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Labor Law—Picketing for Union Shop when No Dispute Exists between Employer and Employees.—Messner v. Journeymen Barbers

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It is suggested that by casting aside the requirement of mutuality of estoppel a party should be allowed to plead affirmatively a judgment against one not in privity with a party to the first action.[8] However, in practice the courts have generally not gone this far, only one case having been found which permitted the prior judgment to be used affirmatively.[9] The courts are understandably reluctant to extend the doctrine beyond the defensive use of the prior judgment against a plaintiff, because of the possibility of undue hardship or injustice if a second plaintiff should be permitted to rely on the first plaintiff's prior judgment against a defendant, as a basis for judgment in the second proceeding.

The same cannot be said for cases like the present,[10] where the major issue in the successive trials was identical, a close legal relationship existed between the three parties involved—a consumer, the retailer from whom he purchased and the packer from whom the retailer received the merchandise. If the consumer could not prove as against the retailer that the purchased item was defective there is no great injustice in saying that he should not be given a second chance to prove it against the packer.

Thus it is felt that the court in the instant case has followed the modern trend that has reached the limit to which the judiciary will extend the rule that mutuality of estoppel is necessary for the application of the doctrine of res judicata.

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Labor Law—Picketing for Union Shop when No Dispute Exists Between Employer and Employees.—*Messner v. Journeymen Barbers.*[1]—Defendant union submitted a contract to the plaintiff that would have required both plaintiff and his employees (barbers) to join defendant's organization. The union did not represent any of the plaintiff's employees, and the em-

[8] Polasky, supra note 3, at 247; Comment, 35 Yale L.J. 607 (1926); Note, 57 Harv. L. Rev. 98, 104 (1943). Cf. Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281 (1957). Such a case would arise where a railroad accident is caused by the alleged negligence of the carrier. After passenger A is successful in maintaining his action against the carrier can passenger B introduce A's judgment to conclusively establish the carrier's liability for the accident leaving B to his proof only of the connection between the accident and his injury and the extent and monetary value of his damages? A second situation could arise where an automobile accident involves driver A, driver B and passenger C in B's car. A's suit against B results in judgment for B based on a finding of A's contributory negligence. Can passenger C in a suit against A rely on B's judgment to establish A's negligence?

[9] Voss Truck Lines, Inc. v. Pike, 350 Ill. App. 528, 113 N.E.2d 202 (1953).

[10] Seavey, Development in the Law of Res Judicata, 65 Harv. L. Rev. 818 (1952). While, as the court points out, Professor Seavey is apparently not sympathetic to the application of the doctrine of res judicata in situations where there is an absence of mutuality of estoppel, he does state: "Perhaps a fair limit would allow strangers to use prior judgments defensively, at least against the plaintiff in the prior action, not affirmatively." Ibid. 863.

[1] 4 Cal. Rptr. 179, 351 P.2d 347 (1960).

ployees expressed the wish not to join the union or to be represented by defendants. Plaintiff's refusal to sign the contract led to defendant's peaceful picketing. The trial court enjoined the union from picketing to secure the union-shop agreement. On appeal to the California Supreme Court, HELD (4-3): Establishment of a closed or union shop is a legitimate object of concerted union activity and peaceful picketing to achieve such cannot be enjoined even though none of the employees desire to join the union.

The majority bases its opinion on the grounds that the California Labor Code outlaws only labor's use of the jurisdictional strike[2] and the employer's use of the yellow-dog contract,[3] that unions have a legitimate interest in organizing workmen in competing nonunion shops to insure the benefits of collective bargaining in union shops, and that state labor policy as declared by the California Labor Code § 923 favors free competition for jobs by any peaceful means not otherwise declared illegal. Section 923 provides in part:

> "In the interpretation and application of this chapter, the public policy of this state is declared as follows: . . . it is necessary that the individual workman have full freedom of . . . designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or of their agents, in the designation of such representatives."

The majority asserts that the economic injury suffered in resisting organization is the price of lawful competition in a free enterprise system.[4] Moreover, when confronted with the legitimate objectives of all the parties concerned, it is not for the court to decide whose interest is paramount, such decisions of broad social and economic policy being peculiarly suited to the legislature. In their view the employer was asking the court to effectuate judicially a "little Taft-Hartley Act" which would call upon the courts to function as a labor board and establish policy.[5]

The dissent contends that when all or a majority of the employees of a particular employer choose not to join a union the spirit and language of § 923 of the Labor Code are as much violated if the employer coerces his employees to join a union under the pressure of concerted union activity, in this case picketing, as they would be if the employer acted at the mere suggestion of a single representative of the union or upon his own initiative.[6]

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[2] Cal. Lab. Code §§ 1115-22. A jurisdictional strike as defined by the code, "means a concerted refusal to perform work . . . or . . . other concerted interference with an employer's . . . business, arising out of a controversy between two or more labor organizations as to which of them has . . . the . . . right to bargain collectively . . . on behalf of [the] employees . . . ."

[3] Cal. Lab. Code §§ 920-22. These sections make promises to join, not to join, or to withdraw from a labor organization or an employer organization, violative of public policy.

[4] 4 Cal. Rptr. at 183, 351 P.2d at 351.

[5] Ibid.

[6] Id. at 193, 351 P.2d at 361.

They further insist that the majority decision is contrary to the prevailing view adopted by state courts and legislatures throughout the nation.[7]

Assuming that the majority interpretation is contrary to the language of § 923, a decision in accordance with the dissent would leave many difficulties unsolved. The type of picketing here involved is "recognitional", i.e., picketing in support of a union demand made upon the employer for recognition as the collective bargaining agent of his employees. This type of picketing could be logically construed to be included under the prohibition of the statute as constituting coercion of the employees to join the union. Yet where the object of the picketing is "organizational", i.e., picketing to induce the employees to join the union, the statute would not appear to be applicable.[8] In effect there is no distinction, for both visit economic sanctions on the employer and in turn coercion upon his employees. The union can accomplish its object with impunity by merely refraining from a demand for recognition.

If the court is to enforce the right of the employees not to organize (and at the same time retain the closed and union shops as legitimate objectives of organized labor), this right would necessarily be exercisable only by the majority. How is the court to determine the wishes of the majority of the employees? Should the court order an election and provide supervision? Granting such supervision, how is the court to determine voting qualifications and the election unit? Although this problem is not presented by the facts of the principle case, and although the validity of denying relief in a clear case because the court might not be able to determine how to proceed in an unclear one without establishing a "little Taft-Hartley Act", is open to dispute, certainly no abiding solution will be reached without the aid of legislation.

Other state courts and legislatures have reached various solutions regarding the desirability of closed and union shops and, more particularly, stranger-picketing to achieve such. Twenty states have "right-to-work" laws that prohibit union security contracts.[9] Ten other states have statutes spe-

[7] Ibid. See also notes 10-14 infra.

[8] The California courts seem to have recognized the distinction in Park & Tilford Import Corp. v. Int'l Bhd. of Teamsters, 27 Cal. 2d 599, 165 P.2d 891 (1946), where it was held that an injunction prohibiting a union from all picketing was too broad where one purpose of the picketing was to induce the employees to join the union, picketing for this purpose being privileged. The court modified the injunction, prohibiting picketing only with respect to the demand that plaintiff sign a closed shop agreement. (The court characterized the object as illegal under the then existing federal law and then proceeded to apply state law.)

[9] Alabama: Ala. Code tit. 26, § 375(2),(3); Arizona: Ariz. Rev. Stat. Ann. §§ 23-1301—23-1307 (1956); Arkansas: Ark. Const. amend. 34, implemented by Ark. Stat. §§ 81-201—81-205 (1960); Florida: Fla. Const. Decl. of Rights § 12, as amended, (1944); Georgia: Ga. Code Ann. § 54-804 (Supp. 1958), § 66-906 (1937); Indiana: Ind. Ann. Stat. §§ 40-2701 et seq. (Supp. 1960); Iowa: Iowa Code Ann. § 736A.1 (1950); Kansas: Kan. Const. art. 15, § 12; Louisiana: The general "right-to-work" law [La. Rev. Stat. §§ 23:881-23:888 (1950)] was repealed by Laws 1956, Act 16. La. Rev. Stat. §§ 23:881 et seq. (Supp. 1958) is a right to work law for agricultural workers; Mississippi: Miss. Code Ann. § 6984.5 (Supp. 1958); Nebraska: Neb. Const. art. XV

cifically requiring that union security contracts be supported by at least a majority of the employees directly involved.[10] Seven states, having a provision more or less similar to California Labor Code § 923, reach a result opposite to that of the California court.[11] Six states have no specific statutes and of these, three would allow such picketing and three would not.[12] No decisions are available in the remaining states.[13]

The problem involves rights not only of the union, employee, and employer, but also of the public. The legislature must consider precisely what the objectives of the law are to be, determine the broad social and economic policies, and provide specific measures with which to implement them. It is submitted that the right of the majority of the employees not to organize should be recognized and that this right should be protected from concerted union activity. On the other hand, the right of unions to peacefully picket

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§§ 13, 14, 15, Nevada: Nev. Rev. Stat. §§ 613,230 et seq. (Supp. 1959); North Carolina: N.C. Gen. Stat. §§ 95-78 et seq. (1958); North Dakota; N.D. Rev. Code §§ 34-0901, 34-0114 (Supp. 1957); South Carolina: S.C. Code §§ 40-46—40-46.11 (Supp. 1959); South Dakota: Const. art. VI, § 2, as amended (1946), S.D. Code § 17.1101 (Supp. 1960); Tennessee: Tenn. Code Ann. § 50-209 (1955); Texas: Tex. Rev. Civ. Stat. art. 5207a (1948); Utah: Utah Code Ann. §§ 34-16-1—34-16-18 (Supp. 1959); Virginia: Va. Code Ann. §§ 40-68 et seq. (1953).

[10] Colorado: Colo. Rev. Stat. Ann. § 80-5-6(c) (1953); Connecticut: Conn. Gen. Stat. Rev. §§ 31-105(5), 31-106(a) (1958); Hawaii: 1959 Session Laws, Act 210, p. 141; Idaho: Idaho Code Ann. § 44-107 (Supp. 1959); Massachusetts: Mass. Gen. Laws Ann. ch. 150A, §§ 4(3), 5 (1958); Michigan: Mich. Comp. Laws § 423.14 (1948); Minnesota: Minn. Stat. §§ 179.12(3), 179.16(1) (1957); New York: N.Y. Lab. Law §§ 704(5), 705; Pennsylvania: Pa. Stat. Ann. tit. 43, §§ 211.06(1)(c), 211.7(a) (1952); Wisconsin: Wis. Stat. § 111.06(1)(c) (1957).

[11] Kentucky: Ky. Rev. Stat. Ann. § 336.130 (1955); Hotel & Restaurant Employees Union v. Lambert, 258 S.W.2d 694 (Ky. 1953); Blue Boar Cafeteria Co. v. Hotel & Restaurant Employees Union, 254 S.W.2d 335 (Ky. 1952); Maine: Me. Rev. Stat. Ann. ch. 30, § 15 (1954); Pappas v. Stacey, 151 Me. 36, 116 A.2d 497 (1955), appeal dismissed, 350 U.S. 870 (1955); Missouri: Mo. Const. art. I, § 29; Bellerive Country Club v. McVey, 365 Mo. 477, 284 S.W.2d 492 (1955); Swift & Co. v. Doe, 311 S.W.2d 15 (Mo. 1958); New Jersey: N.J. Const., 1947, art. I, ¶ 19; Independent Dairy Workers Union v. Milk Drivers Local # 680, 30 N.J. 176, 152 A.2d 331 (1959); Washington: Wash. Rev. Code § 49.32.020 (Supp. 1958); Gazzam v. Bldg. Service Employees Union, 29 Wash.2d 38, 207 P.2d 699, aff'd sub nom. Bldg. Service Employees Union v. Gazzam, 339 U.S. 532 (1950); Audubon Homes Inc. v. Spokane Bldg. Council, 49 Wash. 2d 145, 298 P.2d 1112 (1956), cert. denied, 354 U.S. 942 (1957); Wyoming: Wyo. Stat. Ann. § 27-239 (1957); Hagen v. Culinary Workers Alliance Local # 337, 70 Wyo. 165, 246 P.2d 778 (1952); Montana: Mont. Rev. Codes Ann. § 41-1801 (Supp. 1959) provides that a sole proprietor or member of a partnership consisting of not more than two partners shall have the right to work without interference by any union.

[12] New Mexico [Romero v. Journeymen Barbers Union, 63 N.M. 443, 321 P.2d 628 (1958)], Rhode Island [Lindsey Tavern Inc. v. Hotel & Restaurant Employees, 85 R.I. 61, 125 A.2d 207 (1956)], and West Virginia [Blossom Dairy Co. v. International Brotherhood, 125 W. Va. 165, 23 S.E.2d 645 (1942)] would allow the picketing while Illinois [Bitzer Motor Co. v. Local 604, 349 Ill. App. 283, 110 N.E.2d 674 (1953)], Ohio [Chucales v. Royalty, 164 Ohio St. 214, 129 N.E.2d 823 (1956), cert. denied, 351 U.S. 926 (1956)], and perhaps New Hampshire [(semble) White Mt. Freezer Co. v. Murphy, 78 N.H. 398, 101 Atl. 357 (1917)] would not.

[13] Alaska, Delaware, Maryland, Oklahoma, & Vermont. Oregon has repealed its labor relations statute and has not yet enacted another.

for the purpose of publicizing their organization and organizing an industry is also a valuable one without which union effectiveness would be seriously limited. Attempts to solve this conflict by making the distinction on the basis of the object of the picketing are, as already suggested, impractical. One solution would be legislation allowing peaceful picketing for a reasonable time (measured by the size of the unit picketed), followed by an election after which, if the union were defeated, no further picketing would be presently allowed.[14] Such legislation would certainly require a board to administer it, determining the proper unit and voting qualifications and, in general, supervising elections.

JAMES A. KING, JR.

Mechanics' Lien—Statutory Construction—Encumbrances by Optionee As Statutory Owner.—*Sontag v. Abbott.*[1]—Prior to an option holder's exercise of his option to purchase land he entered into a contract with the plaintiff-materialman for the supply of building materials for the construction of a house on the property. Some of the materials were delivered to the lot on the day of the contract. Subsequently the option to purchase was exercised and a mortgage deed of trust executed in favor of the defendant-mortgagee. The mortgage was recorded the next day. The purchaser abandoned the property without paying in full for the improvements then made by the plaintiff. On foreclosure of the mortgage the defendant secured a deed to the property. The plaintiff now seeks to enforce a materialman's lien on the property.[2] The defendant resists on the basis that the controlling lien statute requires the owner or his agent to contract for the improvements;[3] whereas the contract for the improvements was here entered into with an option holder. Judgment for the plaintiff affirmed on appeal. HELD: An option holder is an owner of the property under option within the meaning of the lien statute.[4]

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[14] In this relation see, Cox, Role of Law in Labor Disputes, 39 Cornell L.Q. 592 (1954).

[1] 344 P.2d 961 (Colo. 1959).

[2] Colo. Rev. Stat. Ann. § 86-3-6 (1953): ". . . All liens, established by virtue of this article shall relate back to the time of the commencement of work under the contract between the owner and the first contractor . . . Nothing herein contained, however, shall be construed as impairing any valid encumbrance upon any such land, duly made and recorded prior to the signing of such contract, or the commencement of work upon such improvement or structure."

[3] Colo. Rev. Stat. Ann. § 86-3-1 (1953): "Mechanics, materialmen, . . . shall have a lien upon the property . . . for which they have furnished materials for the value of such services rendered . . . whether at the instance of the owner, of any other person acting by his authority or under him, as his agent, contractor or otherwise, for the work done or materials furnished. . . ."

[4] Colo. Rev. Stat. Ann. § 86-3-3 (1959): ". . . Any lien provided for by this article shall extend to and embrace any additional or greater interest in any of such property acquired by such owner at any time subsequent to the making of the contract or the commencement of the work upon such structure and before the establishment of such lien by process of law, and shall extend to any assignable, transferable or conveyable interest of such owner or reputed owner in the land upon which such structure . . . shall be placed."