ritters Cafe, supra,* p. 727 of 315 U. S., p 810 of 62 S.Ct.

[42] *West Virginia State Board of Education v. Barnette,* 319 U. S. 624, 638; 63 S. C. 1178, 1185, 1186.

[43] House Conference Report 510, on H.R. 3020, page 57; *Bakery Sales Drivers Local v. Wagshal,* 333 U. S. 437, 442; 68 S. Ct. 630, 632.

[44] *Report of Joint Committee on Labor Management Relations,* 80th Congress, 2d Session, p. 22.

[45] *Id.,* p. 28.

[46] Sec. 8(1).

than file a complaint with the Commission which must first hold a hearing before it can apply to the Court for an enforcement order.

"Labor Peace Act" Brings No Peace

The return of government by injunction to Colorado has not resulted in labor peace. On the contrary, according to the records of the Bureau of Labor Statistics,[47] the yearly average of work stoppages in Colorado rose from 10.6 for the five-year period preceding 1943 to 25.77 for the period between January 1, 1944 and July 1, 1948 (the last date for which figures are available). The total number of men involved in work stoppages in Colorado rose from an annual average of 3,328 for the five-year period preceding 1943 to an annual average of 13,997 for the January 1, 1944-July 1, 1948 period. The annual average of man-days idle increased from 30,734 to 261,644, for the same periods.

This increase in industrial strife cannot be written off as part of a national trend, since during the five-year period preceding 1943, the men involved in work stoppages in Colorado comprised less than .28 of 1% of the national total, while for the period between January 1, 1944 and July 1, 1948, this figure rose to .44 of 1%. Similarly, the number of man-days idle in Colorado was less than .2 of 1% of the national total for the years 1938 through 1942, while for the January 1, 1944-July 1, 1948 period it jumped to .47 of 1% of the national total.

Apparently industrial peace in Colorado will not be realized by means of the labor injunction.

More Old Dicta Available

Supplementing the announcement last month concerning the availability of old copies of Dicta, we now list the following issues as available upon request. Those issues added since last month are italicized:

1939—March, May and June.
1940—*June, August* and *September.*
1941—February.
1943—June.
1944—February, *April,* July, August, September, *October,* November, and December.
1946—*March,* May, June, September, October, and December.
1947—January, March, June, July, August, September, October, November, and December.

If your missing issues are not included in the above listing, feel free, nevertheless, to request them. We *may* be able to supply you, although the above dates are the only ones for which there is any substantial number.

[47] All figures for the year 1938 through 1947 are derived from the *Handbook of Labor Statistics,* 1947 edition, published by the Bureau of Labor Statistics; the figures for the first six months of 1948 are derived from the information contained in the Bureau's release of November 3, 1948.