1922

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Ernest C. Carman

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THE OUTLOOK FROM THE PRESENT LEGAL STATUS OF EMPLOYERS AND EMPLOYEES IN INDUSTRIAL DISPUTES

By Ernest C. Corman*

The present legal status of employers and employees in industrial disputes is most understandable through a study of the historical development of this branch of the law which, oddly enough, has always been closely associated with the law relative to monopolies and combinations in restraint of trade and commerce.

In early England monopolies were, by common law, contrary to public policy and illegal unless permitted by special franchise; and the creation of a monopoly was punishable whether achieved by combined action or individual effort.

From the earliest times, it was unlawful and criminal in England for several persons to combine for the purpose of controlling trade or enhancing prices, and all contracts or arrangements in restraint of trade or labor were held unenforceable because contrary to public policy.

It is not surprising, therefore, that the first labor unions in England (organized about 1720 A. D.) were held to be criminal

*Of the Minneapolis Bar.

[Cases cited]

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conspiracies, not because labor had begun to organize against capital, but because "combinations of this nature, whether on the part of the workmen to increase, or of the masters to lower, wages were equally illegal."

And so, at the outset of the contest between employers and employees both got an equal start; combinations of the one to lower or of the other to raise wages were first declared illegal, not to aid or deter the particular disputants in their quarrel, but to protect the public against monopolistic control of labor and the obstruction of trade and commerce. The rights of the public, as the innocent bystander, were recognized by the common law as paramount from the very beginning.

In the combat itself, labor scored first. Statutes were enacted legalizing labor unions in England and declaring that neither employers nor employees should be punished for any agreement relating to wages or hours of labor, but expressly prohibiting endeavors by either employers or employees to affect wages or hours of labor by "force, threats, intimidation, molestation, or obstruction."

During the hundred years that have passed since the enactment of the statute legalizing labor unions in England, the struggle between employer and employee has progressed there much the same as in the United States. But, with admirable consistency, the English courts have adhered to the common law (as respects both employer and employee) except when authorized or required to depart therefrom by acts of parliament. Under such policy progress in the struggle between employer and employee may have been slower in England than in the United States, but the legal rights of the combatants have been much more clearly defined in

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9Rex v. Cambridge Journeymen-Tailors, (1721) 8 Mod. 11; Rex v. Mawbey, (1796) 6 Durn. & East 619; 3 Columbia Law Review 447.
11Some authorities have mistakenly denied that the English common law was opposed to labor unions, and have attributed the early decisions against labor unions to very ancient English statutes for the enslavement of labor in the days of serfdom. In support of this view, see Statute of Labourers, 23 Edw. III, ch. 1, and 25 Edw. III, stat. 1; 2 & 3 Edw. VI, ch. 15; 3 Eliz. ch. 4.
12St. 5 Geo. IV, c. 95 (June 21, 1824) amended by 6 Geo. IV, c. 129 (July 1, 1825).
13Lyons v. Wilkins, (1896) 1 Ch. 811, 65 L. J. Ch. 601, 74 L. T. N. S. 358.
England—probably to the advantage of both parties as well as the public at large."

Prior to the enactment of the first English statute legalizing labor unions, the American courts had approved and followed the English common law doctrine." After the orderly change of the law by statute in England, the courts of the several common-

"The Trade Union Act of 1871 (St. 34 & 35 Vict. c. 31, as amended by St. 39 & 40 Vict. c. 22), gave labor unions a definitely lawful status within the limits therein set forth. The Conspiracy and Protection of Property Act of 1875 (38 & 39 Vict. c. 86) expressly legalized an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen which might lawfully be done by one person acting alone; but this act also expressly made it illegal for any person, with a view to compelling another person to do or abstain from doing any lawful act, (a) to use violence or intimidate such other person or his wife or children or injure his property, or (b) persistently follow such other person from place to place, or (c) hide tools or property owned or used by such other person or deprive him or hinder him in the use thereof, or (d) watch or beset the house or other place where such other person resides or works or carries on business or happens to be, or the approach to such house or place, it being provided, however, that attending at or near the house where a person resides, or carries on business, or works, or the approach to such house or place, in order merely to obtain or communicate information, should not be deemed unlawful.

The Judicature Acts authorized the courts to issue interlocutory injunctions to prevent the destruction of a business or industry through violation of the above mentioned statutes pending settlement of trade disputes in or out of court.

Therefore when the case of Lyons v. Wilkins, [1861] 1 Ch. 811, 65 L. J. Ch. 601, 74 L. T. N. S. 358, arose, the Court of Appeal was able to decide quite clearly that striking employees of a leather goods manufacturer were within their rights in combining to strike, in assisting each other in supporting themselves for that purpose and deriving support from other trade unions, and in picketing the employer's place of business for the purpose of peacefully communicating to others (whether seeking employment or not) the information that such strike was in progress; but that such striking employees were acting unlawfully in picketing the employer's place of business for the purpose of accosting employees or persons seeking employment and handing them cards reading: "You are hereby requested to abstain from taking work from Messrs. Lyon & Sons", and in calling out on strike the employees of one Shoenthal (who had no quarrel with their employer) in order to compel Shoenthal to cease and desist from making partly finished articles, pursuant to contract, for Lyon & Sons, one of the parties to the trade dispute.

Contrast the clearness of this decision with the confusion and uncertainty of judge-made law in the United States up to the same date; and with the uncertainty of such late American statutes as the Clayton Act, construed by a divided court in the Duplex Printing Case, (1921) 254 U. S. 443, 65 L. Ed. 176, 41 S. C. R. 172. An element of uncertainty in English law, however, has been injected by the Trades Disputes Act, 6 Edw. VII. c. 47, as interpreted in Conway v. Wade, [1909] A. C. 506, and Larkin v. Long, [1915] A. C. 814 when compared with Hodges v. Webb, [1920] 2 Ch. 70.

wealths in the United States undertook to achieve the same result by judicial legislation under the guise of modernizing the English common law to meet the needs of our changed conditions in this new country." The result has been confusion indescribable—such, indeed, that no lawyer could safely advise as to the legal rights of employers or organized employees in any state if there had been a change in the personnel of its court of last resort since the latest decision on the subject.

Confusion in the law of the several states has increased, not alone from the divergence of opinion among judges, but also from the enactment of legislation both directly and indirectly affecting the combatants.

Much of the legislation affecting employers has been indirect and generally aimed at the correction of abuses by capital in many ways, incidentally including unfair treatment of employees; but nearly all legislation affecting employees or organized labor has been passed for specific purposes directly involving the status of labor.

The struggle between employers and employees in the United States has been formidable only during the past fifty years. For within that time the development of industry has incidentally produced the sweatshop with its long hours, low wages, and unfit environment as the crowning evil (from the viewpoint of labor) of the industrial system; while, to combat the sweat shop, labor


"The Sherman Act of July 2, 1890, ch. 617, 26 Stat. L. 209, and the antitrust acts of many states have been variously interpreted, not only as generally prohibiting trusts, monopolies and agreements in restraint of trade by either employers or employees, but also as prohibiting blacklists of employers (Lawlor v. Loewe, (1915) 235 U. S. 522, 59 L. Ed. 341, 35 S. C. 179) and, presumably, of employees. Other legislation indirectly affecting the rights of employer and employee includes the maintenance of fire escapes, guards for machinery, sanitary equipment, methods of work, and a multitude of other matters having to do with the social and economic side of industry in its relation to the community rather than the direct relations between employers and employees.

"The various Trade Union Acts (e. g. 24 Stat. L. 86), anti-injunction acts (e. g. 38 Stat. L. 728; Session Laws Minnesota 1917, ch. 493), anti-blacklisting acts (e. g. G. S. Minn. 1913, sec. 8890), minimum wage acts, acts limiting hours of employment, and many others, bear the unmistakable label of legislation enacted by procurement of organized labor.
unions within the same period have become thoroughly and efficiently organized, and with their constantly increasing and often unreasonably extreme demands have become (from the viewpoint of capital) the greatest menace to industrial development.

Except within the last decade, employers have operated behind closed doors, silently and secretly exerting their power in a multitude of ways to combat legislation or evade laws directed against monopoly, unfair trade, competition, undue profits and other evils detrimental to the public at large, with the labor problem merely incidental to the much more general combat between the few who fain would control everything on the one side and all the rest of the people fighting for a livable distribution of wealth on the other.

But organized labor, in the very nature of things, always has been compelled to operate in the open—in fact to advertise itself noisily to gain strength and support; and, while at times this has put employees at a disadvantage, it has in a general way worked for their benefit because public opinion has been thereby enlisted in their support whenever their cause was just.

The weapons of the employers have been the same from time out of mind—the replacement of dissatisfied labor with other workmen content with (or forced by circumstances to accept) the employers' terms and conditions of employment or, in the alternative, the suppression of the business or industry involved in the dispute. In the use of these weapons, employers have been aided by their organizations for production in widely separated areas supplemented (until recently, at least) by an efficient transportation system whereby the economic demand for their products could be satisfied despite local disturbances; and also by the thousand and one other advantages, legitimate and illegitimate, incident to the possession of great wealth and the private control of large properties.

The first weapon used by employees was the simple strike, or combined refusal to work, which has been generally held to be legal in the United States from an early date; the decisions resting upon the absolute constitutional right of the individual to work or not to work at his pleasure and without assigning any reason therefor, supplemented by the American common-law right of such individuals to combine and do together what each may lawfully do separately.
The simple strike, however, was often ineffective; and that explains why the whole history of organized labor in the last fifty years might be written merely by tracing its development and use of other weapons added to the simple strike to fight its battles with the employers.

One of the first additions to the strike for direct redress of grievances was the further refusal of union labor to work in the same place of employment with non-union labor. There followed a wide difference of judicial opinion as to the legality of such concerted action by employees, but finally the view prevailed that since an individual has an absolute right to refuse to work in a particular place because another employee is objectionable to him, a number of individuals may collectively refuse to work in such place for the same reason;" hence labor unions may require their

"Commonwealth v. Hunt, (1842) 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Randall v. Hazleton, (1866) 12 Allen (Mass.) 412, 414; Vegelahn v. Guntner, (1896) 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 A. S. R. 444, where Justice Holmes, in his dissenting opinion, said: "But there is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But, in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle... One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way."

The legality of strikes was also declared by Justice Holmes to be based upon the doctrine that free competition is worth more to society than its costs, and that "the policy is not limited to struggles between persons of the same class, competing for the same end. It applies to all conflicts of temporal interests."

This doctrine, however, cuts both ways when considered with reference to the present-day attempts of union labor to destroy the free competition of non-union labor (or "outlaw" labor organizations) with them in the labor market. And this, notwithstanding the declaration of some late statutes that "labor is not a commodity;" for competition in the struggle for life is not confined to an interchange of commodities.

Moreover, the right to act in concert has been frequently declared dependent upon an absence of malice and the presence of justifiable self-interest. In National Protective As's'n v. Cimming, (1902) 170 N. Y. 315 61 N. E. 369, 58 L. R. A. 135, 88 A. S. R. 648, Chief Justice Parker said: "Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor, or improving their relations with their employers. They have the right to strike (that is, to cease working in a body by prearrangement until a grievance is redressed), provided the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves."

"Gray v. Building Trades Council, (1903) 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 A. S. R. 477; National Protective Association v.
members not to work where non-union labor is employed. The courts were very reluctant to establish this doctrine; it was rigidly confined, and its legality was made to depend upon the motives of the union or combination rather than upon the effect produced. If the object was to force an employer to unionize his business,” or coerce workmen to join the union,” or induce employees to break an existing contract,” or intimidate persons seeking employment,” or deprive a non-union man of his opportunity to work,” or maliciously injure anyone, then the agreement in combination to quit work for such purposes was an unlawful conspiracy. These limitations upon the right of employees to combine to quit work were of little practical use either to non-union workmen or employers, since proof of the motives actuating union labor in any particular contest was very difficult, if not impossible.

The employers, therefore, retaliated by forming organizations among themselves and agreeing not to employ laborers who had gone on strike or left the employment of any member employer, and agreeing further to discharge union employees and to prevent

Cummings (1902) 170 N. Y. 315 63 N. E. 369, 58 L. R. A. 135, 88 A. S. R. 648 where Justice Parker stated the prevailing view in these words:

"Stated in other words, the propositions quoted recognize the right of one man to refuse to work for another on any ground that he may regard as sufficient, and the employer has no right to demand a reason for it. But there is, I take it, no legal objection to the employee's giving a reason, if he has one, and the fact that the reason given is that he refuses to work with another who is not a member of his organization, whether stated to his employer or not, does not affect his right to stop work; nor does it give a cause of action to the workman to whom he objects because the employer sees fit to discharge the man objected to, rather than lose the services of the objector. The same rule applies to a body of men who, having organized for purposes deemed beneficial to themselves, refuse to work. . . . The reason may no more be demanded, as of right, of the organization than of an individual."


"Plant v. Woods, (1890) 176 Mass. 402, 57 N. E. 1011, 51 L. R. A. 339, 70 A. S. R. 330; Berry v. Donovan, (1905) 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 A. S. R. 499; Erdman v. Mitchell, (1903) 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 A. S. R. 783; Curran v. Galen, (1897) 152 N. Y. 33, 46 N. E. 297; Old Dominion Steamship Co. v. McKenna (1887) 38 Fed. 48, 50, 18 Abb. N. C. (N.Y.) 262, where it was said: "All combinations and associations designed to coerce workmen to become members, or to interfere with, obstruct, vex or annoy them in working, or in obtaining work, because they are not members, or in order to induce them to become members,. . . are pro tanto illegal."


"Lucke v. Clothing Cutters Ass'n, (1893) 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408.
non-union employees from joining any labor union under penalty of discharge. As a means of accomplishing these purposes, the employers circulated "blacklists" of former employees under the ban for striking or joining labor unions."

Employees sought to prevent employers from using such weapon, but the courts held that inasmuch as an employer has an absolute right to employ or to refuse to employ or to discharge from employment any person, for any reason or for no reason at all, it follows that any number of employers may lawfully organize for the same purpose, and may by mutual agreement discharge any employee or refuse to employ any person belonging to a labor union; and as a condition of employment may require any workman to sign a contract agreeing not to leave work because of the employment of non-union workmen in the same industry or place of work; and, further, that such organized employers may keep and circulate (among members of the organization, at least) a list containing the names of former employees who have quit work or have been discharged for any of the reasons above enumerated."

Organized labor then procured the enactment of statutes in many states prohibiting and penalizing the refusal to employ men or the discharge of employees because of their membership in labor unions, and prohibiting the circulation of "blacklists" of discharged workmen; but these statutes have been declared unconstitutional in their main provisions, although some of the provi-

23Worthington v. Waring, (1892) 157 Mass. 421, 32 N. E. 744, 20 L. R. A. 342, is one of the leading cases involving employers blacklists of employees, and denying employees the use of the injunction to prevent same.

24Boyer v. Western Union Telegraph Co., (1903) 124 Fed. 246; Worthington v. Waring, (1892) 157 Mass. 421, 32 N. E. 744, 20 L. R. A. 342; State v. Employers of Labor, (1918) 102 Neb. 768, 169 N. W. 717, where the court, after discussing the right of employees to combine and cease work in a body, said: "On the other hand, employers may legally agree with each other that they will not adopt the 'closed shop' principle or may counsel or advise with each other for that purpose. They have as much legal right to refuse to employ members of labor unions as such members have to refuse to work in an 'open shop', and the same legal right to adopt a course of conduct in concert. Hitchman Coal & Coke Co. v. Mitchell, (1917) 245 U. S. 220, 38 L. Ed. 269, 38 S. C. R. 65. ... Martin, Modern Law of Labor Unions, Sec. 270."

25Act of June 1, 1898, 30 Stat. L. 424, ch. 370 and G. S. Minn. 1913, Sec. 8890 are typical.

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sions against blacklisting discharged workmen may still be in force. Organized labor has a corresponding right to keep and circulate (among its own members, at least) lists of employers who have discharged union laborers or are otherwise hostile to them. But this limited right of employers and employees to blacklist each other must not be confused with boycotting, which is quite another thing.

Organized labor had now established the right in concerted action to quit work together (i.e. strike) not only for the direct purpose of forcing an increase in wages or an improvement in working conditions for the members of the union, but also for the indirect purpose of excluding non-union workmen from participation.

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"State v. Justus, (1902) 85 Minn. 279, 88 N. W. 759; Dick v. Northern Pacific Ry. Co., (1907) 86 Wash. 211, 150 Pac. 8; Joyce v. Great Northern Ry. Co., (1907) 100 Minn. 225, 110 N. W. 975; Hefferman v. Whittlesey et al., (1914) 126 Minn. 153, 148 N. W. 63, where it was said: "If the evidence sustained the charge of a conspiracy between the company and Whittlesey to make false charges against plaintiff's integrity in order to procure his discharge, resulting in his being 'blacklisted,' it is probable that there would be a liability." In State v. Moilen, (1918) 140 Minn. 112, 167 N. W. 345, Chief Justice Brown said in reference to earlier legislation affecting employers and employees: "The so-called blacklisting of employees by employers was prohibited, and the statute was sustained in State v. Justus, (1902) 85 Minn. 279, 88 N. W. 759. . . A statute prohibiting the malicious interference by combination of employers to prevent a discharged employee from obtaining employment elsewhere, was upheld in Joyce v. Great Northern Ry. Co., (1907) 100 Minn. 225, 110 N. W. 975." See also authorities cited and discussed in Notes 62 L. R. A. 714, 19 L. R. A. (N.S.) 561, 27 L. R. A. (N.S.) 666, 48 L. R.; A; (N.S.) 893.

These decisions indicate that the right to blacklist will be closely confined to the original combatants, and not extended beyond the reasoning of the cases of State v. Employers of Labor, (1918) 102 Neb. 768, 169 N. W. 717, and Hitchman Co. v. Mitchell, (1917) 245 U. S. 229, 63 L. Ed. 260, 38 S. C. R. 65. Indeed, in these decisions the courts seem to have avoided the term "blacklist", although recognizing the validity of acts amounting to the same thing.

"Rogers v. Evarts, (1891) 17 N. Y. S. 264; Sinsheimer v. United Garment Workers, (1894) 77 Hun. (N. Y.) 215, 28 N. Y. S. 337, 59 N. Y. St. Rep. 593; Note to Hey v. Wilson, 16 L. R. A. (N.S.) 85, where there is a discussion of many decisions which apparently assumed the right of a labor union to post or list an employer not only as unfit for union laborers to work for, but also as not meriting the patronage of members of the union in the sale of his products—the only doubt expressed having to do with the right to circulate "Unfair Lists," etc. among third persons, thereby instituting a boycott. See also Note to Willett v. Driscoll, 23 L. R. A. (N.S.) 1237, and Montgomery Ward v. S. D. Merch. Ass'n, (1907) 150 Fed. 413.

"Lawlor v. Loewe, (1915) 235 U. S. 522, 59 L. Ed. 341, 35 S. C. R. 170, shows that the circulation by organized labor of a list of "unfair dealers" among prospective customers of such dealers is prohibited by the Sherman Anti-trust Act (26 Stat. L. 209), if it is intended to and does restrain commerce among the states.
ing in the benefits so procured, through being employed in the same place of work with union labor—for such was the undoubted cause of the refusal of union labor to work alongside non-union workmen.

Thus far all was well. Employers might, as they saw fit, either fill their place entirely with union laborers bound together by common ideals and standards, or with non-union workmen entirely unorganized; and employees might elect to work in the one kind of place or the other.

The next step, however, in the progress of union labor was an attempt to prevent employers from hiring non-union workmen to work in places from which union labor, for its own reasons, had withdrawn; and the weapon first adopted by union labor to accomplish such object was picketing the place of employment.

With the advent of picketing another confusing difference of judicial opinion arose. At first the tendency of the courts was to declare all picketing illegal; but this attitude was gradually dissipated and supplanted by the present prevailing view that there is no illegality, at common law, in the act of several persons stationing themselves near a particular place (i.e. the place of former employment of striking workmen) for the purpose of observing and obtaining information or communicating facts concerning such place to persons willing to receive the same, or “peacefully persuading” persons to desist from working therein if such persons are willing to listen to the argument against it.” The common law, as so judicially declared, upon the right of picketing was not satisfactory either to employers or to organized labor. The employers denied the legality of the right even in limited form;

"Chicago Typothetac v. Franklin Union, (not reported, but affirmed in 220 Ill. 355,) where Judge Smith said: “It is idle to talk of picketing for lawful purposes. Men do not form picket lines for the purpose of conversation and lawful persuasion. . . . In imagination and in theory a peaceable picket line may be possible, but in fact a picket line is never peaceable. It is always a formation of actual warfare and quite inconsistent with everything not related to force and violence. Its use is a form of unlawful coercion.”

In Atchison, etc., Ry. Co. v. Gee, (1905) 139 Fed. 582, Judge McPherson said: “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.”

24 Cyc. 835, Notes 76 and 77 and numerous cases there cited. See also Empire Theatre Co. v. Cloke, (1917) 53 Mont. 183, 163 Pac. 107; White Mountain Freezer Co. v. Murphy, (1917) 78 N. H. 398, 101 Atl. 857. Many late decisions in favor of picketing are based upon anti-injunction statutes. See, for example, Truax v. Bisbee Local, (1918) 19 Ariz. 379, 171 Pac. 121.
while organized labor not only contended for the right itself but denied the legality of any limitations whatever upon the exercise of the right. Both sought to establish their contentions by legislation, direct and indirect. Neither succeeded.

Long before the right of picketing had become judicially determined, organized labor had adopted still another weapon some-

25 An Act defining picketing, prohibiting the same, and providing a penalty for the violation thereof—enacted by the Legislature of the state of Washington and published as Chapter 181 Session Laws of Washington, 1915, may be taken as illustrative of the direct efforts of employers to establish by statute the illegality of picketing.

Organized labor sought indirectly to establish an unlimited right of picketing through statutes such as the Clayton Act of Oct. 15, 1914, (38 Stat. at L. 738; 9 Fed. St. Ann. 2nd Ed. p. 750) prohibiting the issuance of injunctions to prevent any person or persons from "attending at any place where such persons may lawfully be . . . for the purpose of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising or persuading others by peaceful and lawful means so to do;" etc. etc. Similar statutes were enacted in many of the states, typical among which are Chapter 493, Session Laws of Minnesota, 1917, and Paragraph 1464 of the Revised Statutes of Arizona of 1913 (Civil Code). The Washington Act prohibiting picketing (Laws 1915, Ch. 481) was defeated on referendum in 1916.

The Clayton Act prohibiting injunctions against picketing (38 Stat. at L. 738, ch. 323, sec. 20) was shorn of its supposed favoritism to organized labor by the Supreme Court of the United States in American Steel Foundries v. Tri-City Central Trades Council et. al., (1921) 42 S. C. R. 72, sustaining the right of federal equity courts to issue injunctions against picketing in any way indicating a militant purpose inconsistent with bare peaceful persuasion, or interfering with free ingress to and egress from the employer's premises; and in that particular case prohibiting the employees from maintaining more than one single picket at each point of ingress and egress in the plant involved—establishing the doctrine that "the purpose should be to prevent the inevitable intimidation of [i.e. caused by] the presence of groups of pickets, but to allow missionaries."

The Arizona statute prohibiting injunctions against picketing (Revised Statutes Arizona 1913, Par. 1464), after being interpreted as absolute in its terms by the supreme court of Arizona (20 Ariz. 70, 176 Pac. 570) was declared unconstitutional by the Supreme Court of the United States in Truax v. Corrigan, (1921) 42 S. C. R. 124, although there was a strong and very able dissenting opinion by Justice Brandeis in which Justices Holmes, Clarke and Pitney concurred. This decision appears to have sounded the death knell of state statutes designed to favor employees as a class immune from general provisions of law applicable to all others under similar circumstances.

The Minnesota statute (Ch. 493 Session Laws of Minnesota (1917) met with the same fate as the Clayton Act in the Wonderland Theatre Case (Campbell v. Motion Picture Machine Operators Union, (Minn. 1922) 186 N. W. 381, 787).

It may safely be said, therefore, that the combatants (employers and employees) are now practically back where they started in their fight to legalize or outlaw picketing by legislation.
what related to picketing—the boycott" The terms "boycott" and "conspiracy" have been loosely used interchangeably in relation to attempts by organized labor to force its will upon employers by concerted but usually indirect action tending to injure or destroy the trade or business of such employers unless the demands made of them should be complied with. There can be no doubt that boycotting was originally illegal at common law; but after early decisions to that effect a wail of protest from organized labor, and a plethora of new statutes in the several states (some for and some against boycotting), soon brought about a change in judicial sentiment and interpretation in most jurisdictions whereby the boycott (as used by labor unions) was legalized within strict limitations, dependent upon the object to be accomplished and the means of attainment. This test of the legality of boycotting (equally unsatisfactory to both combatants) gave rise to a somewhat artificial classification of boycotts as primary and secondary. A boycott is primary where an organized union of employees by concerted action cease dealing, either socially or in a business way, with a former employer; and it is secondary where such employees

"The term "boycott" was probably used first in State v. Glidden, (1866) 55 Conn. 46, 8 Atl. 890, 3 A. S. R. 23, which was a criminal prosecution for violation by members of a labor union of a statute (Session Laws of Connecticut, 1878, ch. 92) unquestionably enacted at the behest of employers (see decision, p. 69) and providing that "every person who shall threaten or use any means to intimidate any person, to compel such person, against his will, to do or abstain from doing any act which such person has a legal right to do, or shall persistently follow such person in a disorderly manner, or injure or threaten to injure his property, with intent to intimidate him, shall upon conviction be liable to a fine not exceeding one hundred dollars, or imprisonment in the county jail six months."


In the Oxley Stave Company case, supra, Judge Thayer said: "While the courts have invariably upheld the rights of individuals to form labor organizations for the protection of the interests of the laboring classes, yet they have generally condemned those combinations usually termed 'boycotts,' which are formed for the purpose of interfering, otherwise than by lawful competition, with the business affairs of others, and depriving them by means of threats and intimidation, of the right to conduct the business in which they happen to be engaged, according to the dictates of their own judgments."

"In Gill Engraving Company v. Doerr, (1914) 214 Fed. Rep. 111, Justice Hough, after denying an injunction to enforce an employers statute against boycotting (Consol. Laws, c. 40, New York), said: "Nor does it advance matters to call the affair a boycott, for 'it cannot be said
induce or compel others (not parties to the controversy) to withdraw their social intercourse or business patronage from a former employer by threatening or doing injury to such other persons.

A great contrariety of judicial opinion arose as to what constitutes a legal or illegal boycott; some courts adhering to the original rule that all boycotts are illegal, some adopting the view that primary boycotts are legal and secondary boycotts illegal, and others adopting the doctrine that boycotts (whether primary or secondary) are legal if free of malevolence or violence and used in support of a bona fide industrial conflict, but otherwise illegal. Some of these conflicting decisions rested upon various anti-trust and anti-conspiracy acts—the former having been judicially stretched to cover combinations of labor as well as capital, and the latter having been enacted (probably through the influence that to boycott is to offend the law.' Mills v. U. S. Printing Company, (1904) 99 App. Div. 611, 91 N. Y. S. 185, affirmed (1910) in 199 N. Y. 76, 92 N. E. 214. This is not thought to mean that every form of boycotting is lawful, but that the word does not necessarily import illegality. I do not perceive any distinction upon which a legal difference of treatment should be based between a lockout, a strike, and a boycott. They often look very unlike, but this litigation illustrates their basic identity. All are voluntary abstentions from acts which normal persons usually perform for mutual benefit; in all the reason for such abstention is a determination to conquer and attain desire by proving that the endurance of the attack will outlast the resistance of the defense; and for all the law of New York provides the same test, viz., to inquire into the legality (1) of the object in view, and (2) of the means of attainment. When courts generally (with some legislative assistance from behind) abandoned the doctrine that any concerted arrangement which hindered the following of a trade or constituted an attempt to change trade conditions (especially wages) amounted to an actionable conspiracy, this judicial position was quite sure to fail, unless it was admitted that the passing of the old doctrine had left the matter political rather than judicial. This has not yet been done." See also Pierce v. Stablemen's Union, (1909) 156 Cal. 70, 103 Pac. 324; Lindsay v. Montana Federation, (1908) 37 Mont. 204, 96 Pac. 127.


of employers) to restrict the use of the boycott in industrial disputes although never expressly so declaring.

But organized labor very soon exerted political pressure to procure enactment of statutes declaring that labor is not a commodity or article of commerce (and, consequently, not within the purview of anti-trust or anti-monopoly statutes or decisions), and expressly providing—as organized labor believed—that injunctions should never be issued to prevent picketing or boycotting in combats between employers and employees, nor to prohibit any other development in such struggles unless necessary to prevent irreparable injury." It was the confident belief of organized labor that these statutes effectually removed all practical restrictions upon their use of the boycott and its adjunct—picketing. This delusion was short-lived; and any prospect of final achievement of such results now seems to have been completely shattered by the Supreme Court of the United States in very recent decisions.

In the Duplex Printing Case it was held that the secondary boycott when so applied as adversely to affect interstate commerce violates the Sherman Anti-Trust Act; that the Clayton Act gives private parties so injured the right to relief by injunction in the federal courts; and that the anti-injunction sections of the Clayton Act cover only direct disputes between employers and employees—hence apply only to primary boycotts lawfully conducted. In the American Steel Foundries Case, a similar interpretation of the Clayton Act was adopted with reference to picketing; and even the common law right of picketing was declared to be very limited indeed, it being said that the aim should be "to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries." And finally, in the Truax Case it was held that the anti-injunction statute of Arizona, when interpreted by the highest court of that state as prohibiting the granting of an injunction against acts by striking employees which would be enjoined if committed by persons other than employees, is unconstitutional in that it violates the fourteenth amendment to the con-

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"The Clayton Act, 38 Stat. at L. 738, identical with Session Laws Minnesota 1917, ch. 493, and similar to Civil Code Arizona 1913, Par. 1464 and California Statutes 1903, page 289 (Penal Code, Deering Ed. 1909, p. 762). Similar acts were passed in nearly all the states.


"American Steel Foundries Co. v. Tri-City Central Trades Council, (1921) 42 S. C. R. 72.

"Truax v. Corrigan, (1921) 42 S. C. R. 124."
stitution of the United States guaranteeing to all the equal protection of the laws.

These sweeping federal decisions were followed by the supreme court of Minnesota in the *Wonderland Theatre Case* interpreting a Minnesota statute identical with the Clayton Act. The most of the other states will follow with like decisions is almost certain, not only because of the desirability of uniformity stressed in the Minnesota decision but also because any other interpretation would probably conflict with the constitution of the United States as interpreted in the *Truax Case*.

As soon as it had been established through the development of American law governing the conduct of employers and employees in trade and labor disputes that employees could lawfully organize and act in concert, the radical elements of organized labor began to chafe under the restrictions and limitations which the law placed upon such concerted action. The decision in the *Danbury Hatter's Case* declaring a combination of labor organizations subject to the inhibitions of the Sherman Anti-Trust Act and its members liable in threefold damages for violation thereof, and the alacrity with which equity courts adopted the use of the injunction to prevent abuses where prospective actions at law for damages gave no promise of adequate relief, together aroused such bitterness that the more important rights of the parties were for a time overshadowed by this phase of the contest. The result was a split in the ranks of union labor and the growth of hybrid offshoots—the bastard progeny of a hapless forbear—which afforded a fertile field for the evil work of anarchists and criminal propagandists masquerading as friends of labor. The success of these advocates of "direct action" and the crimes committed by them in the name of union labor (but without its approval) led to

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*Campbell v. Motion Picture Operators Union, (Minn. 1922) 186 N. W. 781.*

*Session Laws of Minnesota for 1917, ch. 493.*


*In a dissenting opinion in Truax v. Corrigan, (1921) 24 S. C. R. 124, 138, Justice Brandeis said: "In America the injunction did not secure recognition as a possible remedy until 1888. When a few years later its use became extensive and conspicuous, the controversy over the remedy overshadowed in bitterness the question of the relative substantive rights of the parties." This bitterness, however, was caused quite as much by the decision in the Danbury Hatters' Case as by the too ready use of the injunction.*

*Such, for instance, as the so-called Industrial Workers of the World and other insincere exponents of "The One Big Union" idea.*
the enactment of statutes in various states creating, defining, and providing for drastic punishment of the new offense of criminal syndicalism."

And here rests the development of the relative legal rights of employers and employees in trade and labor disputes.

The combatants face each other in legalized battle array. Fighting is the order of the day. Peace and quiet prevail only between the rounds. The legalized weapons of employers are suppression of industry and derangement of commerce, lockouts, blacklists, discrimination agreements, and starvation of employees. The legalized weapons of employees are suppression of industry and derangement of commerce, blacklists, discrimination agreements, strikes and boycotts. There are forty-eight different sets of rules for intrastate battles but only one set for interstate conflicts. The legislatures are the rule-makers; the courts are the referees; and the "big stick" is the injunction. But it is not a contest of sportsmanship, but a dirty fight to the death where each gladiator strikes the other below the belt whenever he can conceal the foul blow, and at pleasure tramples under foot the spectators who are paying nearly all the costs of the fight and eventually will contribute the purse for the winner and the consolation prize for the loser. There is no arena and there are no sidelines for the safety of the onlookers who, perforce, are interested in the outcome. All of this broad land—the land of the free and the

"Session Laws of Minnesota, 1917, ch. 215, the first section of which is as follows:

"Criminal syndicalism is hereby defined as the doctrine which advocates crime, sabotage (this word as used in this bill meaning malicious damage or injury to the property of an employer by an employee), violence or other unlawful methods of terrorism as a means of accomplishing industrial or political ends. The advocacy of such doctrine, whether by word of mouth or writing, is a felony punishable as in this act otherwise provided."

This Act was held constitutional in State v. Moilen, (1918) 140 Minn. 112, 167, N. W. 345, where Chief Justice Brown said:

"The contention that the statute violates rights granted and secured by the federal constitution is without merit. The design and purpose of the legislature in the enactment of the statute was the suppression of what was deemed by the lawmakers a growing menace to law and order in the state, arising from the practice of sabotage and other unlawful methods of terrorism employed by certain laborers in furtherance of industrial ends and in adjustment of alleged grievances against employers. That they are unlawful and within the restrictive power of the legislature is clear."

Similar statutes have been passed in many other states. In the state of Washington, criminal syndicalism is given a more restricted definition, but sabotage is made a separate crime. See Session Laws of Washington, 1919, ch. 173 and 174.
home of the brave—is the battle ground of the combatants. There is no place of retreat for noncombatants—for women and children. Many are forced into the conflict against their will to die with the vanquished or survive with the victors; others are deprived of the necessities of life; and all remaining are left to sink or swim in the maelstrom of business depression, curtailed production, artificially enhanced prices, and disordered channels of trade and commerce that inevitably result from the very nature of the conflict.

That such conditions will remain static is unthinkable. For it must soon be more clearly realized that the existing status is the natural result of unscientific legislation and economically unsound judicial opinion. The public detriment resulting from physical combat between individuals has been recognized and made unlawful ever since "trial by battle" disappeared from Anglo-Saxon jurisprudence; and yet the same primitive fallacy has been deliberately adopted by legislatures and courts as the means whereby employers and employees shall determine their disputes in economic conflicts that indirectly but no less surely accomplish the destruction or disability of the combatants themselves, and occasion vastly greater and infinitely more far-reaching public detriment.

An outbreak of mob violence or other physical combat between contending forces in Pennsylvania would scarcely affect the citizens of Minnesota, but as this article is written (April, 1922) a strike of coal miners in Pennsylvania gives direful promise of leaving the poor in Minnesota and the Dakotas as well as in Pennsylvania to freeze during the next succeeding winter; and, even if they be spared that calamity, at least a further shrinkage in their already too thin purses will assuredly follow the enhanced prices for fuel that inexorably results from curtailment of normal pro-

"In the Report of the Congressional Committee on Industrial Relations, 1915, p. 135, appears the following: "There are apparently only two lines of action possible: First, to restrict the rights and powers of employers to correspond in substance to the powers and rights now allowed to trade unions, and, second, to remove all restrictions which now prevent the freedom of action of both parties to industrial disputes, retaining only the ordinary civil and criminal restraints for the preservation of life, property, and the public peace. The first method has been tried and failed absolutely... The only method, therefore, seems to be the removal of all restrictions upon both parties, thus legalizing the strike, the lockout, the boycott, the blacklist, the bringing in of strike breakers, and peaceful picketing."

"Bossert v. Dhuy, (1917) 221 N. Y. 342, 117 N. E. 582, shows the extent to which permissible combat may now be carried."

duction. But that is not all; for unlawful physical violence will also surely occur in the vicinity of the mines if such strike long endures. The history of strikes in general admits of no other conclusion.

The reason for lawlessness in all long continued strikes is not far to seek. The weapons of legally permissible use are woefully inadequate for the achievement of complete victory by either of the combatants; hence, in the heat of conflict, both find the use of illegal means preferable to a stalemate or a failure. Human passions are not easily controlled—especially when set in motion with legal sanction. "Gentlemen's agreements" will be made behind closed doors and "sab cats" will prowl in the dark just as long as strikes are allowed and the means of winning them are prohibited by law.

But there is no disposition by either legislatures or courts to add to the list of permissible weapons of the combatants nor to extend their use. The tendency of recent legislation and decisions has been quite to the contrary.

And this tendency will continue, because it is due to a realization by law-makers and courts of the intolerable consequences of their mistaken policy of the past if it be continued to its logical end in the future. It was too much for the supreme court of Minnesota in the Wonderländ Theatre Case when it came face to face with the logical result of its previous decisions and was forced either to modify and restrict them or to announce that the erstwhile employer in the Wonderländ Case might be boycotted and picketed indefinitely because he chose personally to do a certain job for himself rather than hire two union men to do it. A statute cor-

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38The decision in the American Steel Foundaries Case, (1921) S. C. R. 72, upholding in theory the right of peaceful picketing but limiting the use of pickets to "each point of ingress and egress" in the plant there involved, may be considered by organized labor as a grim paraphrase of that old doggerel jest:

"Mother, may I go out to swim?  
Yes, yes, my darling daughter;  
Hang your clothes on a hickory limb,  
But don't go near the water."


In the statement of facts by the court in the Wonderland Case, Campbell v. Motion Picture Machine Operators Union, (Minn. 1922) 186 N. W. 781, appears the following:

"Until February 24, 1917, plaintiff employed none but members of Local 219 to operate the projecting machines in this theatre. On Fe-
responding to the Clayton Act afforded a convenient and quite sufficient excuse for following the Supreme Court of the United States in its interpretation of that Act. But these decisions, state and federal, are not to be deplored. On the contrary, they represent a healthy effort to limit the effects of a mistaken policy previously adopted in good faith, and are the best that the courts can do under present circumstances.

For it is now apparent to all careful observers that trade and labor disputes between employers and employees cannot be settled satisfactorily, as a rule, by combats between the disputants armed with economic weapons the use of which must be so closely restricted in the public interest that neither combatant can effectually subdue the other. And, paradoxical as it may seem, the ultimate public good forbids that either be allowed to subdue the other; for the result would be either a workers' soviet on the one side or a return to the sweatshop on the other. Either is intolerable. This being so, why continue the fight? Why allow ten million combatants to keep the home of a hundred million people in constant turmoil, to destroy their property, to imperil their safety, to obstruct their sources of supply of the necessities of life, to interfere with their happiness and convenience in a thousand other ways—all for the purpose of allowing the combatants the special privilege of injuring but never of completely destroying or subduing each other?

February 10, 1917, having decided to reduce his expenses, he gave to his operators the notice called for by his contract with them for termination of employment, and gave similar notice to the Local. He informed them that, to reduce expenses, he was going to operate his machine himself for the whole or a greater portion of the time, but was willing to employ a member of the Local, at the wage scale fixed by it, to relieve him a portion of the time each day. The officers of the Local refused to enter into the proposed arrangement. Plaintiff then offered to join the Local, but was not taken in because the rules did not allow an owner or proprietor of a theatre to become a member. On February 24, 1917, the employment of plaintiff's machine operators was terminated in accordance with the notice, and from and after that date until June 18, 1917, plaintiff operated his machines himself, with part time aid from one Dillon, who was not a member of Local 219. It was upon such facts that plaintiff was boycotted and picketed.

"The radical laborer's dream of life in a palace is hardly less attainable than the aim of radical employers to "smash the labor unions". (See any one of Judge Gary's after dinner speeches). Labor unions have come to stay. Their legitimate uses are numerous and varied, not the least of which is their inestimable service to the general public in curbing and exposing malefactors of great wealth whose lawless greed would otherwise add much to the burdens of life. A coal company declaring one thousand per cent. dividends is quite as reprehensible as a misguided labor union striving to deprive a man of the privilege of doing his own work.

The legalization of economic fights between employers and employees
The best friends of organized labor on the bench are apparently anxious for a change—for the substitution of some other method of adjusting disputes between employers and employees."

Others high in authority have suggested a continuance of the present struggle with experimentation in changing the rules of combat as a possible solution of the problem." It may be conceded that experimentation is the key to progress in the development of the law to fit the constantly changing conditions in modern society; but fifty years of experimentation in armed economic conflict between employers and employees has been of doubtful benefit to either of them, and has resulted in repeatedly dragging the public

despite the resultant injury to the general public constitutes in itself a vicious special privilege. Other classes are generally required to submit their disputes, of whatever nature, to some orderly tribunal or commission for determination and settlement—particularly where the public interests would otherwise suffer.

A blacklist in the hands of others than employers or employees meets with severe condemnation of the courts. (Eastern States Retail Lumber Dealers Association v. United States, (1913) 234 U. S. 600, 58 L. Ed. 490, 34 S. C. R. 951) and is held criminal even when limited in circulation to the members of an association.

A boycott maintained by any except employees or employers is unlawful (Davis v. Starrett, (1903) 97 Me. 568, 55 Atl. 516).

Recognizing this evil in interpreting Section 20 of the Clayton Act, the United States Supreme Court in the Duplex Printing Case said: "Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States, and upon the general operation of the Anti-trust Laws,—a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public; and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section, not to speak of ignoring or slighting the qualifying words that are found in it."

"Justice Brandeis, the most profound student of industrial disputes and the most pronounced friend of organized labor on the bench, closed his dissenting opinion in favor of the unions involved in the Duplex Printing Case with these words:

"Because I have come to the conclusion that both the common law of a state and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest, and to declare the duties which the new situation demands. This is the function of the legislature, which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."

"In closing his dissenting opinion in the Truax Case, Justice Holmes
with the combatants to the brink of an abyss where disaster was averted only by resort to subterfuges—among which the Adamson Act was the most conspicuous. A policy fraught with such danger in indefensible. Experimentation, to be helpful, must be made along sound lines; but this has not been done. The apologists for experimentation in the continuance of the economic war between employers and employees attempt to justify their views with the argument that it is all for the public good." The argument proves too much; for a fight to the finish would assuredly destroy the public as well as the combatants,—and a lesser fight

said: "There is nothing that I more deprecate than the use of the fourteenth amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."

In his dissenting opinion in the same case, Justice Brandeis said: "The rules governing the contest necessarily change from time to time. For conditions change, and furthermore, the rules evolved, being merely experiments in government, must be discarded when they prove to be failures."

"In his dissenting opinion in the Truax Case, Justice Brandeis said: "The history of the rules governing contests between employer and employee in the several English-speaking countries illustrates both the susceptibility of such rules to change and the variety of contemporary opinion as to what rules will best serve the public interest. The divergence of opinion in this difficult field of governmental action should admonish us not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal and thus to close the door to experiment within the law. . . In England improvement of the condition of workingmen and their emancipation appear to have been deemed recently the paramount public need."

"It needs no argument to demonstrate that the removal of all restrictions upon employers allowing them to form a nation-wide combine could, and in a great contest with organized labor would, result in the complete cessation of all industry throughout the country. On the other hand, the removal of all restrictions upon employees, allowing them an unlimited and nation-wide use of secondary boycotts and sympathetic strikes, would achieve exactly the same result. And so the public would either perish with the combatants, or become the prey of the victor—either the serf of the malefactors of great wealth or the slave of soviet tyrants. The United States Supreme Court foresaw one side of this proposition in the Duplex Printing Case, where Justice Pitney in the majority opinion reversing the lower court and restricting the anti-injunction section of the Clayton Act to primary boycotts, said:

"The extreme and harmful consequences of the construction adopted in the court below are not to be ignored. The present case furnishes an apt and convincing example. An ordinary controversy in a manufacturing establishment, said to concern the terms or conditions of employment there, has been held a sufficient occasion for imposing a general embargo upon the products of the establishment and a nation-wide blockade of the channels of interstate commerce against them, carried out by inciting sympathetic strikes and a secondary boycott against complainant's customers, to the great and incalculable damage of many innocent people far remote from any connection with or control over the original and
injures the public only in a lesser degree. In general, the conduct of a just and free government must be predicated upon the principle of the greatest good to the largest number; and a departure from this principle whereby a few of the people are allowed to inflict economic injury upon all the rest, for whatever purpose, is surely of doubtful public benefit. If disarmament and the settlement of differences by discussion and arbitration is a good policy in the politics of the nations, the principle would seem to be equally advantageous in the settlement of industrial disputes between employers and employees. Common sense leads to the same conclusion; for the justice of a disputed wage scale can better be determined by disinterested arbiters than by an endurance contest between the disputants—unless the public prefers the doctrine that might makes right. A vague comprehension of the foregoing principles has already set the trend of the best thought of the times toward industrial disarmament and arbitration, even though it meets temporarily with the disapproval of organized labor.\footnote{The Minnesota State Board of Arbitration created in 1895 by chapter 170 Session Laws of Minnesota, 1895 (R. L. 1905 sec. 1828 to 1834; G. S. Minn. 1913 sec. 3940 to 3946), and the Board of Mediation and Conciliation created by Act of Congress of July 15, 1913 (ch. 6, 38 Stat. at L. 103) are typical.}

It became evident that Congress and the several state legislatures had come vaguely to realize the futility of armed economic combat as a means of settling disputes between employers and employees when various acts were passed creating labor boards and commissions with power to inquire into the facts in such disputes and offer their services as mediators.\footnote{In sections 300 to 316 of the federal Transportation Act of February 28, 1920 (41 Stat. L. 456 and 946) Congress created the Railroad Labor
The boldest attempt yet made in the United States to substitute peaceful arbitration for industrial combat is to be found in the Kansas Industrial Court Act. The Kansas Act is the first clear-cut modern recognition of the existence and rights of the third and most important party to industrial disputes—the public. It is an application of the fundamentally sound doctrine that all individual rights are relative and not absolute—a doctrine long advanced in favor of employers and employees and offered as an excuse for the incidental harm done to the general public in trade and labor disputes, but now turned "to other end to" and applied in favor of the general public and against employers and employees in Kansas. The Act impresses with a public interest the production and distribution of food, clothing and fuel; provides that controversies between employers and employees engaged in such production or distribution shall be adjudicated by the court of industrial relations therein created, saving certain constitutional rights to the disputants; prohibits strikes and other acts lessening normal production and distribution thereof; and adequately provides for enforcement of this new law. The Act is predicated upon the paramount interest of all the people as opposed to the oppression of contesting groups in strategic economic positions, whether such oppression be direct or indirect. It is not a law against or in favor of employers or employees, but a law enacted wholly for the benefit of the non-combatants—the general public. Indeed, in its broader sphere of operation the powers and duties of the Kansas Industrial Court are roughly analogous to those of the Interstate Commerce Commission in the domain of national transportation. The Kansas Industrial Court Act is, therefore, a pioneer in Ameri-
can law, and it represents a local legislative opinion in favor of a complete reversal of policy—the suppression of industrial combats in the public interest instead of their enlargement in the interest of the combatants. Naturally enough it has met with the opposition of both employers and employees, but the tendency of this new idea to spread is already indicated by bills for similar laws since brought before the legislatures of Massachusetts and New York and now contemplated in other states—anti-industrial-court planks in political platforms as bait for votes to the contrary notwithstanding.

The Kansas idea was probably derived from legislation in the British Dominions. As early as 1907 the right of employers or employees engaged in industrial disputes in Canada to cause a cessation of industry by lockouts or strikes was temporarily withdrawn until after official investigation and report upon such controversy should have been made.

In Australia a confederation of states exists under a constitution modeled on the constitution of the United States of America but expressly conferring on the Federal Parliament power to make laws with respect to “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state.” There, as here, all residuary powers of legislation remained in the states. The Federal Parliament by statute created a “Court of Arbitration and Conciliation” for the settlement of disputes between employers and employees extending beyond the limits of one state, while the several states enacted similar legislation for like intrastate disputes. In general these statutes forbade boycotting, picketing, the strike and the lockout; use of the injunction to enforce compliance with the acts was expressly sanctioned, and violation thereof was also made punishable by criminal proceedings. Along with these prohibitions, industrial arbitration through courts or administrative tribunals created by the same acts was made compulsory, the “absolute” rights of


both employers and employees being subordinated to the public interests. Fifteen years of operation under these laws in Australia seems to have demonstrated not only that such system is vastly superior to legalized industrial combat, but also that the abridgment of personal liberty necessary to make the new system effective has been quite harmless.

In America, the induction of any system for compulsory settlement of disputes between employers and employees may meet with serious obstructions in the nature of constitutional limitations. The provisions against deprivation of liberty or property "without due process of law," and against "involuntary servitude," and in favor of "equal protection of the laws," may be urged with much force against the compulsory operation of industries by employers and employees or even the submission of their economic disputes to legal tribunals. But rising beside these constitutional restrictions is the indefinable "police power" reserved to the states to support just such legislation as will necessarily be involved in compulsory settlement of industrial disputes; while the power to regulate commerce between the states and with foreign nations still inhere, by express constitutional provision, in the federal government. Ultimately the two powers together may be found sufficient to sustain both state and federal action to compel submission of disputes between employers and employees to duly constituted tribunals for adjudication without the cessation of industry or

"In the third of a series of articles in the Harvard Law Review by Henry B. Higgins, President of the Australian Court of Conciliation and Arbitration, it is said (34 Harvard Law Review, 126):

"From our Australian point of view, the objections so fiercely urged in America and in Great Britain to compulsory arbitration appear to be fanciful and irrelevant. Compulsion may be applied at either of two points: compulsion to submit to arbitration before strike, and compulsion to obey the award. . . Under the Australian act, both kinds of compulsion are applicable; and no voices, so far as I know, are now raised against either. Regulation by tribunals of some sort is accepted; it is welcomed especially by the unions—the great majority of the unions. . . The ideal of the Court is to get such a regulation as the parties ought to put in a collective agreement; and compulsion means merely that as to claims on which the parties cannot agree, or as to which some of the parties will not agree, the Court can make an award. Very often the mere fact that the Court has a power of compulsion in reserve impels the parties to find a line of agreement; and reasonable employers are more willing to make concessions when they feel that their competitors are to be bound by the same terms. . . Moreover, . . the dread expressed by certain theorists—that compulsion would end in a servile state—a state in which the workers would be compelled to work in return for certain guarantees as to conditions—is unfounded, so far as our experience goes. It has been established here that a worker is not compelled to take work, any more than an employer is compelled to give work."
other economic disorders. The decisions upon the Kansas Industrial Court Act have already partially established the existence of the necessary power; and the general trend of judicial opinion is in the same direction."

The right of the sovereign to enforce the operation of public and quasi-public service utilities privately owned is already too well established to admit of controversy; and the line of demarcation between public service and private enterprise is hazy as well as flexible. All industry, all general trade and commerce between human beings is necessarily impressed with a public interest of greater or less degree; and well it may be that the courts of last resort, under pressure of an enlightened public opinion, will finally declare it to be exclusively for the legislatures to determine whether any given industry so far affects the public weal as to justify enforced operation thereof and compulsory settlement of labor disputes arising therein. Under such ruling of the courts, the incidental loss (if any) to the owner resulting from enforced operation in the public interest would be damnum absque injuria.

As to the employee, however, it is admittedly impossible constitutionally to enact any law specifically requiring him to work against his will; but there is no constitutional limitation upon that economic law which compels him to work or starve. That he has no vested right in the special privilege of engaging in great industrial combats grossly inimical to the public welfare is clear; and if deprived of such right by positive law and shorn of all privilege down to his bare constitutional right of working or not working,

"In Wilson v. New, (1917) 243 U. S. 332, 61 L. Ed. 755, 37 S. C. R. 298, which sustained the Adamson Law, Justice McReynolds in his dissenting opinion said:

"But considering the doctrine now affirmed by a majority of the court as established, it follows as of course that Congress has power to fix a maximum as well as a minimum wage for trainmen; to require compulsory arbitration of labor disputes which may seriously and directly jeopardize the movement of interstate traffic; and to take measures effectively to protect the free flow of such commerce against any combination, whether of operatives, owners or strangers."

In American Coal Mining Co. v. Special Coal and Food Commission of Indiana, (1920) 268 Fed. 563, it is said in the syllabus:

"The regulation of the coal mining business is within the police power of a state, and in such regulation the state can fix prices, which is a well recognized mode of police regulation. The test to determine whether a state law passed under its police power violates const. U. S. amend. 14 is whether there is no basis of fact on which to support the Legislature's finding of public welfare, or when the remedy presented has no possible connection with the evil to be cured."

The decision adverts to the New York and Wisconsin statutes regulating rentals, recently upheld as a valid exercise of the police power.
the economic law would soon deprive him of his absolute right of idling and bring him to a better realization of his economic duty to the community which gives at least as much to any individual as it takes from him. Analogous expedients to force a waiver of ultra-absolute constitutional rights of both employers and employees have been used effectively in the various Workmen's Compensation Acts."

And finally, if it be found absolutely necessary, constitutional amendment to permit compulsory arbitration of disputes between employers and employees is not impossible."

From the foregoing study it appears that specially legalized economic combat as a means of settling disputes between employers and employees has been weighed in the balance and found wanting; that it is a mistaken policy based upon doctrines economically unsound and legally indefensible; and that it must be discarded in the public interest and other methods invented and substituted in its place. The signs of the times indicate a growing public comprehension that the proper settlement of industrial disputes lies neither with a soviet of workers nor an oligarchy of employers, but in a complete reversal of policy—in the substitution of reason for force, of the modern processes of justice for the more primitive method of trial by battle, and of the might of the state to enforce peace between industrial combatants for the paramount public good.

And so mote it be.

"See the so-called elective provisions of the various Workmen's Compensation Acts whereby either an employer or an employee may stay without or come within the operation of the law; but he is presumed to have elected to come within the operation of the law unless he indicates the contrary, and if he does so indicate, he is deprived of practically all his non-vested rights relating to personal injuries unless the other also expressly elects to stay without the law—in which case the status of both remains as though no compensation act existed.

"Various economists, including Professor Alvin Hansen of the University of Minnesota, have estimated that employers and employees together in all lines of human endeavor constitute about one-half the total population. See Quarterly Publications of American Statistical Society, December, 1920. Governor Allen of Kansas estimates that in any particular controversy the proportions are: the public, ninety per cent.; employers and employees combined, ten per cent. Constitutional amendment, under such circumstances, is by no means an impossibility. Twenty years ago many public men predicted that no further federal constitutional amendments would ever be accomplished. Since then the federal constitution has been amended four times—to provide for election of senators by direct vote, the levy of an income tax, prohibition, and woman suffrage. None of these amendments are more important than the matter of industrial peace."