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LABOR AND THE NEW JERSEY COURTS

I.

More than a quarter of a century ago Dean Pound, stirred to bitterness by the decision of the United States Supreme Court in *Adair v. United States*,¹ scathingly condemned a court that, unlike the good Quaker Fox, "refused to speak to the times". The decision of the Court, he said,² is founded on catchwords that were current in the legal philosophy of the Eighteenth Century; the notion of the "natural liberty" of contract is built on the outmoded individualist conception of justice and is effective in exaggerating private, at the expense of public right; the Court was bound to a system of mechanical jurisprudence; the decision, and the opinion of Mr. Justice Harlan for the majority of the Court, evidence the survival of, and the attempt to perpetuate, juristic, as against social, conceptions. "From the time that promises not under seal have been enforced at all," said the Dean, "equity has interfered with contracts in the interests of the weak, necessitous, or unfortunate promisors";³ but in the year of grace nineteen hundred and seven, in a land industrially and technologically in the vanguard, with a form of government in theory dedicated exclusively to the interests of the people and that had become the model for its elders who had been slower in liberating themselves from tyranny in the form of royalty and the oppression of plutocracy, the highest court in its wisdom held that the Constitution of the United States does not sanction a Congressional act which makes it a criminal

¹ (1907) 208 U. S. 161. Vide notes in 21 HARV. L. REV. 370, 44 HARV. L. REV. 1287.

² Pound, *Liberty of Contract* (1909) 18 YALE L. JOUR. 454.

³ *Ibid.*, at p. 482.

offense for an agent or officer of an interstate carrier to discharge an employee from service *because of his membership in a labor organization*.⁴

But Dean Pound was no fatalist, and his conclusion sounded a cheerful note:

"What, then, is the hope for future legislation? On the whole one must say that it is bright. . . . The opinion of Mr. Justice Day in *McLean v. Arkansas*⁵ especially is fraught with promise of a return on the part of the Federal Supreme Court to its sounder views prior to the *Lochner*⁶ and *Adair* cases."⁷

One need only think of *Coppage v. Kansas*,⁸ the *Hitchman Coal Case*,⁹ *Truax v. Corrigan*¹⁰ and the *Tri-City Central Case*,¹¹ to note that the Dean's expression of hope should be taken as characterising the mind of an enlightened teacher and critic of jurisprudence, but not the subsequent decisions of the United States Supreme Court. *Michaelson v. United States*¹² lets in a narrow ray, hardly bright enough to be taken, even by the visionary, for a pillar of light that might lead the march from slavery to freedom; and the opinion of Chief Justice Hughes in *Texas and N. O. R. Company v. Railway Clerks*,¹³ offers little of substance on which labor would wish to build its house.

⁴ STATS. at L. 424, c. 370; U. S. COMP. STATS., 1901, p. 3205. See notes in 30 HARV. L. REV. 632, 37 HARV. L. REV. 486.

⁵ 211 U. S. 539.

⁶ (1905) 198 U. S. 45.

⁷ Op. cit. *supra* note 2, at pp. 486, 487.

⁸ (1914) 236 U. S. 1. Vide 28 HARV. L. REV. 496, 44 HARV. L. REV. 1287. Cf. *People v. West. U. Tel. Co.* (1921) 70 Colo. 90; *Gillespie v. People* (1900) 188 Ill. 176. Sayre, *Inducing Breach of Contract* (1923) 36 HARV. L. REV. 663; Carpenter, *Interference With Contract Relations* (1928) 41 HARV. L. REV. 728.

⁹ (1917) 245 U. S. 229. Vide 31 HARV. L. REV. 648, 41 HARV. L. REV. 770; Cook, *Privileges of Labor in the Struggle for Life* (1918) 27 YALE L. JOUR. 779.

¹⁰ (1921) 257 U. S. 312.

¹¹ *American Steel Foundries v. Tri-City Central Trades Council* (1921) 257 U. S. 184. Carey and Oliphant, *The Present Status of the Hitchman Case* (1929) 29 COL. L. REV. 441.

¹² (1924) 266 U. S. 42. Vide note in 37 HARV. L. REV. 486.

¹³ (1930) 281 U. S. 548. Berman, *The Supreme Court and the Railway Labor Act* (1930) 20 AM. ECON. REV. 619. Vide also 44 HARV. L. REV. 293, 294; *Ibid.* 1287, 1290, 1291. III. I. J. A. Bull No. 5; Cf. *Dorchy v. Kansas*, 272 U. S. 306 (1926); Mason, *The Right to Strike*, 77 U. OF PA. L. REV. 52 (1928).

Summarizing the decisions of the Court, we find the following propositions law: (1) As to yellow-dog contracts, neither Congress¹⁴ nor a state legislature¹⁵ may make it illegal in an employer to discharge an employee from service because of his membership in a labor union, or to require as a precondition of entrance into service, or as a condition of continuing therein, the employee's promise not to become or continue a member of any labor organization; and inducing employees, who have become parties of yellow-dog contracts, to join a union, is illegal and may be enjoined.¹⁶ (2) As to limitations on the powers of a court of equity to issue injunctions in labor disputes, neither Congress¹⁷ nor a state legislature¹⁸ may pass any act having as its object such limitation. (3) As to trial in contempt cases, a Congressional act¹⁹ which gives the right to trial by jury in cases of proceeding for contempt in violation of restraining orders by acts which are also criminal, is not unconstitutional.²⁰

A consideration of the law of labor combinations in the Federal courts leads to the conclusion that it is quite unfavorable to labor. The Clayton Act²¹ has proved almost valueless, and unless the Supreme Court will be differently disposed there is little that might be expected from the Norris-LaGuardia Act.²² Indeed, a perusal of Section 2 of the Act, which defines the public policy of the legislation, makes it obvious that the framers themselves had not much expectation in the remedial efficacy of the law *proprio vigore* should the courts fail to scrap their economic views maintained by them so stringently theretofore.

¹⁴ *Adair v. U. S.*, *supra* note 1.

¹⁵ *Coppage v. Kansas*, *supra* note 8.

¹⁶ *Hitchman Coal Case*, *supra* note 9.

¹⁷ *Tri-City Central Case*, *supra* note 11.

¹⁸ *Truax v. Corrigan*, *supra* note 10.

¹⁹ Clayton Act, sec. 21; *Cf.* N. J. P. L. 1925, c. 169.

²⁰ *Michaelson v. U. S.*, *supra* note 12.

²¹ COMP. STATS. sec. 1243d, 6 FED. STATS. ANNO. 2d ed., p. 141.

²² 47 U. S. Stat. L. 70-73; 29 U. S. C. A., secs. 101-115. Doskow, *Statutes Outlawing Yellow-Dog Contracts* (1931) 17 A. B. A. JOUR. 516; Frankfurter and Greene, *Labor Injunctions and Federal Legislation* (1929) 42 HARV. L. REV. 766; FRANKFURTER AND GREENE, *The Labor Injunction* (1930) concluding chapter; Cochrane, *Injunction Legislation Pending in Congress*, 18 AM. LAB. LEG. REV. 318. MONTHLY LABOR REV., July, 1932, p. 66; Dec., 1932, p. 1347; II. I. J. A. Bull. No. 12, p. 4; III. I. J. A. Bull. No. 1, p. 5; *Ibid.* No. 4, p. 6; *Ibid.*, No. 5, p. 5.

The language of the Section is that of a Petition of a self-constituted extra-governmental group of individuals rather than of a legislative enactment of a constitutional body. Rather than the pronouncement of the will of a sovereign people, it is an entreaty to a superior to be concessive.

II.

How does labor fare in the New Jersey courts? As the reader will see for himself, it is not possible to summarize the law of the State as we are able to do in the case of the Federal Supreme Court; for the reason that Chancery, in the exercise of its limitless discretion, has often found it convenient to gloss the adjudications of the Court of Errors and Appeals, and enforce its own economic views, in much the same way that the United States Supreme Court has on occasion incorporated Spencer's *Social Statics*²³ into the Constitution. The decisions, therefore, do not form a current; rather, there is an ebb and flow, Chancery, influenced by one set of values, pulling one way, and the Court of Errors and Appeals, influenced by another set of values, pulling the other way. Legislation, by whatever set of values determined, hardly matters; it constitutes, as Emerson would say, only a rope of sand which perishes in the twisting. But there is no need to anticipate our conclusions.

In 1867 it was held an indictable conspiracy for several employees to combine and notify their master that unless he discharges certain enumerated persons from his employment, they will, in a body, themselves quit his employment.²⁴

For this position the Court could find sufficient excuse in the state of English law which was uninfluenced by the American war to free negroid slaves. Until 1824 workmen in the mother country could not at all combine to affect their economic position even if they did not resort to a strike.²⁵ Until 1871 threatening a strike was an indictable offense.²⁶ The Conspiracy and Protection of Property Act of 1875²⁷ declared that

²³ *Lochner v. New York* (1905) 198 U. S. 75.

²⁴ *State v. Donaldson* (1867) 32 N. J. Law 151.

²⁵ 5 Geo. IV c. 95, replaced by 6 Geo. IV c. 129.

²⁶ *Crim. Law Amend. Act* (1871) 34 and 35 Vict. c. 32, sec. 1, subsec. 2.

²⁷ 38 and 39 Vict. c. 26, sec. 3.

workmen combining in furtherance of a trade dispute were not indictable for criminal conspiracy unless the act if done by one person would be indictable as a crime. It was not until 1906 that the ban on peaceful picketing, the secondary strike and the boycott was removed. This was accomplished by the famous Trade Disputes Act,²⁸ which eight years later became the model for our Clayton Act. This act of Parliament also declared legal the act of inducing workers to break their contract of employment,²⁹ though, of course, the employee remained liable in damages to the employer.³⁰

In 1883 New Jersey followed the example set by Maine,³¹ New York,³² and Pennsylvania,³³ and passed an act which provides that it shall not be unlawful for any two or more persons to combine for the purpose of persuading, advising, or encouraging, by peaceable means, other persons to enter into any combination for or against leaving or entering into the employment of any person or corporation.³⁴

Soon the statute came up for construction before the Court of Chancery in the case of *Mayer v. Journeymen Stonecutters' Association*.³⁵ The Court held that the statute changed the common-law rule by legalizing private injuries, and refused to restrain acts of a labor association on the alleged ground that they may be detrimental to trade or injurious to an industrial business.

Again, in *Cumberland Glass Manufacturing Co. v. Glass Bottleblowers' Association*³⁶ Chancery construed the act liberally and refused to restrain peaceable measures for inducing workmen to quit or to refuse to enter the employment of a master whose works were closed to union labor.

This case concludes the fortunate career of labor in the

²⁸ 2 Edw. VII c. 47, sec. 2.

²⁹ *Ibid.*, sec. 3.

³⁰ Early English statutes affecting labor: 53 Geo. III c. 40; 23 Edw. III cs. 1-8; 25 Edw. III cs. 1-7, known as Statute of Laborers; 5 Eliz. c. 4; 1 Jac., c. 6.

³¹ ME. REV. STATS. 1883, c. 126, sec. 18.

³² N. Y. L. 1870, c. 19; 19 N. Y. Pen. Code 1881, sec. 170; N. Y. L. 1882, c. 384.

³³ Pa. L. 1869, act No. 1242; Pa. L. 1872, act No. 1105; Pa. L. 1876, act No. 33.

³⁴ P. L. 1883, p. 36.

³⁵ (1890) 47 N. J. Eq. 519.

³⁶ (1899) 59 N. J. Eq. 49.

Court of Chancery. In 1902 the case of *Frank & Dugan v. Herold*³⁷ came before the Court. A reading of the opinion by the Vice-Chancellor who advised the decree makes it obvious that he was influenced not so much by legal principles, as by a tender and paternal regard for the property in his workers had by every employer. He demonstrated that it is the judge, and not the elected representatives of the people, who determines what the policy of the State shall be, by his power to declare null and void on principles of constitutional law "which are scarcely more than hazy moral precepts".³⁸ The Vice-Chancellor in granting injunctive relief held that the effect of the statute is merely to make an indictment impossible, but it in no way affects private rights which may arise out of the acts which are legalized thereby.

To reach this result the Vice-Chancellor involved himself in a net of superfine reasoning that is transparent casuistry. All will agree that some acts are unlawful and yet unindictable; and that a distinction is to be made between the indictable, the unindictable, the lawful, and the unlawful; *therefore*, what is lawful may nonetheless be enjoined *as if* unlawful.

And the Vice-Chancellor went further: The legislature, he said, has no right to limit the Court of Chancery in the exercise of its power of injunction in such cases.

"If the legislature should declare lawful an act which in itself is an invasion of private rights and inflicts upon an individual an actionable injury, such legislation would be unconstitutional. The legislature of New Jersey, whatever may be the power of the English parliament, has no power to declare that one man may, with impunity, inflict a pecuniary injury upon another, or otherwise invade his personal rights."³⁹

It is noteworthy that the private rights invaded, which one

³⁷ 63 N. J. Eq. 443; *Cf.* *Martin v. McFall* (1903) 65 N. J. Eq. 91.

³⁸ *Cf.* *Dodd*, 28 POL. SC. Q. REV. 3; opinion of Brandeis, J., in *Burns Baking Co. v. Bryan* (1924) 264 U. S. 504; *Cook, Privileges of Labor Unions in the Struggle for Life* (1918), 27 YALE L. JOUR. 779, 800.

³⁹ At p. 448.

might suppose to be among the "natural" rights, and inalienable and inviolable, were not recognized as rights before 1853.⁴⁰ But the legal situation presented itself to the Court in a more tangible form than his language quoted might lead one to think. The defendants were not simply guilty of invading complainants' rights, or of inducing a breach of contract: *labor is a commodity, and no one has the right to interfere with the free flow of commodities.*

Then, too, one can always appeal to the principle of Equality. All persons are on an equality before the Law.⁴¹ Every free person, said the Vice-Chancellor, has the right to work where he sees fit and no other person has the right to prevent his doing so, or, without his consent, endeavor to persuade him to quit. Indeed, one has no right to attempt to persuade another unless the latter is willing to listen.⁴² A laborer may be employed at will, and may quit or be discharged at any time for any reason or no reason at all; but to induce that laborer to quit is an invasion of a private right of the employer's and is, despite the statute, an unlawful act.

The evil that this case did lived long after it, as we shall have occasion to note. In the same year the case of *Jersey City Printing Co. v. Cassidy*⁴³ came before a Vice-Chancellor, and again it was held that yellow-dog contracts are not illegal. The appeal was once more to the principle of Equality. Said the learned Vice-Chancellor:

"An operator upon printing machines has the right to offer his labor freely to any of the printing shops in Jersey City. These shops may all combine to refuse to employ him on account of his race, or membership in a labor union, or for any other reason, or for no rea-

⁴⁰ *Lumley v. Gye*, 2 E. & B. 224. Of course at very early common law, when a servant was his master's "money," there was an action for depriving a master of the services of his servant; this also obtained in Fitzherbert's day, vide *NATURA BREVIVM*, 167 B—168B. However, the writ fell into disuse, and it was not until the middle of the Nineteenth Century, by the case of *Lumley v. Gye*, that its use was revived. *Bower v. Hall*, 6 Q. B. D. 333.

⁴¹ Cf. Konvitz, M. R., *Utilitarian Justice: Technical and Discretionary* (1931) 40 *PHIL. REV.* 69, 76.

⁴² Case cited *supra* note 37, at p. 449.

⁴³ (1902) 63 N. J. Eq. 759.

son, precisely as twenty employees in one printing shop may combine and arbitrarily refuse to be further employed unless the business is conducted in accordance with their views."⁴⁴

In 1894 Chancery had been called on to construe the act in a case in which a newspaper was the complainant.⁴⁵ The Court held that boycotts, primary or secondary, are not within the sanction of the statute, and issued an injunction against the sympathy strike called by defendants, the boycott of the "Newark Times," and the "moral intimidation" brought to bear on the newspaper's advertisers.⁴⁶ As to the primary boycott, the Vice-Chancellor held that, each employee may stop patronizing the newspaper without thereby making himself in any way liable, and workmen have the right to associate themselves into a voluntary organization; however, their organization may not act in concert and advise or order a boycott. The reason is that if a union does order a boycott, the individual member thereafter "no longer uses his own judgment". By accepting membership in the trade or craft union, he agrees to be bound by its decrees, and so loses his freedom of will. He dare not as a member disobey orders, and he asserts his independence at "the risk, if not absolute sacrifice, of all association with his fellow-members. They will not eat, drink, live or work in his company. Branded by the peculiarly offensive epithets adopted, he must exist ostracised, socially and individually, so far as his former associates are concerned. Freedom of will under such circumstances," concluded the learned Vice-Chancellor, "cannot be expected".

Nor, it would seem, is any one in society freely good; for if he were to breach the communal code of conduct, his fellows will not eat, drink, live or work in his company; he will be

⁴⁴ *Ibid.*, at p. 767.

⁴⁵ *Barr v. Essex Trades Council* (1894) 53 N. J. Eq. 101. Vide 15 HARV. L. REV. 482. Cf. *Truax v. Bisbee Local C. W. A.* (1918) 19 ARIZ. 379, 171 PAC. REP. 121; *Walters v. Retail Clerks' Union* (1904) 120 GA. 424, 47 S. E. REP. 911; *Hennii Co. v. Alexander* (1916) 198 ILL. APP. 568; *Heitkamper v. Hoffman* (1917) 99 N. Y. MISC. 543, 164 N. Y. SUPP. 533.

⁴⁶ *Ibid.*, p. 114. Cf. *Pierce v. Stablemen's Union* (1909) 156 CAL. 70, 103 PAC. REP. 324; *Lindsay Co. v. Mont. Fed. Labor*. (1908) 37 MONT. 264, 96 PAC. REP. 127.

branded by offensive epithets and ostracised. But the Vice-Chancellor, in fairness to him it should be said, may have been moved to issue the restraining order against the union out of a tender regard for the welfare of its individual members; it may be that in order to save them from their self-assumed subjection to the tyranny of their united selves that he held, that while they have a right to associate themselves, their association must have leaden legs and weighted arms.

The secondary boycott was a *fortiori* enjoined. A striker may not advise the employer's customers that he will stop doing business with them if they continue to do business with the employer. That is intimidation, coercion. It is difficult to criticise such doctrine because it is so clearly contrary to reason and authority. In law a threat is a declaration of an intention to injure another by the commission of an unlawful act; intimidation is the act of making one fearful by such declaration. If the act intended to be done is not unlawful, then it follows that the declaration is not a threat in law, and the effect is not, in a legal sense, intimidation.⁴⁷ What one may do in a certain event, one, generally speaking, may give warning of an intention to do in that event; such a forecast is not, in legal contemplation, a threat, whatever may be implied by the term in colloquial usage.⁴⁸ One cannot be said to be intimidated or coerced, in the sense of unlawful compulsion, by being induced to forego business relations with John Doe rather than lose the benefit of more profitable relations with Richard Roe.⁴⁹

In 1903 we hear of the Jonas Glass Company for the first time. This was a shop closed to union-men. An order to show cause why an injunction should not issue according to the prayer of the bill was made accompanied by an *ad interim* stay.⁵⁰ On the return of the order defendants filed separate answers to the number of about a hundred to which were attached numerous affidavits, denying the facts and circumstances

⁴⁷ *Payne v. West & A. R. Co.* (1884) 13 Lea Tenn. 507, 49 Am. Rep. 666.

⁴⁸ *Empire Theatre Co. v. Cloke* (1917) 53 Mont. 183, 163 Pac. Rep. 107.

⁴⁹ Vide opinion of Sloss, J., in *Parkinson Co. v. Bldg. Trades Council* (1908) 154 Cal. 581, 21 L. R. A. (N. S.) 550, 98 Pac. Rep. 1027; *Holmes, J.*, in *Vegelahn v. Guntner* (1896) 167 Mass. 92, 44 N. E. 1077; *National Protective Assoc. v. Cumming* (1902) 170 N. Y. 315, 63 N. E. 369.

⁵⁰ *Jonas Glass Co. v. Glass Blowers' Assoc.* (1903) 64 N. J. Eq. 640.

set up in the complainant's bill and asserting that the strike was being conducted without either violence, intimidation, or other unlawful interference with the business of the Jonas Works. "The situation is this," said the Vice-Chancellor, "—a restraint is outstanding which imposes no hardships upon the defendants, the legality of which is not challenged, save as it is contended that in point of fact there is no occasion for its exercise . . . As the *ad interim* restraint is not injurious to the defendants," the restraining order was to continue in effect until the final hearing.

The question naturally comes to mind: Was the Vice-Chancellor really unaware of the immense psychologic effect on strikers and sympathetic workers of a restraining order? Did he really think that a restraining order "is not injurious to the defendants"? The objection to yellow-dog contracts is not that they have the force of a legal restraint on the promisor. Where the labor is at will the worker may join a union despite his contract not to do so and quit his employment; or the employer may dismiss him at any time whether he joins a union or no. It is because of their psychologic effect on the mind of the employee, particularly the ignorant or illiterate worker, that makes yellow-dog contracts obnoxious. He knows that he has entered into a solemn compact; if he violates it, who knows?—he will not only lose his livelihood, but he may be even imprisoned. He must not let union men communicate with him, and keep strictly to the letter of his undertaking. All the more objectionable, we think, is a restraining order, even if it purports to enjoin only acts which defendants deny doing and which they under oath affirm not to intend.

And if the Vice-Chancellor on the return of the order does not go into the merits or truth of either set of affidavits, believing both parties or neither, then why give complainant relief *as if* only he were believed? The injunction is issued because, he said, defendants deny doing the acts complained of, and swear they do not intend to do them; therefore, they will not be injured by being ordered to refrain from those acts. Then, under such circumstances, is not the order a vain gesture? At least since 1878 it has been well settled in New Jersey, by a Court of Errors and Appeals case, that a preliminary injunc-

tion will not issue, on return of an order to show cause, to be effective pending the determination of the case on its merits, where the material facts in the bill are met by full, explicit, and circumstantial denial under oath.⁵¹

In 1906 there came before the same Vice-Chancellor who advised the decree in the *Cassidy Case*⁵² the case of *Booth & Bro. v. Burgess*.⁵³ Complainant's employees had declared a strike because he had converted his shop from one that was closed to non-union men into one closed to union men. The Vice-Chancellor approved his own opinion in the earlier case, especially the doctrine of the right to a free market. Such a market obtains, he said, "where transactions occur naturally according to the ordinary laws of trade and commerce, unaffected, not only by coercion, but also by persuasions or non-coercive inducements from outside parties".⁵⁴ He further declared that a principle established beyond all question is

"the absolute right of all men to contract or refrain from contracting. . . . The motives which actuate a man in refraining from making a contract in relation to labor or merchandise or any thing else are absolutely beyond all inquiry or challenge. Self-evident as it may be, the proposition, I think, has often been lost sight of that the right to refrain from contracting is an absolute right, which every man can exercise justly or unjustly, for a good purpose or for a bad purpose, 'maliciously' in the popular sense of the term, or benevolently."⁵⁵

It is interesting to note that this "absolute" right of contract not bound by any moral considerations, which the Court of Equity defends, has in fact many limitations, recognized by reputable courts. Thus a statute which requires weekly pay-

⁵¹ *Citizens' Coach Co. v. Camden Horse Ry. Co.* (1878) 29 N. J. Eq. 299; *Thayer v. Somerville Water Co.* (1911) 79 N. J. Eq. 613. Vide especially *Rissler v. Plumbers' Local* (1931) 109 N. J. Eq. 91; *Kellett v. Local 274 United Assoc.*, etc. (1933) 114 N.J.Eq. 107.

⁵² Case cited *supra* note 43.

⁵³ (1906) 72 N. J. Eq. 181.

⁵⁴ *Ibid.*, p. 189.

⁵⁵ *Ibid.*, p. 190.

ment of a laborer's wages has been held constitutional;⁵⁶ an act limiting the hours of labor of women and children;⁵⁷ freedom of contract as to small loans has been seriously curtailed by statutes which have withstood attacks upon their constitutionality;⁵⁸ the form of contract of insurance may be prescribed by the legislature;⁵⁹ a statute prohibiting contracts to pay wages less often than twice each month;⁶⁰ a statute requiring wages earned but not due, to be paid immediately upon discharge, with or without cause, of any servant or employee, regardless of any contract respecting the subject,⁶¹ and the Workmen's Compensation Act.⁶²

The Vice-Chancellor in a thirty page opinion went into many refinements. Equity, he said, will not restrain "a voluntary boycott," a refusal to buy or work. An injunction restraining a group of workmen from "conspiring" to refrain from working or buying, when each of the group is legally free to so refrain, would be, he said, "not only an anomalous and abortive procedure, but a dangerous attempt to interfere with conduct which is, and ought to be, beyond legal control—conduct which the law leaves subject to social and ethical influences only". But he hastened to assert what the Court of Chancery thinks of those who refuse to buy from or work for an employer whom they deem unfair to themselves. "Communities where men are guided in their dealings in the market by unscientific, impolitic or immoral principles are bound to suffer . . ." ⁶³

He held that complainant's employees had the right to leave his employment; that the employees of complainant's customers had the right to sever their relations with their re-

⁵⁶ Opinion of Justices, 163 Mass. 589, 40 N. E. 713.

⁵⁷ Commonwealth v. Hamilton Mfg. Co., 120 Mass. 383; Commonwealth v. Connor Co., 222 Mass. 299, 110 N. E. 301; People v. Schweinler Press, 214 N. Y. 395.

⁵⁸ Commonwealth v. Danziger, 176 Mass. 290, 57 N. E. 461; Dewey v. Richardson, 206 Mass. 430, 92 N. E. 708.

⁵⁹ Considine v. Metro. L. Ins. Co., 165 Mass. 462, 43 N. E. 201.

⁶⁰ Erie Ry. Co. v. Williams, 233 U. S. 685.

⁶¹ St. Louis, Iron Mt. & So. R. Co. v. Paul, 173 U. S. 404; Holmes, J., in Adkins v. Children's Hosp., 261 U. S. 525, 568, 569; Pound, op. cit. *supra* note 2, at pp. 481-486; Erie Coal Co. v. Ohio Ind. Coms. (1915) 236 U. S. 338.

⁶² Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209 (1911); Pound, *Courts and Legislation* (1913) 7 AM. POL. SC. REV. 361, 380.

⁶³ Case cited *supra* note 53, at p. 193.

spective employers out of sympathy or for no reason.⁶⁴

The Court hypothetically conceded the right of laborers to subject themselves to the rules and orders of their organization; but, he added, "they can only surrender the interest which they themselves have in their liberty".⁶⁵ Who the others are who have also an "interest" in the liberty of workers is revealed in this passage:

"No surrender of liberty or voluntary agreement to abide by by-laws on the part of the employes *who are first coerced*, made by them when they enter their labor unions, can, in my judgment, affect *the right of the complainant to a free market*, which right he will enjoy for all it may be worth if these employes are permitted to exercise their liberty. The employes may be able to surrender their own rights, but they certainly cannot surrender *the right of other parties*."⁶⁶

In 1907 we hear of the Jonas Glass Company again. In that year an attempt was made to unionize the Glass Works, whose president and principal owner, a Mr. Jonas, "had persistently refused to subject his business to the management and control," said the Vice-Chancellor, "of this self-constituted monitor (defendants)."⁶⁷ A sweeping injunction against the continued activities of the workers' association issued; at the same time the learned Vice-Chancellor took the opportunity to declare his State on record opposed to any and all forms of labor activity extramural the Labor Lyceum. Picketing, in its mildest form, is a *nuisance*, he held, and

"to compel a manufacturer to have the natural flow of labor to his employment sifted by a self-constituted antagonistic committee (a wrong, presumably, similar to the diversion of the natural flow of a water course to the detriment of a riparian owner) *whose*

⁶⁴ *Ibid.*

⁶⁵ Case cited *supra* note 53, at p. 196.

⁶⁶ *Ibid.*, p. 197. Italics supplied.

⁶⁷ *Jonas Glass Co. v. Glass Bottle Blowers' Assoc.* (1910) 72 N. J. Eq. 653, at p. 657.

very presence upon the highway for such purpose is a deterrant, is just as destructive of his property as is a boycott which prevents the sale of his products."⁶⁸

The learned Vice-Chancellor went on to quote with unstinted approval from the opinion of McPherson, J., speaking for the United States Circuit Court, in the case of *Atchison, Topeka & Santa Fe R. R. Co. v. Gee*,⁶⁹ to the effect that there is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching.

The workers, hoping the Court of Errors and Appeals would construe the 1883 statute favorably and once for all bind the Chancery Court to a liberal approach, took an appeal; three years later the appeal was heard; but the decision, in one of the few important labor cases to come before the Court, and the opinion for the majority, on the contrary sustained the Vice-Chancellor, and in effect completely nullified the legislation. The Court of Errors and Appeals affirmed the decree,⁷⁰ and restrained the defendants from using coercion, inducements, or persuasion to bring about a termination of the employment, whether the employee be under contract of employment or an employee at will.⁷¹ As to picketing used to dissuade applicants for employment, defendants were restrained from interfering with them by coercion, or personal molestation or annoyance, but not by mere persuasion. The Court *sub silentio* distinguished the natural flow of engaged labor from the natural flow of prospective labor. Boycotting it restrained generally. The Court disapproved of the construction of the act in the *Cumberland Glass Case*,⁷² saying that

"whatever may have been the purpose of its framer, there are, as we think, constitutional obstacles in the way of giving the act so extensive a force."

⁶⁸ *Ibid.*

⁶⁹ 139 Fed. 582, 584.

⁷⁰ (1910) 77 N. J. Eq. 219. Subsequent references to the Jonas Case in this article will be to this decision.

⁷¹ *Ibid.*, 222.

⁷² Case cited *supra* note 36.

For a correct construction the Court went back to the *Frank & Dugan Case*.⁷³

"The act of 1883 is, as we think, properly to be treated as merely rendering the combination no longer indictable. . . . It does not legitimize an invasion of private rights nor prevent the party injured from having full redress."⁷⁴

To create the relation of master and servant, the Court said, it is not necessary that there should be a contract in writing, or even a verbal contract, between them to work for any particular length of time; that the relation exists when the one person is willing from day to day to work for the other, and that other person desires the labor and makes his business arrangements accordingly.

The decision was ten to four, Mr. Justice Minturn writing a dissenting opinion. He contended that *Brennan v. United Hatters*⁷⁵ had settled it that an ordinary wage employee bears towards his master a relation denominated as a service at will, for interference with which an action at law for damages will lie; nonetheless, "assuming that this relationship of a servant at will is to be dignified with the status of a formal contract *inter partes*, then *concededly* the terms of this statute (of 1883) must be read into it. 2 Kent Com. 571."⁷⁶ The statute, he maintained, empowers a number of persons to do what it would be perfectly lawful for one to do,⁷⁷ and he approved of the *Cumberland Glass Case*⁷⁸ and of *Mayer v. Journeymen Stonecutters' Association*.⁷⁹

In 1915 Fink & Son, meat-packers, determined that its factory or shop should no longer be conducted as a union shop. The employees struck and the consequence was a secondary boycott, and an application before Chancery.⁸⁰ The Vice-Chan-

⁷³ Case cited *supra* note 37.

⁷⁴ Case cited *supra* note 70, at pp. 224, 225.

⁷⁵ 73 N. J. Law 729.

⁷⁶ Case cited *supra* note 70, at p. 227.

⁷⁷ *Ibid.*, p. 230.

⁷⁸ Case cited *supra* note 35.

⁷⁹ Case cited *supra* note 36.

⁸⁰ *Fink & Son v. Butchers' Union* (1915) 84 N. J. Eq. 638. Cf. Marx &

cellor found that coercive and intimidative methods were used by the union, and as proof related that

“there was one poster which was quite largely used which was printed in red ink and contained at the top a skull and cross-bones in a frame, and under it the words ‘A. Fink & Son’s products are unfair to organized labor,’ with a union label at the bottom showing that it was printed by a union shop. *This is, perhaps, the most distinctive specimen of intimidating matter produced in the case.* That it is intimidating and was intended to have that effect is apparent at the slightest glance.”⁸¹

He found further that the defendants had entered into a conspiracy not for the purpose of benefiting themselves but of ruining the business of Fink & Son and their customers:

“not for the benefit of the unions or their policies; not because there is in contemplation any sort of influence on the labor market, but to maliciously interfere with and ruin the business men and stop their sales in whom and in which they have no interest whatever, in order to drive the complainants into compliance with their wishes.”

This is, indeed, a strange species of reasoning. There was a conspiracy maliciously to ruin complainant’s business, not for the benefit of the union—but in order to drive complainant into compliance with the union’s wishes; as if to say, You are not to please the Lord—you are to do His will.

The best one can say of the opinion is that the ground of decision really is a proposition of policy “concerning the merit of the particular benefit to themselves intended by the defendant, and suggest a doubt whether judges with different economic sympathies might not decide such a case differently when

Jeans Clothing Co. v. Watson (1902) 168 Mo. 133, 67 S. W. 391; *Root v. Anderson* (1918) (Mo. App.) 207 S. W. 255; *People v. Radt* (1900) 71 N. Y. Supp. 846.

⁸¹ *Ibid.*, p. 641. Italics supplied.

brought face to face with the issue".⁸² For admittedly injury is never a social good, but that an individual suffer it may sometime entail less evil than an attempt to check it by legal means; and courts have often recognized this "freedom to commit injury"⁸³ when public policy demanded such recognition.

In *Baldwin Lumber Co. v. Brotherhood of Teamsters*⁸⁴ the Vice-Chancellor held that provisions of contracts making the yards of complainants closed shops to non-union men were against public policy and void, because tending towards or constituting a monopoly. In construing the injunction in the *Jonas Case*⁸⁵ he held that *peaceful* picketing engaged in for the purpose of *persuasion* addressed to present or *prospective* employees is enjoined.

In 1921 the question of the legal effect to be given a yellow-dog contract was considered by a Vice-Chancellor.⁸⁶ He enjoined the solicitation of employees to join a union, and followed the *Jonas Case* without expressed reluctance. "It is the complainant's legal right to hire men unaffiliated with labor unions, and to make continuance of unaffiliation a condition of employment," and the opinion for the majority of the Court in the *Jonas Case* he found instructive "as it is compelling".⁸⁷

In the same year the question was for the second time before the Court of Errors and Appeals, in the case of *Keuffel & Esser v. International Association of Machinists*.⁸⁸ The Court took as its model the *Tri-City Central Case*,⁸⁹ and, per Mr. Justice Swayze, said:

"Thus, men may accost one another with a view of influencing action, but may not resort to persistent importunity, following and dogging,"⁹⁰

⁸² Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1.

⁸³ Andrews, J., in *Foster v. Retail Clerks Intern. Protective Assoc.* (1902) 39 N. Y. Misc. 48, 78 N. Y. Supp. 860; Beatty, Ch. J., in *Parkinson Co. v. Bldg. Trades Council* (1908) 154 Cal. 581, 98 Pac. Rep. 1027.

⁸⁴ (1920) 91 N. J. Eq. 240.

⁸⁵ Case cited *supra* note 70. Cf. *Commonwealth v. Hunt*, 4 Metc. 111, opinion by Shaw, Ch. J.

⁸⁶ *Currier & Sons v. Intern. Molders' Union* (1921) 93 N. J. Eq. 61.

⁸⁷ *Ibid.*, p. 65.

⁸⁸ (1921) 93 N. J. Eq. 429.

⁸⁹ Case cited *supra* note 11; cf., *Kinloch Teleph. Co. v. Local Union* (1920) 265 Fed. 312.

⁹⁰ Case cited *supra* note 88, at p. 431.

and held that picketing by twenty-five workmen, although unaccompanied with violence, molestation of others, annoying language or conduct, because of its mere numbers amounts to intimidation and is enjoined.

Chief Justice Gummere and Justices Trenchard, Black, and Van Buskirk dissented in part, expressing it as their opinion that it is not unlawful for a body of men to march through public streets in a quiet and orderly manner, even though the paraders carry banners and placards, absent aggravating circumstances.⁹¹

Mr. Justice Minturn again dissented and wrote a separate opinion in which he said:

"The conclusion we have reached in this case, it will be observed, but serves to mark another step in the cycle of judicial legislation which, beginning with an appropriate effort to curb agitation of a forceable character, has concluded with an edict which will be construed to put an end to peaceable and constitutional economic agitation. Thus, in *Brennan v. United Hatters*, 73 N. J. Law 749, ignoring constitutional limitations peculiar to American government, and basing our conclusion upon a line of English cases, evolved from class conditions, in a land where no constitutional limitations exist, we conceded that the feudal right of property in the man, and his labor, still subsists in the hands of a master. . . . Nothing further would seem to be necessary to complete the chaplet of judicial legislation, unless it be the invocation of the provisions of the statute of laborers (23 & 24 Edw. III), under which the laborer was effectively conscripted to the service of the master, and to that end was hounded as a helot and labeled with the brand of Cain."⁹²

The entire opinion by Mr. Justice Minturn, indeed, is worthy of quotation for its remarkable clarity, factual foundation, freedom from cant and the appeal to sacrosanct indefin-

⁹¹ *Ibid.*, p. 438.

⁹² *Ibid.*, pp. 444-451.

ables and the panicky clutching at bad reasons for worse conclusions; withal, for its courage, and the endeavour to be free of the dead hand of the past without doing violence to recognized principles of legal science, recalling to mind the boast of John Bright: "We sit on the shoulders of our forefathers—and see further!"

In the same year the Court was called upon to review a decree of contempt in *Bijur Motor Appliance Company v. International Association of Machinists*.⁹³ It affirmed the decree of contempt of an order restraining striking employees "from parading in the neighborhood of the plant bearing placards or otherwise indicating that a strike is in progress". Mr. Justice Minturn, *dissentiente*, characterized the terms of the restraining order as evidencing the medieval reasoning which supported the feudal concept of master and servant; "a doctrine," he added, "which was supposed to have emitted its valedictory in the *Dred Scott Case*, and to have received its quietus in the emancipation declaration".

Three years later, by a ten to five decision, the Court reversed itself and by a saltatory act reenforced the original liberal position taken by Chancery about thirty-five years before. It held that the Vice-Chancellor's construction of the act in the *Frank & Dugan Case*⁹⁴ and the Court's construction in the *Jonas Case*⁹⁵ were only *dicta* and not controlling as decrees.⁹⁶ It reversed the decree of Chancery advised by the Vice-Chancellor,⁹⁷ and approved of the *Mayer Case*⁹⁸ and the *Cumberland Glass Case*.⁹⁹ Said Mr. Justice Black for the majority: "An act lawful, if done by one, is not necessarily rendered unlawful by the mere fact of concerted action". To enjoin a strike or other acts, the object or the means used must be unlawful or exercised for the purpose of maliciously injuring another.

That was in 1924. It is noteworthy that it was not until

⁹³ (1921) 114 Atl. Rep. 802.

⁹⁴ Case cited *supra* note 37.

⁹⁵ Case cited *supra* note 70.

⁹⁶ *N. J. Painting Co. v. Bro. of Painters* (1924) 96 N. J. Eq. 632.

⁹⁷ 95 N. J. Eq. 211.

⁹⁸ Case cited *supra* note 35.

⁹⁹ Case cited *supra* note 36.

1931¹⁰⁰ that any New Jersey court was again to construe the act with such liberality. Chancery did not hold itself bound by the adjudication of its superior, and only in the following year a Vice-Chancellor revived the obnoxious doctrine of the *Keuffel & Esser Case*.¹⁰¹ The Court of Errors and Appeals had buried the body, it seemed, but its ghost, like that of Hamlet's father, came frequently to disturb and beckon Chancery. The learned Vice-Chancellor granted a preliminary injunction against picketing, holding that the number of pickets may of itself make picketing unlawful. Of yellow-dog contracts he said:

"I do not understand that it is illegal or in any other way offensive for an employer of labor to attempt to operate a shop with workmen who are not members of a trade union, and any such action upon the part of this complainant can have no bearing upon a determination of its right to be free from illegal actions upon the part of its employees who have refused to continue at their work."¹⁰²

But the *piece de resistance* is the case of *Gevas v. Greek Restaurant Workers' Club*.¹⁰³ decided in 1926 in Chancery. For as good an example of judicial supererogation one needs to go back to the *Frank & Dugan Case* of 1892 or *People v. Williams*.¹⁰⁴

Shortly before the Vice-Chancellor was called upon to enjoin the activities of the Workers' Club, the New Jersey Legislature, following the example of Congress and eight sister States,¹⁰⁵ had passed an act¹⁰⁶ in part modeled after Section 20 of the Clayton Act.¹⁰⁷ It provided, in brief, that no restraining

¹⁰⁰ Case cited *post* note 111.

¹⁰¹ *Forstmann & Huffman Co. v. United Front Committee* (1924-1925) 99 N. J. Eq. 230. Cf. *Currier & Sons v. Intern. Molders Union* (1921) 93 N. J. Eq. 61. Dunn and Hardy, *Labor and Textiles* (1931) New York, pp. 161, 222.

¹⁰² *Ibid.*, p. 237.

¹⁰³ (1926) 99 N. J. Eq. 770.

¹⁰⁴ 189 N. Y. 131; reversed by *People v. Schweinler Press*, 214 N. Y. 395.

¹⁰⁵ Vide FRANKFURTER AND GREENE, *The Labor Injunction* (1930) p. 180.

¹⁰⁶ P. L. 1926, ch. 207. Vide 27 A. L. R. 415; Donovan, *Legislation Affecting Labor Injunctions* (1930) 16 A. B. A. JOUR. 561.

¹⁰⁷ 29 U. S. C. 52 (1926).

order shall be granted enjoining any person or persons "to peaceably and without threats or intimidation persuade any person to work or abstain from working . . . provided said persons remain separated one from the other at intervals of ten paces or more".

The learned Vice-Chancellor found *sub silentio* that the acts of 1883 and 1926 were economically unsound and void. He thought that even the *Tri-City Central Case* was too liberal. Not only is the *Social Statics* part of the Constitution of Nation and State, but, too, the *laissez faire* doctrine of the *Wealth of Nations*.¹⁰⁸ He issued a preliminary injunction, placed the Court's approval on yellow-dog contracts, and denounced the Restaurant Workers' Club. He said *ex benevolentia*:

"A single sentinel constantly parading in front of a place of employment for an extended length of time may be just as effective in striking terror to the souls of the employees bound there by their duty as was the swinging pendulum in Poe's famous story 'The Pit and the Pendulum' to victims chained in its ultimate path. In fact, silence is sometimes more striking and impressive than the loud mouthings of the mob. . . . It is admitted that back of the demonstrations is the full force and power of the American Federation of Labor."

The fact that the parading picketers remained silent, approached no one and communicated with no one, gave the picketing, he said, a "sinister aspect," and made the parading intimidation in itself. If, therefore, the picketers are a mob of loud mouths, they are intimidating; if they are incommunicative, they are intimidating, and call to mind Poe's famous story "The Pit and the Pendulum".

The learned Vice-Chancellor found encouragement in the fact that his researches had not resulted in the discovery of a single reported New Jersey case where picketing was the subject of the complaint and an injunction was not issued.¹⁰⁹

¹⁰⁸ Laski, *Political Thought in England from Locke to Bentham*, ch. on *The Foundation of Economic Liberalism*.

¹⁰⁹ Case cited *supra* note 103, at p. 782.

Knowledge of the fact that the American Federation of Labor is behind a picketer is alone sufficient to strike terror into the tender heart of the employer and his small band of employees. The Vice-Chancellor quoted from the *Hitchman Coal Case*¹¹⁰ and Mr. Justice Pitney to the effect that an employer is free to make non-membership in a union a condition of employment; that this is a part of the constitutional rights of personal liberty and private property, and not to be taken away even by the legislature. The 1926 act is declaratory of, and does in no respect change, the laws theretofore in existence; and the immunity of the act is effective (if ever) only when there is an actual controversy: *it is not enough that such a controversy formerly existed, where the employer has been successful in filling the places of the strikers.*

Just as there is no ambiguity as to what the predominant position of Chancery is, so now is it clear what is the position of the Court of Errors and Appeals. In 1931 the Court reaffirmed the doctrine of the *New Jersey Painting Company Case*¹¹¹ in the case of *Bayer v. Brotherhood of Painters*.¹¹² In his opinion for the unanimous Court¹¹³ Mr. Justice Donges said that employees may enforce their demands by strikes, if they thereby violate no contractual obligation; that they may peaceably and without threats or intimidation induce others to do so, if no contractual rights are violated thereby; and "the fact that complainant may be affected unfavorably by the regulations of the union established to further their own interests does not render them unlawful."

The decision was undoubtedly a victory in the interests of labor, but subsequent events show that it was no panacea. Injunctions issued out of Chancery on *ex parte* proceedings preliminary to the return of the show-cause order, and were continued after the hearing; as happened in the seven year period lapsing between the two prior decisions of the Court of Errors and Appeals.

¹¹⁰ 257 U. S. 312.

¹¹¹ Case cited *supra* note 96.

¹¹² (1931) 108 N. J. Eq. 257. Cf. *Waloche v. Sherlock*, 110 N. J. Eq. 223.

¹¹³ It is noteworthy that Lloyd, J., who had voted with the minority in case cited *supra* note 96, in the instant case voted with the Court.

In December of 1933, in *Elkind and Sons v. Retail Clerks' Intern. P. Ass'n.*,¹¹⁴ the Court of Chancery held that "peaceful picketing" is a contradiction in terms; that picketing in its mildest form is a nuisance which the Legislature is not empowered to legalize.

In *J. Lichtman and Sons v. Leather Workers' Indus. Union*¹¹⁵ the same court held that a strike of employees to induce an employer to unionize his shop is unlawful, as the purpose is unlawful, and any act in furtherance thereof will be enjoined.

These cases are typical of numerous others, most of them unreported, such as *Aimco, Inc. v. Panaswitz*; *Caldes Restaurant Co. v. National Hotel, etc., Local No. 1*; *Hotel Association v. Resort Hotel Workers' Union*; *Blakely Laundry Co. v. Cleaners & Dyers Union*.¹¹⁶

In 1934 the Court of Errors and Appeals had again before it a case involving a labor dispute, and again it took a liberal view. In *Bayonne Textile Corp. v. American Federation of Silk Workers*,¹¹⁷ the Court of Chancery enjoined a strike. The defendants were prohibited "from participating, promoting, encouraging, directing, or being in anywise engaged in any strike against or picketing of the complainant, its business or factory".

The order of the Court of Chancery was founded on two assumptions; namely, that a strike called without resort to the machinery of the N.R.A. for adjustment of the dispute was illegal, and that employees had no right to representation by non-employees.

Mr. Justice Heher, in his opinion for the Court of Errors and Appeals,¹¹⁸ held that the lower court was "clearly in error". The Recovery Act does not outlaw strikes. Section 7(a) gives labor the right to organize and bargain collectively through representatives of their own choice. This right "connotes the right to strike in event that such course is deemed advisable, by the employees for their mutual aid or protection. The latter is

¹¹⁴ 114 N. J. Eq. 586.

¹¹⁵ 114 N. J. Eq. 596.

¹¹⁶ 11 N. J. Misc. R. 915. *Harris v. Guir*, 112 N. J. Eq. 99 is an exception.

¹¹⁷ 114 N. J. Eq. 307.

¹¹⁸ 116 N. J. Eq. 146.

an incident of, and imparts efficacy to, the former. It cannot be that Congress intended to reserve the right of collective action, in respect of wages, and to deprive the employees of the only weapon at their command to make its exercise effective. . . . The denial of *this long-established fundamental right to strike* would, in effect, compel acceptance of the scale of wages fixed by the employer. The act does not provide compulsory arbitration, in any form, of wage controversies”.

The learned Justice held, further, that the effect of Chancery’s interpretation, would be the outlawing of national unions, at any rate to the extent of prohibiting them from aiding their locals. It would force the employees into company unions. The right to organize and strike is not sufficient—“employees must make their combination extend beyond one shop”.

The contention was made in Chancery that the union and its officers were “intermeddlers”. The high court did not so view them. “The members of the defendant unions and the employees of the complainant, present and expectant, had a common interest in the rate of wage and the conditions of labor in the industry generally. They were not remote from any connection with or control over the matters in controversy. This was patently not a malicious interposition, but one wholly justified by the common interest in maintaining a proper standard of living”.

The case represents the outstanding victory of labor in the courts, not only of New Jersey, but perhaps of the United States. “The *Bayonne Textile* case represents a victory labor has had to win in the courts largely because the Administration, from the President, Senator Wagner, General Johnson and Donald Richberg down, have in all their pronouncements upon the need for industrial peace and the right of labor to choose its own representatives never found occasion to enunciate the simple principles decided by the case, which every intelligent person has known were necessary if the N.R.A. was to be of any benefit to labor”.¹¹⁹

Following close upon the heels of this case came the dispute between the Miller Furniture Company and its employees,

¹¹⁹ II I. J. A. Bull. 7.

and the issuance of an *ex parte* restraining order on June 25, 1934, by the Court of Chancery, which was vacated by Judge Avis of the United States District Court on July 23, where the case was removed because of diversity of citizenship.

In *Institute of Dyers & Printers v. United Textile Workers*,¹²⁰ approximately 20,000 Paterson dyers each received in his pay envelope a copy of a sweeping *ex parte* injunction.

In recent months, however, some of the Vice-Chancellors have shown "not so much a tendency to follow the *Bayonne* case as a disinclination to grant *ex parte* restraints".¹²¹ In *Master Weavers Institute v. Associated Silk Workers*,¹²² the Court refused an *ex parte* restraint. So, too, in *Adelman v. Universal Fur Dressing Co.*,¹²³ where the Court refused an *ad interim* restraint. In *Restful Slipper Co. v. United Shoe & Leather Workers*¹²⁴ the Vice-Chancellor modified the *ad interim* restraint considerably when he granted the preliminary injunction. In *Singer & Bros. v. Rabbit Fur Workers Union*,¹²⁵ the preliminary injunction allowed peaceful picketing although the original restraint forbade all picketing.

In the *Restful Slipper Case*,¹²⁶ the right under Chancery Rule 204 to require the testimony in open court of those making affidavits was exercised for the first time in a labor dispute case. On the return day, before any testimony was taken, the court modified the injunction so as to permit peaceful picketing, and the Vice-Chancellor indicated that in the future he would not grant *ex parte* injunctions. That other Vice-Chancellors will follow his example is far from certain.

III.

In the construction of statutes by courts "the ultimate judicial question is, not whether the court construes the Constitution as permitting the act, but whether the Constitution

¹²⁰ Unreported.

¹²¹ III I. J. A. Bull. 5.

¹²² 116 N. J. Eq. 502.

¹²³ 116 N. J. Eq. 511. Cf. *Campbell Soup Co. v. Cannery Industrial Union*, unreported.

¹²⁴ 116 N. J. Eq. 521.

¹²⁵ Unreported.

¹²⁶ Cited *supra* note 124.

permits the court to disregard it."¹²⁷ The question of the wisdom or expedience of legislation is for the Legislature and not for the courts. A statute may be economically and socially undesirable, but, unless the constitutional tripartite division of our government be disregarded, such considerations are political or legislative and not judicial. When regarded in such light, the position taken by the Court of Chancery of New Jersey, appears to be an abuse of judicial discretion, a direct and obstinate refusal to limit its functions within the bounds set by the organic law of the State and by the genius of our republican democracy.¹²⁸

But the New Jersey courts are not singular, and Congress and the legislatures of many states, aroused by a vigilant and militant public opinion shocked by the recalcitrance of the courts, are considering, or have already enacted, statutes which, it is hoped, might remedy the situation. There is the Norris-LaGuardia Act.¹²⁹ Wisconsin¹³⁰ has gone furthest in attempting to limit the jurisdiction of its equity courts in labor disputes. Ohio,¹³¹ Arizona,¹³² Oregon,¹³³ Colorado,¹³⁴ Nevada,¹³⁵ and Pennsylvania¹³⁶ have enacted new legislation. New York¹³⁷ has passed an act prohibiting the issuance of *ex parte* injunctions in any case, and Minnesota¹³⁸ has a new law modeled after the Clayton Act.

In the United States Supreme Court in 1930 by a unanimous decision (Reynolds, J., not participating) it was held that a *bona fide* trade union must be recognized and that a company

¹²⁷ Garrison, J., in Attorney General v. McGuinness, 78 N. J. Law 346.

¹²⁸ Kilbourn v. Thompson, 103 U. S. 168; Meyers v. U. S., 272 U. S. 52; Springer v. Philippine Islands, 277 U. S. 188. Cf. Jensen v. So. Pacific, 244 U. S. 221; Laski, op. cit. *supra* note 108, at pp. 63, 164.

¹²⁹ 47 Stat. 70-73; 29 U. S. C. 101-115.

¹³⁰ Wis. Stat., 1929, 103.46; 1931 Wis. L. ch. 376; vide 44 H. L. Rev. 1287.

¹³¹ S. 108.

¹³² H. B. 44; 1930 Code Anno. 14-885.

¹³³ S. B. 259, Laws c. 247.

¹³⁴ H. B. 232.

¹³⁵ Nev. 1929 Comp. Laws 10743-44.

¹³⁶ Acts 310 and 311 of 1931 session. See case comment in 80 U. OF PA. L. REV. 305 (1931).

¹³⁷ Laws 1930 ch. 378. Vide Interborough Rapid Transit v. Lavin (1928) 247 N. Y. 65, and Interborough Rapid Transit v. Green (1928) 131 N. Y. Misc. 682. See 80 U. OF PA. L. REV. 305; II I. J. A. Bull. 12, p. 7 (1934); III I. J. A. Bull. 7, p. 4 (1934).

¹³⁸ Laws 1929 ch. 260.

union must be dissolved.¹³⁹ Said the Chief Justice:

“‘Interference’ with freedom of action and ‘coercion’ refer to well-understood concepts of the law. . . . The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. ‘Influence’ in this context plainly means pressure, the use of authority or power of either party to induce action by the other in derogation of what the statute calls ‘self-organization’. The phrase covers the abuse of relation or opportunity so as to corrupt or override the will. . . .

“The legality of collective action on the part of the employees in order to safeguard their proper interests is not to be disputed. . . . Such collective action would be a mockery if representation were made futile by interferences with freedom of choice.”¹⁴⁰

The failure of Mr. Justice Parker to be confirmed in his nomination to the Supreme Court bench, because of his unfavorable attitude towards labor manifested in his decision in the *Red Jacket Case*,¹⁴¹ crystallized and accentuated the Nation’s criticism of its courts.¹⁴²

However, it is doubtful if the new legislation will be effective. In 1930 the Supreme Judicial Court of Massachusetts in an advisory opinion declared unconstitutional and against public policy an act declaring void provisions in contracts of employment whereby either party undertakes not to join, become, or remain a member of a labor union, or of any organization of employees, or undertakes in such event to withdraw from the contract of employment.¹⁴³ In Indiana¹⁴⁴ a similar bill was

¹³⁹ *Texan & N. O. R. Co. v. Railway Clerks*, 281 U. S. 548. *Hardware Dealers Mut. F. Ins. Co. v. Glidde* (1931) 76 U. S. (L. ed.) 65, 67.

¹⁴⁰ *Ibid.*, pp. 568, 570. But *vide* ed. in *New Republic*, Jan. 20, 1932, p. 256.

¹⁴¹ *R. J. Consolidate Coal & Coke Case*, C. C. A. (4th), 18 F. (2d) 839.

¹⁴² *Cochrane, Public Opinion Flays Judicial Approval of Yellow-Dog Contracts*, 20 A. LAB. LEG. REV. 181. A discussion of the Houde case and other cases decided by the administrative boards set up by the NRA would take us out of the scope of this paper.

¹⁴³ *In re Opinion of the Justices* (1930) 171 N. E. 234; 44 HARV. L. REV. 293.

¹⁴⁴ H. B. 49 (1931).

passed by the legislature with only one opposing vote in each house, but was vetoed by the Governor on the basis of an advisory opinion of the Attorney General; and in 1930 the Supreme Court of the State of Washington upheld the Board of Education of the City of Seattle in requiring from teachers contracts agreeing not to join a union. Wherever serious strikes have taken place, the injunction continues to be used as the principal weapon of the employers.

Professor Sayre in an article on "Labor and the Courts,"¹⁴⁵ states what he thinks may be reasonably expected from the passage of proper legislation. A brief resume of his conclusions is worthy of consideration. He maintains: (1) In the absence of legislative safeguards or limitations, reactionary Federal or state courts, through the doctrine of civil or criminal conspiracy, will always be provided with a means for curbing the otherwise lawful activities of labor unions. (2) There can be no legislation making it impossible for courts to hold unions illegal as in restraint of trade. (3) In an action by an employer against a third party for the tort of inducing a breach of contract between himself and his employees, malice need be proved, but the courts are free to define the term as they please.¹⁴⁶ (4) A strike to unionize a shop is illegal. *Arguendo*: If employers have the right to discharge employees for belonging to a union, why should not employees have the correlative right to cease work because the shop is or has become non-union? Strikes with such an objective should be legalized by legislation; and the mere prohibition of injunction suits is insufficient, for if a strike is illegal though not enjoined, there remains the likelihood of heavy damage suits. (5) The existent law does not enjoin boycotts by commercial organizations but does enjoin if by labor organizations. The law should be the same for both classes of organizations. Primary boycotts and sympathetic strikes should also be legalized. "Under such legislation all having common interests in the competitive struggle, whether or not they happen to be in the same shop, trade, or industry, should be permitted to act collectively, so long as no illegal means are used,

¹⁴⁵ (1930) 39 YALE L. J. 682.

¹⁴⁶ Ruddy v. Plumbers (1910) 79 N. J. Law 467.

against all having opposed common interests".¹⁴⁷ (6) Peaceful picketing should be legalized. (7) If a blacklist is legal, why should not an unfair list issued by employees be legalized?

As against Professor Sayre's suggestions and conclusions, these difficulties come to mind and are to be considered: (1) Legislation, in so far as it may attempt to legalize what would otherwise be illegal is invalid as depriving the injured of property without due process of law.¹⁴⁸ (2) The fact that the legislative act is directed only to restrict the remedy by injunction does not save it, since the effect of deprivation of the only "adequate" remedy against an "irreparable" injury is to deprive the injured of the right violated or infringed upon.¹⁴⁹ (3) The fact that the acts were done in furtherance of an industrial dispute does not constitute a reasonable basis for a classification which deprives the complaining employer of a remedy otherwise available.¹⁵⁰ (4) State legislation limiting the injunctive power of the Chancery Court may be declared invalid as undertaking to limit the jurisdiction vested in the constitutional courts of the State.¹⁵¹ (5) The greatest obstacle is the freedom of the courts in defining such terms as malice, coercion, intimidation, irreparable injury.¹⁵² The definition of such terms is, in fact, a value-judgment, determined by a resolution of a conflict of interests. It will always rest with the courts to give content to these terms, and the court's attitude and conclusion will be determined by its policy.

If the policy of the courts be opposed, labor will find little balm in legislation, howsoever remedial in intent it may be. It is not new or additional legislation that labor needs, but a bench not predisposed to disfavor them; a bench that will consider as legitimate and warranted, argument and contention on

¹⁴⁷ Op. cited *supra* note 145, at p. 701.

¹⁴⁸ Case cited *supra* note 10; *Bogni v. Perotti* (1916) 224 Mass. 152, 112 N. E. 853.

¹⁴⁹ *Goldberg, B. & Co. v. Stablemen's Union* (1906) 149 Cal. 429, 86 P. 806.

¹⁵⁰ Case cited *supra* note 10; *Pierce v. Stablemen's Union* (1909) 156 Cal. 70, 103 P. 324.

¹⁵¹ *Bogni v. Perotti*, cited *supra* note 148; *Monday Co. v. Auto. Aircraft & Vehicle Workers* (1920) 171 Wis. 532, 177 N. W. 867.

¹⁵² Case cited *supra* note 80. *Schamps v. Fid. & Cas. Co.*, 259 Fed. 55, 58 (C.C.A. 6th 1919); *Laube, The Social Vice of Accident Indemnity* (1931) 80 U. OF PA. L. REV. 189, 196; *DeMinico v. Craig*, 207 Mass. 593, 598; *FITCH, The Causes of Industrial Unrest*, p. 277.

the part of labor that is fair and vigorous—at least as fair, vigorous, and repeated as the arguments on the floor of Congress or in the consultation room of an appellate court; and not insist that workmen be restricted to the amenities of the sewing circle, the gentility of the parlor, and the meekness that shall see God.¹⁵³

The latest move of labor in New Jersey to protect itself from the devastation of the injunction and the *ex parte* restraint indicates that labor now realizes that neither new legislation nor a favorable decision by the Court of Errors and Appeals can help much. Over a thousand local unions have turned to the Chancellor himself with a petition asking him to exercise his broad rule-making power to regulate the procedure in labor cases. They ask that *ex parte* injunctions be done away with, that hearings for temporary injunctions be brought on speedily, that no injunction order shall be construed to prohibit acts sanctioned by the 1926 statute, and that it be required to make findings of jurisdictional facts similar to those provided in the Norris-LaGuardia Act.

This petition represents the only avenue remaining open for labor in an attempt to insure to itself by legal means those meagre rights which the representatives of the people have time and again said is rightfully and legally theirs.

MILTON R. KONVITZ.

JERSEY CITY, N. J.

¹⁵³ Mason, *The Right to Strike*, 77 U. OF PA. L. REV. 52, 59.