Injunctions, labor

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CONGRESSIONAL REGULATION OF INJUNCTIONS

HEARINGS

BEFORE THE

COMMITTEE ON LABOR

HOUSE OF REPRESENTATIVES

SIXTY-SECOND CONGRESS

SECOND SESSION

ON

PENDING ANTI-INJUNCTION BILLS

AUGUST 12, 1912

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COMMITTEE ON LABOR.

House of Representatives.

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PENDING BILLS FOR REGULATING INJUNCTIONS.

COMMITTEE ON LABOR,
HOUSE OF REPRESENTATIVES,
Monday, August 12, 1912.

The committee met at 11 o'clock a. m., Hon. William B. Wilson (chairman) presiding.

STATEMENT OF THOMAS CARL SPELLING, ATTORNEY AT LAW, NEW YORK, N. Y.

Mr. SPELLING. Mr. Chairman and gentlemen of the committee, a bill known as the Clayton injunction bill passed the House on the 14th of May last by a vote of 243 to 31, no Democrat voting against it and many Republicans for it. It went to the Senate, and reached the Judiciary Committee on the 15th of May, three months ago lacking three days. A subcommittee of the Senate Judiciary Committee was appointed. Hearings began before that subcommittee within a few days after that date, and they continued from day to day, hour by hour, down to three weeks ago. During that time there have been six arguments made of from one and a half hours up. Some of the arguments were an hour and a half in length, some of them were two hours, and some of them ran on from day to day—all of them by counsel representing associations, railroad companies, and other corporations in opposition to the bill. At length, three weeks ago, it was announced that the proponents and supporters of that bill (H. R. 23635) would be heard. They appeared, led by the officers and representatives of the American Federation of Labor, with counsel. That was on a Thursday; but the subcommittee adjourned until the next Tuesday, without giving anyone a chance to be heard. The proponents of the measure appeared there on the day and at the hour to which adjournment was taken, as they had done before, and were then ready to proceed. At 10 minutes to 11 o'clock the subcommittee took an abrupt adjournment before a word could be spoken for the bill. As far as any record was made, there was no time set for any further opportunity to be heard.

The session now draws to a close and I greatly fear the utter failure of the bill in the Senate, and of any other bills having the same purpose in view. I say this, notwithstanding the fact that notice has been given of a hearing next Tuesday (to-morrow) at 12 o'clock, at which Mr. Gompers and others are expected to be heard.

The counsel in opposition to that bill fully understand the far-reaching importance of it; they see that great irrepressible, far-reaching, economic, and social problems underlie it. In their arguments they have brought forth, almost from the first, the conflict

between capital and labor and exploited it to the uttermost. Fully do these trained and well-retained lawyers realize that there is an enormous financial advantage in the prevailing capitalistic view taken by many of the Federal judges on the question of injunctions, relief from which forms the subject matter of the bill. In nothing is the importance of this question so clearly shown as in the personnel and character of the forces arrayed for and against the bill—the one class against the other. The labor forces have been accused in the argument, time and again, of trying to unsettle the law; of trying to give an unfair advantage to a class by overturning established laws and paralyzing the powers of the courts; whereas, in truth and fact, the labor representatives are only asking Congress to protect them from judicial actions in excess of proper legal restraints and to put up proper legislative safeguards against aggressive wrongs committed in the interest of a class.

Although the bill contains no definition of property or property right, well do the learned counsel in opposition realize that most of the abuses of which labor complains arise from a disregard of the limitation of equitable jurisdiction founded upon the fundamental distinction between the rights of property and personal rights, and that sooner or later that great issue must be met and settled by legislation. Therefore, without reference to any provision in the bill, that question is made the starting and ending of each of their arguments, as if they were trying to erect a bulwark against the future and obtain a prejudgment in their favor from Senators and Members of the House. But I have heretofore encountered such so-called arguments as they have here again advanced, and do not regret that they have again thrown upon me the light burden of refutation.

Now, gentlemen, we seldom see the extent of an evil until its final development. It has been so in many instances that I might use for illustration. The tendency or the practice in the courts of assuming that the right to do business or the right to continue business regardless of the consequences to others is entitled to the exercise of jurisdiction by injunction, as a protection or safeguard of the men who happen to be business men, as contradistinguished from men in other classes, is going to lead to the unsettling of all social conditions, and, if it is not checked or stayed in some way, will lead to the overthrow of our institutions. In that usurpation consists the vice of personal government, and each judge, if allowed to go on and carry that practice to its logical result, would become a sovereign with absolute powers in his own domain.

Now, if the right to do business or continue in business is to be thus protected, notwithstanding the fact that the business man has no such protection against the ordinary obstacles to and vicissitudes of business, and the rule protecting it in labor disputes is given its logical operation, then the remedy by injunction to protect it must be coextensive with all interferences that may affect it. The courts concede now the right to strike for any cause, although some of them have within the last three or four years been trying to inject into it an element of motive and have undertaken to say that they must strike with a good motive. But what is called peaceful picketing and persuasion are also conceded to be legitimate. And yet, if this new idea, that the right to do business can be protected by injunction against violence, as in the case of the nonunionist seeking the job of

the unionist, on the ground that such an act is an interference with the right to do business, is sound, then why not enjoin the strike, which is a direct, as well as a more serious, interference with business?

So, you see, we can comprehend the full effect of not checking this abuse. I say "we," and in using that word I include all who are really interested in the welfare of the people, the labor class constituting a majority. I mean we who are seriously concerned for the perpetuity of our institutions and are able to see the vital importance of pressing forward in this fight, and pressing forward without compromise, working earnestly for the early passage by the Senate of the bill which I have mentioned as having already passed the House.

If in the course of what I say here I appear to go outside the real issue, this is my answer, that by showing hereafter that the courts possess no jurisdiction to enjoin any other injuries than those threatened to property, such showing has been made necessary by the course in argument of the opposition. Such showing is not a case of proving too much, but a case in which the greater includes the less.

It can not be doubted that some of the wrongs to labor by excesses of jurisdiction are due to willful perversion of judicial authority, but it is evident that most of them are attributable to a false view of social duty.

The attitude of the courts of whose conduct complaints have been made has all the dangers and vices of the most obnoxious paternalism. Such courts have accepted the abstract right to do or to continue business, which, because of its universality, is clearly seen to be merely personal, as a property right, vested in one class to the exclusion of others. Hence, in protecting it by injunction in excess of jurisdiction they are not exercising a judicial function at all but enacting destructive legislation for the benefit of one class and directing it against another. And this is a complete answer to the objection, so often repeated here in argument, that this bill proposes legislation in the interest of a class.

The right asserted by the interests here arrayed in opposition to the bill is not merely that of doing business, but of continuing business under all conditions and circumstances exclusive of the rights of others, and though the exercise of it may mean the subordination of all other rights. Take for illustration the case of Buck's Stove & Range Co. against the American Federation of Labor and others. The evidence in that case showed strong provocation for the hostility on the part of organized labor toward the plaintiff. There was not only a dispute of long standing concerning the hours of service in the works, but plaintiff's open and organized hostility to unionism in general. It was shown that the plaintiff's president was at the head of one national organization whose avowed purpose was to oppose nearly all that union labor stands for, and that he held official positions in other organizations of employers in his own line of production whose by-laws provided for various forms not only of resistance but of aggressive action hostile to the unions. Under the circumstances the action taken by the labor organizations against the plaintiff might have been fairly considered a legitimate battle of trade, with which a court of equity should not have interfered. The feature of that case which is pertinent here is the viewpoint of the court which granted an injunction against the defendants.

Among the objects which the president and representative of the plaintiff in the case proposed to accomplish in the labor field was the maintenance of the "open shop," of which his company's plant was an exemplar.

In dealing with its customers that company insisted upon and had succeeded in establishing the "closed shop"—that is to say, it made a contract with just one dealer and no more in each town or city in the country and bound the customer to deal in its goods exclusively. And it was this right for which it sought and obtained the court's protection. The court saw nothing wrong in the exclusion by contract or combination between it and a dealer in each community of all competition and the acquisition of the power to compel workingmen and all others to pay its prices or go without stoves and ranges; but when the union men, to whom that company denied the right of establishing fair and reasonable hours, refused to patronize it and asserted the right of free speech and freedom of the press in calling attention to its unfairness the court concluded that was not permissible and that it should be prevented, even if to prevent it required the exertion of all the powers of the court.

The plaintiff in that case was, in all other respects, without protection from external forces and competitive enterprises. Other manufacturers to the number of more than 60 were in the market, each competing, at least with respect to the volume of trade, through the exclusive contract plan probably, and otherwise, each seeking to establish a "closed shop" for itself in each town; but they were all members of the Stove Founders' National Defense Association, which exhibited strong hostility to organized labor in its by-laws. Here they stood united; but all the members were otherwise in competition each with the other. The courts afford no remedy against this competition, and we consistently maintain that they should afford none. And yet the court forbade by injunction labor from resorting to effective means of competition for a fair division of the joint product of capital and labor.

The agents of each of the sixty-odd manufacturers were free to make whatever representations they pleased, truthful or untruthful, about plaintiff's goods, and thus to boycott it, if you please, to the fullest extent, and thus narrow its market and destroy its business, and to do this from purely selfish or vindictive motives. Against all this the plaintiff had never thought of seeking an injunction, and if one had been sought the courts would have treated the application as an absurdity. But when union labor, seeking the establishment of better conditions for its members, and acting in its own interest in pursuit of its legitimate objects, laid down a fair condition upon which it would patronize the plaintiff and declared that until the condition was accepted it would withhold its patronage, its entire membership was enjoined from maintaining even this negative attitude toward the plaintiff. In other words, only one thing was deemed important in that case, only one consideration seems to have moved the court, and that was the successful continuance of the plaintiff in business, the preservation of the market for it, at all events, regardless of the interests and opinions of the members of the unions, who were the principal retail purchasers of its products, as to whether it was entitled to a continuance of their favor.

And that case is fairly illustrative of many others.

JUDICIAL GUARANTIES AGAINST HAZARDS OF BUSINESS.

The courts, supposedly the representatives of the Government and handmaids of public justice, are thus guaranteeing to a certain class immunity against the ordinary vicissitudes and hazards of business. And they are doing this in a country of supposed equals, and in order to do it are robbing hundreds and thousands of men of their liberties. They are meantime establishing a preferred class—a business despotism—and exempting the membership of that class from some of the difficulties and opposing forces which they would have to encounter if recognition were given to the principle of equality before the law and impartiality in the administration of justice.

Employing capital is thus exempted, and labor correspondingly discriminated against. It appears that some of the courts have unconsciously imbibed the spirit of commercialism, and when led by that spirit are no longer able to attach importance to the simple ordinary rights of the citizen. Such courts act as if they considered it the chief purpose of government to promote and encourage the accumulation of wealth in the hands of those in possession of the machinery of production and trade. In the presence of that purpose all conflicting interests must yield. The interests and personal rights of hundreds and thousands must give way whenever the conflict in court happens to come between the interests of what are designated "business men" and those of "wage earners." The failure of an individual business man, or even an interruption of his operations, is considered a misfortune of direst import as compared to the paralysis of the arms and tongues of any number of men having smaller interests, though those interests be equally dear, or even vital, to the possessors.

Gustavus Myers in the preface to his remarkable History of the Supreme Court of the United States says:

> Instance after instance occurs where justices, at the end of long service on the bench, have died virtually penniless or possessed of the most scantily moderate degree of means. Yet many of those very justices were the same who by their decisions gave to capitalists vast resources of power translatable into immense wealth. The influences so consistently operating upon the minds and acts of the incumbents were not venal, but class influences, and were all the more effective for the very reason that the justices in question were not open to pecuniarily dishonest practices.
>
> From training, association, interest, and prejudice, all absorbed in the radius of permeating class environment, a fixed state of mind results. Upon conditions that the ruling class finds profitable to its aims and advantageous to its power are built codes of morality as well as of law, which codes are but reflections and agencies of those all-potent class interests.
>
> In the case of men whose minds are already permanently molded to such purposes, and whose character and station forbid the use of illicit means, immeasurable subservience can be obtained which crude and vulgar money bribery would hopelessly fail to accomplish. Under these circumstances a great succession of privileges and powers are given gratuitously, and class corruption appears as honest conviction because of the absence of personal temptations and benefits on the part of the justices. In this deceptive and insidious guise supreme judicial acts go forth to claim the respect and submission of the working class, against whom the decisions are applied.

It would be useless to attempt hiding the social and economic struggle out of which this issue has grown. No one who has given thought to the subject can doubt that, among many causes for the high cost of living and the consequently relative low wage rate for labor is overcapitalization by corporations. The payment of divi-

dends on stocks which often represent no investment, or very little, compels them to force the cost of living up at one end and the wages of their employees down at the other. Thus they exploit both the consumer and the wage earner, oftener than otherwise represented in the same person. In order to pay these dividends they totally ignore the claims of humanity, resort to speeding up, long hours, and other forms of downright cruelty. To such extremes would they go were it not for such resistance as organizations of labor can interpose, and were we to leave in their hands the instrumentality of injunctive processes as now administered, they would soon reduce labor in this country to a worse plight than in any nation of the world—worse even than that of Russian exiles in the coal mines of Siberia.

Of course, writs of injunction are not recklessly and inconsiderately granted by all courts, but these large employing corporations, such as constitute membership in the associations represented by Mr. Hines, Mr. Dillard, Mr. Davenport, Mr. Emery, Mr. Monaghan, Mr. Herrod, Mr. Drew, and others can always find a judge who fails to properly discriminate between a good complaint and a bad one, a fair order and one that is too drastic and too vague.

I will insert some figures furnished by Roger W. Babson, a celebrated statistician. These figures were obtained by him from the returns of corporations under the corporation-tax law of 1909, and are therefore official.

National corporation tax returns.

	1910	1911	Increase.
Capitalization	$52,371,626,752	$57,886,430,519	$5,514,803,767
Bonds and debt	$31,333,952,696	$30,715,336,008	[1] $618,616,688
Dividends	$3,125,480,000	$3,360,250,642	$234,779,642
Number corporations	262,490	270,202	7,712

[1] Decrease.

Of course you will understand that these are returns only from corporations having net incomes of $5,000 and over and that some classes of very large corporations are exempted from the tax and are therefore also omitted.

Now, by their own showing in the record of the Senate hearings, the gentlemen I have named represent a large number of these corporations, which, with others not represented but directly interested, employ the labor of this country. These are some of the corporations which realize in profits and pay to their stockholders in dividends over three and a quarter billions of dollars a year, taken back out of the wages they pay and from moneys otherwise earned by the people of this country. Last year their capitalization increased five and one-half billions of dollars and their profits, represented in dividends, increased over $234,000,000.

Such are the opponents of this bill. Such are the institutions that object to loosening even one of the fetters they have placed upon the limbs of labor, fetters which are held through the constant menace of writs of injunction and the fear of jail sentences.

I wish to present some further statistics on this subject. The figures which I now present represent the operations of steam railroads engaged in interstate commerce:

	Total revenue.	Total outgo.	Net revenue.	Ratio operating expenses to operating revenue.	Percentage, net revenue.
				Per cent.	
1908	$2,424,640,637	$1,695,101,878	$729,538,758	69.91	30.09
1909	2,393,805,989	1,669,547,876	730,235,381	69.75	30.25
1910	2,787,266,136	1,847,189,773	940,076,363	66.27	33.73

It is also eminently proper on this occasion to call attention to a few matters of relevant history. At the close of the Civil War so large a proportion of transportation was by water and railroad mileage and investment were relatively so small that the latter was not a matter of serious concern in any quarter as a political or financial power. The lines were short and they were operated merely as feeders of transportation by water. Railroad bond issues outstanding did not exceed $400,000,000. Now, it is claimed, or rather admitted, by the highest railway authorities that altogether not more than $8,000,000,000 of cash capital has been invested to date, and yet they claim that the $18,000,000,000 of stocks and bonds outstanding are not in excess of the value of the railroad properties.

In other words, that, considering present values, there is no overcapitalization. Accepting all these claims and admissions at face value, what do they prove? They prove that each investment of $8 has resulted in a net increase in capitalization of $10. Eliminating from the calculation the small beginning that had been made, starting with 1866, and assuming the entire $8,000,000,000 as an investment made at that date, a net increase is shown of 125 per cent in 44 years. But inasmuch as the aggregate of original investment has increased much faster during the last than during the first 22 years of the period, it is at least fair to treat the investment of $8,000,000,000 as one made 22 years prior to 1910. The showing then is of an average annual net profit from investments in railroad properties of a fraction over 5.77 per cent, which is found by dividing 125 by 22. Now, with one-seventh of the Nation's capital, all in the hands of one small class of business men, withdrawing from all others 5 77 per cent of net profit as against a much smaller percentage withdrawn by the rest (estimated at 3 per cent), it is not difficult to see the end of prosperity in all lines of enterprise other than that of transportation by rail. It is clear that if some peaceable and lawful means be not found to end this grossly unjust disparity the end will be complete financial despotism on the one hand and abject dependence on the other.

Now, that 5.75 per cent is practically guaranteed as a fixed income on $18,000,000,000. But the interest paid on railroad bonds is much less than 5 per cent, and runs as low as 3 per cent. The Interstate Commerce Commission in 1904 made a report showing that the average dividend rate on railroad stocks was then 5½ per cent. The commission's statistics show that in 1908 and 1909 it was 6.43 per cent,

and as there was a great increase in net revenues in 1910 it is now over 7 per cent. The bonded indebtedness represents almost the entire investment, and is less than one-half the capitalization; so that 7 per cent dividends is really 14 per cent on the actual investment, assuming, though contrary to the fact, that the present owners of the railroads made the investment, or any part of it.

But this does not tell the whole story. At least one-half the operating revenue goes to extensions and improvements which when made belong to the holders of the stocks, who own the railroads.

I think that instead of trying to hold down their employees to low wages with the menace of usurped injunctive powers of the courts, it would be fairer, and cheaper in the long run, to increase wages and shorten the hours of toil.

There is another phase of this matter, however, to which I am strongly tempted to call your attention. How long can the people of this country stand these vastly disproportionate returns to class capital? It would relieve the situation somewhat if they gave their employees shorter hours and better wages. Some of the stupendous exactions from business and industry would thus find its way back to the people who pay freights and fares, instead of creating multimillionaires, or being squandered in foreign countries and in wasteful luxuries at home.

Mr. Hines went into the apparently irrelevant matter of wage increases by the railroads. But in spite of nominal increases, the net earnings of the railroads increased in 1910, when most of the increases took effect over the net earnings of 1909, by more than $110,000,000.

I have inserted the foregoing statistics and commented upon their significance because I recognize that the struggle between capital and labor is really competitive. An irrepressible, inevitable conflict between the respective forces, with a just division of the joint products of capital and labor as the issue, and that the unwarranted resort to the process of injunction gives to one side of that conflict a grossly unfair advantage. The courts should never interpose between these forces unless the facts would warrant interference in the absence of a dispute, and in other trade conflicts they never do interpose.

In Hopkins *v.* Oxley Stave Co. (83 Fed. R., 912) Judge Caldwell said:

> While laborers, by the application to them of the doctrine we are considering, are reduced to individual action, it is not so with the forces arrayed against them. A corporation is an association of individuals for combined action; trusts are corporations combined together for the very purpose of collective action and boycotting; and capital, which is the product of labor, is in itself a powerful collective force. Indeed, according to this supposed rule, every corporation and trust is an unlawful combination, for while its business may be of a kind that its individual members, each acting for himself, might lawfully conduct, the moment they enter into a combination to do that same thing by their combined effort the combination becomes an unlawful conspiracy. But the rule is never applied.
>
> Corporations and trusts and other combinations of individuals and aggregations of capital extend themselves right and left through the entire community, boycotting and inflicting irreparable damage upon and crushing out all small dealers and producers, stifling competition, establishing monopolies, reducing the wage of the laborer, raising the price of food on every man's table and of the clothes on his back and of the house that shelters him, and inflicting on the wage earners the pains and penalties of the lockout and the black list, and denying to them the right of association and combined action by refusing employment to those who are members of labor organizations; and all these things are justified as a legitimate result of the evolution of industries resulting from new social and economic conditions, and of the right of every man to carry on his business as he sees fit, and of lawful competition.

On the other hand, when laborers combine to maintain or raise their wages or otherwise to better their conditions or to protect themselves from oppression or to attempt to overcome competition with their labor or the producers of their labor in order that they may continue to have employment and live, their action, however open, peaceful, and orderly, is branded as a "conspiracy." What is "competition" when done by capital is "conspiracy" when done by laborers. No amount of verbal dexterity can conceal or justify this glaring discrimination. If the vast aggregation and collective action of capital is not accompanied by a corresponding organization and collective action of labor, capital will speedily become proprietor of the wage earners as well as the recipient of the profits of their labor. This result can only be averted by some sort of organization that will secure the collective action of wage earners. This is demanded, not in the interest of wage earners alone, but by the highest considerations of public policy.

In Vergelahn *v.* Guntner (167 Mass., 92) Justice Holmes, now of the Supreme Court of the United States, said:

It is plain from the slightest consideration of practical affairs or the most superficial reading of industrial history that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it is, or detrimental it is inevitable, unless the fundamental axioms of society and even the fundamental conditions of life are to be changed.

One of the eternal conflicts out of which life is made 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 potent and powerful. Combination on the other is a fair and equal way. * * * If it be true that the workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has to support their interest by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control.

I desire to read from what Lord Coleridge said in the great case of the Mogul Steamship Co. *v.* McGregor (21 Q. B. Division, 544, 1892). This is a case of conflict between capitalists for the control of the carrying trade of the ocean. The court said:

There can be no doubt that the defendants were determined, if they could, to exclude the plaintiffs from this trade. Strong expressions were drawn from some of them in cross-examination, and the telegrams and letters showed the importance they attached to the matter, their resolute purpose to exclude the plaintiffs if they could, and to do so without any consideration for the results to the plaintiffs if they were successfully excluded. This, I think, is made out, and I think no more is made out than this. Is this enough? It must be remembered that all trade is, and must be, in a sense selfish. Trade not being infinite—nay, the trade of a particular place or district being possibly very limited—what one man gains another loses.

In the hand-to-hand war of commerce, as in the conflicts of public life, whether at the bar, in Parliament, in medicine, in engineering—I give examples only—men fight on without much thought of others, except a desire to excel or defeat them. Very lofty minds, like Sir Philip Sydney, with his cup of water, will not stoop to take advantage if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sydneys, but these counsels of perfection it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business.

I have already said that the same conflict goes on between capital for the trade of the world, which is not infinite; goes on and is unavoidable between capitalists, whether in individual hands or in the hands of these mighty combinations and labor, and without organization the tendency inevitably is for labor to descend, and that rapidly, to a condition of absolute servitude and helplessness. I say that, in the nature of things and under present conditions, this warfare is unavoidable, and there is the same justification for organized labor resorting to the legitimate and recognized methods of warfare in its hard and unequal struggle against capital that there is expressed in the foregoing extracts in the conflicts of capital against capital, and the learned justices have shown you what extraordinary lengths are held justifiable.

And in Pickett *v.* Walsh (192 Mass., 572) Judge Loring, delivering the opinion, said:

Further, the effect of complying with the labor union's demands apparently will be the destruction of the plaintiff's business. But the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of the acts. It was well said by Hammond, J., in Martell *v.* White (185 Mass., 255, 260), in regard to the right of a citizen to pursue his business without interference by a combination to destroy it: "Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly."

The application of the right of the defendant unions, who are composed of bricklayers and stonemasons, to compete with the individual plaintiffs, who can do nothing but pointing (as we have said), is in the case at bar disastrous to the pointers and hard on the contractors. But this is not the first. The case at bar is an instance where the evils which are or may be incident to competition bear very harshly on those interested, but in spite of such evils competition is necessary to the welfare of the community.

To the same effect is Allis-Chalmers Co. *v.* Iron Molders' Union (C. C.) (150 Fed. Rep., 155), per Sanborn, J.

Great changes are at work in the public thought of the Nation, and labor is abreast of the times.

In the report of the House committee on this bill we find this expression:

The idea has been advanced and ably supported in argument by one of the proponents of this legislation that liberty and more of it is safe in the hands of the workingmen of the country. We are convinced of the merit and truth of that contention. The tendency toward freedom and liberation from legal trammels and impediments to progress and to a great social advance is seen in nearly all civilized nations. It is an unpropitious time to oppose a reform like that embodied in this bill in view of the fact that the abuses of power which it seeks to terminate have been, admittedly, numerous and flagrant.

As evidence that organized labor fully understand their rights, I read from the address of President Gompers to the last annual convention of the American Federation of Labor, the same having been unanimously adopted as the sense of the members.

POLITICAL CHANGES AFFECTING LABOR.

At length it has become evident to all open-minded men that important changes are impending in our methods of government, and especially with reference to the status of political parties. Voters are now demanding better reasons for their support of a particular candidate than his nomination by a party or his indorsement by some official or unofficial boss. The spirit of revolt and change is abroad in the land, and the spirit of liberty which first inspired the Revolutionary leaders in 1776 has again entered the hearts of the American people. The people who form the rank and file of political parties are more progressive than their leaders. They will no longer submit to the rule of evasion and false pretenses found in platforms, presidential messages, and public addresses. They demand straight talk and open, honorable methods.

I hope to find henceforth that the millions of intelligent men of labor, having passed beyond the influence of campaign buncombe, have come to understand that the welfare of the people and the promotion of the cause of labor are more important than any party candidacy or empty partisan success.

In the progress being made toward popular rule, now seen not only in our own country but in all nations, labor can justly claim an important, if not indeed a leading, part. In this movement international boundaries may be disregarded. The manhood and intellect associated in the war for the rights of men, differentiated from those of wealth, privilege, and hereditary rank, belong to no particular race, class, or nationality. The spirit of liberty and self-assertion overlaps mountain ranges and speeds across the seas separating empires and continents. It can not be stayed by kings, nor by injunctions and jail sentences.

True progress has never been by rapid strides, notwithstanding that a change from the old to a new order comes with a suddenness which is almost startling, when after a long period of dissension and preparation the people are ready. Labor has been patient and persistent, enduring many wrongs and sacrifices. There should be no retreat from the points of vantage it has conquered.

Labor's contentions of many years have at length become merged into, or have rather coordinated with, those of the progressives of all parties. The people as a whole, irrespective of class, condition, calling, or partisan alignment, have declared for freedom in fact and not merely in name. They are taking affairs political into their own hands. They will no longer tolerate the sale of legislation to the highest bidder or the granting of franchises to the richest bribe giver.

Under the coming régime assuredly there are to be no more court decrees entered as prepared in advance and ordered by the attorney for the stronger party—stronger politically or financially. Along with these abuses will depart the midnight injunction and the policeman's ready club, at the behest of those claiming a property right in the labor of the vicinage, whether at work or on strike. In lieu of the political boss and his machine we s all have leadership of intelligence, pleading for public justice, with adherents proportioned in number to the strength of the arguments. The stuffed ballot box, the false count, and the perjured election return will likewise disappear. With these opportunities, with these stimulating inducements to free thought and action, the cause of public justice will be advanced in all directions. Labor, acting from the point of enlightened self-interest, and yet with a full sense of responsibility respecting the just rights of all others in society, will manfully and patriotically meet its enlarged responsibilities.

Under the prevailing system of cut-and-dried platforms and slated nominations, preceded by fake primaries, the ballot in our hands has not been, in any adequate sense, either a protecting shield against wrong or a means of redress. We may not for some time be entirely rid of the rule of parties. If they be an evil, they are such as are incident to all governments based on popular suffrage. I deem it unwise, or rather impolitic, to waste our energies now in efforts to abolish political parties. Perhaps they are institutional in all free governments. But if we can not destroy them we may, by more assiduous and regular exercise of our privileges and rights of citizenship, do much in the way of controlling them.

Under existing conditions we must obtain various measures of legislation at the hands of dominant parties in legislative bodies, and if party affairs are to remain in the hands of corporate agents and corrupt bosses, as heretofore, then our interests will be imperiled and the desired end retarded no matter which party has the majority.

But political parties should, after all, be treated as means to an end. The success of a party should never outweigh the accomplishment in legislation or administration of the important purposes of labor. In casting our ballots we should ever distinguish whenever possible between our friends and our enemies, and between these should be no division on party lines among us. On general party issues it would be useless to attempt bringing about unity of action, and perhaps it is better in the long run that such is the case. But when we are seeking legislation from Congress on so vital a matter as curtailment of personal liberties, including the right of free speech and free press, we should be a unit in opposition to candidates who stand in the way, no matter how exalted the office sought by them.

DO ABUSES EXIST?

Abuses in issuing and enforcing injunctions do exist, and so serious have they been that two Presidents, one of whom had been himself a judge, were compelled, presumably by sense of duty, to send messages to Congress calling attention to them and suggesting legislative remedies.

Every well-informed lawyer in the country knows that such abuses exist, and some judges have spoken of them in condemnation. And yet there has not been a suggestion from one of the half dozen counsel appearing in opposition to this bill that Congress should amend the law in any particular. On the contrary, you may read each argument in turn and you will find that every single feature and provision of the bill, from the general purport to the minutest detail, is bitterly assailed and the same old decisions and the same old threadbare

arguments employed in one speech after another. As showing the attitude of the opposition, I call attention to the fact that the character of opposition before the House committee was just as vindictive, just as unyielding, just as uncompromising, just as hardened against reason, as before the Senate committee. At the hearings before the House committee one of the members said to the gentleman whom I consider the leader in opposition, Mr. Davenport:

I should like to ask you this question. In the course of an experience which has been more extensive than that of any other man I know, has it come to your observation that the writ of injunction, in its issuance, is abused in any way at all?

The reply was:

Never. They are really very hard to get.

Then he was asked:

Is there any suggestion that it occurs to you to make for a change in the administration of the law?

And he replied:

No; not even the one contained in the proposition of Mr. Moon in the last Congress.

The Moon proposition was offered in the House as a substitute for the Clayton bill, which passed the House by a vote of 243 to 31. The substitute was defeated by a vote of 48 to 220.

I can not, of course, quote from the presidential messages; but during Mr. Roosevelt's incumbency he urged legislation in messages of the following dates: December 5, 1905, January 31, 1908; March 25, 1908; and December 18, 1908. President Taft included recommendations for such legislation in messages dated December 7, 1909, and December 6, 1910. Over and over in these messages it was declared that abuses exist and that it was the duty of Congress to legislate on the subject.

Mr. Davis, of West Virginia, a member of the House Judiciary Committee, summed up the principal forms in which these admitted abuses have appeared in a speech in the House on the Clayton bill, May 14, 1912. He was answering another member of the committee, who had asserted, as counsel have asserted in the Senate hearings, that there have been no instances of judicial abuse herein. Mr. Davis said:

I accept the challenge of the gentleman from Pennsylvania, Mr. Moon, and assert that if the testimony of the witnesses before the committee did not disclose them, still the reported cases will show at least five glaring abuses which have crept into the administration of this remedy. I name them:

The issuance of injunctions without notice.
The issuance of injunctions without bond.
The issuance of injunctions without detail.
The issuance of injunctions without parties.

And in trade disputes particularly, the issuance of injunctions against certain well-established and indisputable rights. These are the evils which this bill seeks to cure.

But there are other authorities upon the necessity for legislation to correct not only uncertainties in the practice, but erroneous views of judges as to their powers. I quote from an authority which has been freely quoted by counsel in opposition. I refer to Martin's Law of Labor Unions. He says in his preface:

There is, however, a great lack of harmony in the decisions relating to trade disputes, and many of them, it is believed, are erroneous in principle and oppressive and unjust to organized labor. In this category may be placed decisions which hold without qualification that strikes or threats of strikes to procure the discharge or

prevent the employment of workmen are unlawful and criminal, as being unwarrantable interference with the business of the employer, and an invasion of the rights of the workmen against whom these acts are directed; denying unions the right to exercise disciplinary measures in accordance with their rules and by-laws; to compel insubordinate members to join in a lawful strike or continue on strike after going out; holding that all picketing is unlawful; enjoining unions at the instance of an employer against whom a strike is in operation from giving strike pay or using its funds in furtherance of picketing; requiring defendants against whom a writ of injunction, delective and ambiguous in its terms, has been awarded, to ascertain, or, more properly speaking, to attempt to ascertain what is prohibited by reading the writ in connection with the bill.

In view of all the foregoing utterances, it is surprising to find anyone to claim that the injunctive remedy should not, at any rate, be safeguarded in its issuance and enforcement by all possible checks and formalities to prevent its abuse. No one who has given it proper study will deny that, even when issued within the jurisdiction, it is a species of judicial legislation. And since, as such, it is legislation by one man, the restrictions should be at least equal to those by which Congress is governed in the enactment of statutes. Upon Congress are imposed constitutional requirements; and in addition to these are the rules and committee service, all intended to prevent imposition, possibility of abuse of privilege and surprise, and to guard against ambiguity and vagueness in the language of enactments. In view of all this, it is strange that to this time no restrictions have been placed upon the judiciary with respect to these methods of exercising their extraordinary powers. An injunction may always develop into an ex post facto law, the vindicatory part to be enacted and put in force after the doing of an act which the court considers or construes to be a violation.

Justice Baldwin, in Bonaparte *v.* Railroad Co. (217 Fed. Cases, 1617), said:

> There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case than the issuing of an injunction. It is the strong arm of equity, and never ought to be extended unless in cases of great injury, where courts of law can not afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protective preventive process of injunction but that will not be awarded in doubtful cases, or new ones not coming within well-established principles, for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great or lasting injury about to be done by an illegal act.

PROVISIONS OF THE CLAYTON BILL.

The first section of the bill amends section 263 of the Judicial Code so as to safeguard the first step in a proceeding for injunction. It reads as follows:

> SEC. 263. That no injunction, whether interlocutory or permanent, in cases other than those described in section 266 of this title, shall be issued without previous notice and an opportunity to be heard on behalf of the parties to be enjoined, with notice, together with a copy of the bill of complaint or other pleading upon which the application for such injunction will be based, shall be served upon the parties sought to be enjoined a reasonable time in advance of such application. But if it shall appear to the satisfaction of the court or judge that immediate and irreparable injury is likely to ensue to the complainant, and that the giving of notice of the application or the delay incident thereto would probably permit the doing of the act sought to be restrained before notice could be served or hearing had thereon, the

court or judge may, in his discretion, issue a temporary restraining order without notice. Every such order shall be indorsed with the date and hour of issuance, shall be forthwith entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed seven days, as the court or judge may fix, unless within the time so fixed the order is extended or renewed for a like period, after notice to those previously served, if any, and for good cause shown, and the reasons for such extension shall be entered of record.

The formalities and safeguards here provided in section 263 are only such as are necessary, in view of what I have already set forth; also in view of what Justice Baldwin said in the case cited.

Section 266a adds a new section to the code to require security in all cases and reads as follows:

SEC. 266a. That no restraining order or interlocutory order of injunction shall issue except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

I now read from Foster's Federal Practice, page 753:

Later the practice (i. e., the practice as to security) was extended to interlocutory injunctions granted upon notice to the defendant, first in special cases, then generally; and now they (i. e., bonds) are usually required as a matter of course in England and in most of the United States, although in some of the circuits the Federal judges are accustomed to grant injunctions without such requirement.

Section 255b of the bill also adds a new section to the code. It reads as follows:

SEC. 266b. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their agents, servants, employees, and attorneys, or those in active concert with them, and who shall by personal service or otherwise have received actual notice of the same.

There can be no greater justice than that parties upon whom the edict of a judge falls, often without notice, shall know the exact condition in which it places him; and there can be no greater injustice, no greater cruelty, I might say, than to impart to him merely a vague or indefinite understanding that his past or present conduct has been already condemned by the court, leaving him to guess as to his proper deportment, groping in darkness with fear and trembling lest he be dragged before a single judge and sentenced to imprisonment for acts which have been done in a belief that he was not answerable before a court.

I can not describe all the defects of process by which the parties served are left in doubt and perplexity and exposed to oppression and injustice. But it is a common bad practice to include in these writs and orders, at the end, an omnibus or basket clause, forbidding all other acts of similar character, or referring for further details to the prayer of the bill, in the hope that anything which might have been omitted by the zealous lawyer will be corrected by the court when the time comes for punishing the party for contempt.

It is claimed that the present practice affords ample safeguards, that there are no precedents justifying the provisions of this section. In view of my investigation and study, the result of which I intend laying before the committee, I can scarcely conceive of a greater untruth. The present law affords no security whatever against

vague, indefinite, ambiguous, misleading, bewildering commands of the courts. The Supreme Court rules, which have been again and again referred to, do not help us any herein. They neither cover the subject nor do they conflict with anything in this section. I will not take your time to read to you the Supreme Court rules, but throw out this challenge, and counsel may call any conflicting provision which they can find to the attention of the committee.

Among the many authorities I might cite as to what is proper, commendable, and salutary in practice, which is no more than is aimed at in this section, is Foster's Federal Practice (p. 745), where it is said:

> The writ should contain a concise description of the particular acts or things in respect to which the defendant is enjoined and should conform to the directions of the order granting the injunction. * * * The defendants ought to be informed, as accurately as the case permits, what they are forbidden to do. It seems that a writ is insufficient which designates the acts sought to be enjoined by a reference to the bill without describing them.

Now, in support of Mr. Foster, I will cite Swift & Co. *v.* United States (196 U. S., 376), where it was said:

> On the other hand, we equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendant's business at the peril of a summons for contempt. We can not issue a general injunction against all possible breaches of the law. * * * The general words of the injunction "or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid," should be stricken out. The defendants ought to be informed as accurately as the case permits what they are forbidden to do.

That case was followed in New York, N. H. &. H. R. R. Co. *v.* I. C. Com. (200 U. S., 404), the court adding to what was said in the Swift & Co. case these words, here especially significant and relevant:

> To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen.

I call attention to the fact that the words "or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid," which the court condemned and ordered stricken out as a menace to liberty, are the very words (or equivalent words) which several opponents of this provision strenuously insist should be retained as part of the practice pursued in labor cases. In so insisting they confess themselves unwilling to conform to correct practice, as laid down by the Supreme Court, and admit that a reprehensible different practice has been pursued.

Members of the Senate committee have been calling for some explanation of the purpose of this provision. Some of you may have heard of blanket injunctions. Whether you have or not, the labor people have, and I would not say that their meaning is known to them, because that is something past finding out. But they have learned from sad experience of their effect. Presently I shall exhibit to you several specimens of the article, some placed in the record by Mr. Monaghan and some by myself; but first I wish to call your attention to what I would not call practice, but malpractice, amounting to crime. It is one of the most important phases of this subject, and is alone a justification for all these first three sections. I refer to the devices and tricks of injunction lawyers by which they wreak upon workmen on strike all the disastrous consequences of an injunction

rightfully issued, but without any basis of right, justice, or law, and yet escape all risk and responsibility of being themselves called to account or their clients incurring any liability.

In the first place, the complaint, though usually voluminous, is filled with irrelevant and immaterial allegations and is defective in material essential specifications. Such complaint will be presented to a judge, who naturally shrinks from going through and scrutinizing a long document. He relies in part upon the attorney's representations of what he can prove and issues a restraining order, already prepared, and that is usually a drastic, comprehensive injunction, often so stringent that it barely leaves the defendants room to breathe. He serves the order on a few of the leaders among those participating in the trouble and takes care that his sharp practice is immediately exploited in the press. Now, even the leaders can seldom understand the matter even with the help of such lawyers as they are able to employ.

We hear about disobedience in such cases and about the necessity of serving hundreds and thousands of men. It is all moonshine. There may be rare exceptions; but, as a rule, whether several or many are served, all hear of it and all are completely demoralized and discouraged. No matter how just their side of the dispute, the very fact that a court possessing plenary and arbitrary powers has interfered on the other and stronger side, the side of capitalistic and police power, is an insuperable obstacle to winning the strike. So what is the use to appear and defend? Mr. Monaghan is correct at least in his statement as to the effect of a restraining order or injunction. It is true that few injunction cases involving labor disputes are reported. The first act of the judge is as destructive to the strike as would be a volley of musketry, with its incidental carnage.

What becomes of the complaint or affidavits? It is a subject that some committee ought to investigate. As a rule, the complaint disappears immediately. The clerks are usually very accommodating to the attorneys for big employers of labor; besides, in some jurisdictions the attorneys are allowed to retain the original papers. In 1906, when I first appeared before the House Judiciary Committee, I tried in vain to obtain copies of complaints in some of these cases. About that time an injunction was issued in the District of Columbia, which I thought and still think a clear abuse. I applied at the clerk's office while the case was fresh, but found that the attorneys had withdrawn the papers. Upon application to them it was claimed that they had been mislaid—at any rate, I could not get a look at the complaint. All that I could make available was the order.

In the course of his argument, Mr. Monaghan made very broad assertions as to the hesitancy of the courts to grant injunctions and their careful scrutiny of applications. He gave a surprisingly small number as having been issued in labor disputes. Being pressed by the committee, he admitted that his estimate was based only on reported cases. He also admitted that in many cases no report was available. Of course not. The injunctions and restraining orders against strikers run into the hundreds every year. He was requested to produce records, orders, and injunctions. He has produced just three complaints, with accompanying affidavits, and the record contains just 15 out of 3 times that number of orders and injunctions issued on application of his clients alone.

The second clause of section 266b says of the injunction or restraining order that "it shall be binding only on the parties to the suit, their agents, servants, employees, and attorneys, or those in active concert with them, and who shall by personal service or otherwise have received actual notice of the same."

Notwithstanding all criticisms hurled against this provision by learned and ingenious counsel, I insist that it embodies the law as it now is according to best authorities, and that to have it otherwise, even if courts confined themselves to rightful jurisdiction, leaves the way open to intolerable abuses and judicial tyranny of a character which will, unless corrected soon, overturn the Republic and establish despotism on its ruins.

Time and again have we been referred to the Debs case as a precedent and basis for the opposition to this provision. I deem it worth while to call special attention to that case again and in this connection. It is first to be noted that the case in the lower court was not the case heard in the Supreme Court. The excesses and superfluities of the writ were not before the supreme court. Debs was a party named in the writ, and had been served. No defect or excess of any pleading or process was there involved. It was a habeas corpus proceeding, and therefore necessarily turned on a question of the lower court's jurisdiction. I claim that the order and writ in the lower court were monstrosities, but whether they were or not is a question never judicially passed upon in that case.

In addition to forbidding about everything that men could conceive of or imagine, the order named certain defendants, of whom Debs was one, and then commanded and enjoined "all other persons whatsoever." A learned commentator, writing in the Harvard Law Review of the period (8 Harv. L. Rev., 228), and speaking dispassionately, said:

> It is difficult to see how such injunctions can stand the test of precedent and principle. An injunction issues in a civil suit to any party who has been complained of, at least, and has had notice of the motion of his adversary. To be obliged to wait until the injunction has been violated to determine against whom it was issued ought to be enough to show that it is not an injunction at all, but in the nature of a police proclamation, putting the community in general in peril of contempt of court if the proclamation be disobeyed. Courts of equity were evidently not intended to possess such functions, and it must be regretted that Judge Grosscup, in his most commendable eagerness to offset the criminal inaction of Gov. Altgeld, should have been forced to such a legal anomaly. The power of a court to imprison for contempt of its orders or of the persons of its judges is an arbitrary one at best, and to stretch it as here in the time of disorders and almost panic in the immediate vicinity would seem to show that the court has been deserted by the calm judicial temper which should always characterize its proceedings.

But the loose, deplorable, and reprehensible practices which this provision condemns and would end have been expressly condemned by the Supreme Court, both in its rules and decisions. Equity rule 48 provides as follows:

> Where the parties on either side are very numerous and can not without manifest inconvenience and oppressive delays in the suit be all brought before it, the court, in its discretion, may dispense with making all of them parties and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

Scott *v.* McDonald (165 U. S., 107) was a case arising under the South Carolina dispensary law. A writ of injunction had been

applied for to and issued by the circuit court. The defendants were certain parties named and "all other persons claiming to act as constables, and all sheriffs, policemen, and other officers acting or claiming to act under the South Carolina dispensary law." When that injunction came before the Supreme Court of the United States it laid down a rule which I claim is that laid down in the provision of this bill now under consideration. The court said:

> The decree is also objectionable because it enjoins persons not parties to the suit. This is not a case where the defendants named represent those not named. Nor is there alleged any conspiracy between the parties defendant and other unknown parties. The acts complained of are tortious and do not grow out of any common action or agreement between constables and sheriffs of the State of South Carolina. We have, indeed, a right to presume that such officers, though not named in this suit, will, when advised that certain provisions of the act in question have been pronounced unconstitutional by the courts to which the Constitution of the United States refers such questions, voluntarily refrain from enforcing such provisions; but we do not think it comports with well-settled principles of equity procedure to include them in an injunction in a suit in which they were not heard or represented, or to subject them to penalties for contempt in disregarding such an injunction. (Fellows *v.* Fellows, 4 John Chan., 25, citing Iverson *v.* Harris, 7 Ves., 257.)
>
> The decree of the court below should therefore be amended by being restricted to the parties named as plaintiff and defendants in the bill, and this is directed to be done, and it is otherwise affirmed.

Not speaking with especial reference to labor disputes, the unwarranted comprehensiveness of restraining orders is well designed to defeat the rule as to parties and drag into the toils of litigation just the number required in order to defeat every purpose of a strike, whether or not those so enmeshed have done more than merely assume a negative attitude by the severance of relations and have patiently and steadily preserved it. It is not every lawyer even who would be able to analyze and draw the line between the legal discrepancies in such a case and take the proper steps to preserve the rights of unoffending persons held to account as participants in illegal conduct without being even mentioned by name on the complaint or order. Is it any wonder, then, that advantage has been taken of the loose and inconsiderate practice which these representative orders show the courts have sanctioned and of which workingmen complain?

I will here mention one or two terms often loosely used by the courts: "Combination" and "conspiracy" describe illegal associations, and their meanings are the same for all practicable legal purposes. "Association" primarily denotes an entirely legal relation between the members. It is often said, however, by the courts, when a body of organized labor embarks upon an illegal undertaking, that it is a combination or conspiracy, an expression signifying that the association itself has become unlawful or criminal.

In legal essence all illegal acts of the membership of such an association, whether done by them singly or collectively, are perpetrated beyond and outside its purpose and should impose no legal consequence by way of injunction or otherwise upon the association as such or upon its members as such. In Pickett *v.* Walsh (192 Mass., 572, 589) the court said:

> There is a point of practice which must be noticed. As we have said, the plaintiffs have undertaken to make three unincorporated labor unions parties defendant. That is an impossibility. There is no such entity known to the law as an unincorporated association, and consequently it can not be made a party defendant.

Often has this well-established rule of law been completely overlooked or ignored in labor cases. That this principle was willfully

and knowingly violated in all the cases in which Mr. Monaghan was counsel for complainants is seen by placing side by side the bills of complaint which he placed in the record and his admission at page 58 of the hearings, where he said:

> We can not sue the union as a voluntary unincorporated association because there is no statute upon the books of the Federal Government which permits a suit against a voluntary unincorporated organization as such.

The doctrine of ultra vires should apply here as in the case of corporations. According to that doctrine illegal acts done by officers and stockholders create personal liability only, and in no way bind the corporation. But only in rare instances have the courts given the labor organizations the benefit of the application of the doctrine, and in many cases have brought into the litigation and held to account the entire membership, though the vast majority had never previously heard of the acts done or had any intention to participate in doing them. In Bucks Stove & Range Co. *v* American Federation of Labor and others the boycott was instituted and prosecuted mainly by the St. Louis Labor Council, not connected in any sense with the national organization. The officers of the latter merely placed the complainant on an unfair list in the official magazine. Not more than a few hundred, or at most a few thousand, persons knew of the boycott. And yet the American Federation, as a voluntary association, and each of its million and a half of members were enjoined and rendered liable to punishment for contempt.

That is therefore a wise provision of this bill which requires personal notice to all parties whom it is sought to bind with orders granting injunctions and restraining orders.

In the hearings before the House committee have been placed from time to time various restraining orders and injunction writs. Altogether, if inserted here they would needlessly occupy much space. A description of their excesses and omissions alone will suffice to show the necessity of this bill.

The first instance to be noticed is Kansas & Texas Coal Co. *v.* Denney, decided in the district court for Arkansas. And here, as in most of such cases, no full official report of the case can be obtained from the published reports, but only a mere memoranda. The trouble and expense of procuring certified copies of the records have had to be resorted to in some instances. In this case the defendants (strikers) were ordered to be, and were, enjoined from "congregating at or near or on the premises or the property of the Kansas & Texas Coal Co. in, about, or near the town of Huntington, Ark., or elsewhere, for the purpose of intimidating its employees or preventing said employees from rendering service to the Kansas & Texas Coal Co.; from inducing or coercing, by threats, intimidation, force, or violence, any of said employees to leave the employment of the said Kansas & Texas Coal Co.; or from in any manner interfering with or molesting any person or persons who may be employed or seek employment by and of the Kansas & Texas Coal Co. in the operation of its coal mines at or near said town of Huntington or elsewhere."

It will be observed that a defendant in that suit would render himself liable to punishment for contempt if he met a man seeking employment in a foreign country and persuaded him not to enter its service.

In the case of Adams *v.* Typographical Union in the Supreme Court of the District of Columbia no mention was made of the

filing of any complaint or of any reason whatever why the parties were restrained. Striking through the typographical union, all its members were dragged in—those who had and those who had not done the forbidden acts were placed on the same footing of condemnation. The union, a mere word sign in legal sense, was impleaded as a defendant. We find in the order this broad, almost limitless, command and prohibition, "from interfering with any of the complainants in the conduct of their business for the purpose of preventing them from conducting the same in their own lawful way." Also this:

Such injunction to remain in force during the pendency of this proceeding, or until the further order of the court.

This was not a restraining order, but an injunction, issued at and upon filing the complaint. There isn't a word in the compliant in the case about loss or financial detriment to result from the acts of the defendants. It is also observable that the order contained not a word to show why it was issued, not even a mention of the filing of a complaint. It gave the parties no day in court for the purpose of getting rid of it, nor was any other relief prayed other than the advantage to accrue to the complaintants by the issuance of the injunction. There have been many such orders and injunctions issued in the first instance here in the District.

In the Bucks Stove & Range case the order was so long and involved that a busy man would almost prefer paying a fine to having to read it. Among other matters were these words:

And from interfering in any manner with the sale of the product of the complainant's factory or business by defendants, or by any other person, firm, or corporation.

Now, if one of the million and a half persons dragged in by using the associate name or anyone else had a stove or range to sell, he was forbidden to tell a prospective purchaser that it was a better article than that offered by the complainant; much less could he tell him that complainant was unfair to labor. They were forbidden "from declaring or threatening a boycott against the complainant or its business or the product of its factory." Such a clause is clearly forbidden by the Supreme Court in Swift & Co. *v.* U. S. and in the Chesapeake Coal case, elsewhere cited. But if the goods were of inferior quality, the defendants couldn't mention the fact to their friends or relations; neither the American Federation of Labor nor any of its members could declare a primary boycott against the complainant for any cause. And I note that the complaint was projected on the theory of a secondary boycott, and toward the close we have in the restraining order this sweeping overlapping clause "and in any manner whatsoever impeding, obstructing, interfering with, or restraining the complainant's business, trade, or commerce." This also was exactly the excess which the court in the Swift and Chesapeake Coal cases condemned as dangerous to personal liberty.

I will not go into the details of the Alaska case, since we are not much surprised at anything happening there. But the order had all the usual excesses, including the usual catch-all clause running to the end of time and covering all possible activities of the defendants. It also assumed to drag in all the members of the union, wherever they might be or however circumstanced, by the simple expedient of impleading the union as a defendant.

In the Massachusetts case it will be noted that the union was impleaded according to the usual bad practice, and with the Supreme Court's decision in Pickett *v.* Walsh staring them in the face. This order enjoins them "to desist and refrain from interfering with the business of the complainants, or any of them, by the use of threats, force, or intimidation, with anyone seeking employment as seaman with any of the complainants or their agents, or by the use of promises to pay board," etc. The order here fails to state that any complaint had been filed, but, "whereas it has been represented unto us by the complainants," naming them, "that the said complainants have exhibited a bill of complaint," etc. No complaint in such a case under any correct system of pleading could possibly have shown a cause of action in more than one complainant, and yet here were a dozen joined, no doubt with a view to overawing the defendants into submission.

The order in the West Virginia case (Hitchman C. & C. Co. *v.* Mitchell et al.) possesses the vice of not containing the name of either complainant or defendant. It is more in the form of a proclamation by a military commander or provisional governor of a conquered province in war times than anything I can think of. Under that order it would have been dangerous for any member of the union to have made any statement or representation whatever about the complainant or complainant's business to anyone seeking employment with the complainant, even if the person seeking employment had asked for information. It was what might be termed a roving injunction, calculated to catch and bind anyone upon whom it might be served or to whose attention it might be called.

I will not attempt to make extracts from it. It is all so bad that I would not know where to begin or end. It was issued by United States Judge Dayton, and is attested by the clerk of his court, though not signed by the judge. That thing was entitled and styled a restraining order, but had all the terms and legal effect to be found in any permanent injunction. Its drastic, far-reaching, and stringent prohibitions were introduced with the words "it is therefore adjudged, ordered, and decreed by the court," etc. There is not in it a line or word to inform the reader as to the offenses or wrongs charged against them. There was no notice nor order nor opportunity to show cause why the order should not stand until the day set for final hearing, nor any way to get rid of it upon any ground until the end of a protracted and expensive litigation. And in order to make the destruction of the rights of the defendants all the more complete and certain, the hearing was set 2 months and 21 days after the date of its issuance.

Before discussing in detail the court records produced by Mr. Monaghan, attorney for the founders' association, I will call attention to the showing of the records produced by him with reference to the practice which has characterized the conduct of such cases. In the first place, we note that each and every attorney for these industrial corporations denies emphatically that any court has in any instance abused its power or exceeded its jurisdiction and has asserted, apparently with entire candor, that the most that can be imputed to the judges is an occasional error or irregularity.

Now, Mr. Monaghan admitted that some injunctions and restraining orders had issued of which he would be unable to obtain any data

or record. That sounds a little strange to those familiar with the essentials of proper and regular court procedure. But those at any rate who know the reckless and oppressive uses of injunctions in labor disputes are not surprised. It often happens that they get a drastic order or injunction and then, after it has done its deadly work, it disappears.

Mr. Monaghan thought he could at any rate produce a certain number of records; and in response to the urgent request of the committee, promised to produce 34 at least. He produced and placed in the record just 3 complaints, and restraining orders and injunctions, both, to the number of 15. It is fair to assume that he did not discriminate against his clients or himself in making the selections. Although those he was unable to locate and produce may be worse than those he has placed in the record, I do not care to see them. These are bad enough. Those produced bear internal evidence of having been prepared by competent and painstaking lawyers in Cincinnati seeking to make the best possible showing with such materials in the way of facts as were available. And yet how utterly lacking in essential allegations as a basis for the exercise of equitable jurisdiction through the extraordinary strong-arm process of injunction. First we have the complaint in the Greenwald Co. case, upon which an injunction was granted by a judge of the Supreme Court at Cincinnati. It recites, of course, that the complainant has large capital, large business, and employs a large number of men, allegations which are always deemed important by counsel who prepare and judges who issue these writs. It impleads three labor unions as defendants, and through that contrivance drags in their members to the number of hundreds, perhaps thousands, as parties to a complaint charging criminal conspiracy, most of whom must have resided at a distance and have been utterly innocent of knowledge of the acts charged, or even of the situation at the scene of the dispute.

The nearest approach to a charge of trespass, hence the only threatened injury to a property right, found in the complaint is that the defendants selected and detailed "large numbers of persons called pickets to constantly watch and beset the approach to plaintiff's foundry" without stating whether the congregating was in the street or on private property with the owner's consent, whether it was near the entrance or a mile away. But the real grievance, as is plainly seen by reading the complaint, is the charge that the union was on strike "and their officers, associates, and confederates are all combining and confederating together for the purpose of preventing the employees of plaintiff who are desirous of working from continuing in its employ, and also of preventing others from entering the employment of plaintiff." It is not necessary to attempt to analyze or to point out the weak features of the two other complaints—one in the United States Circuit Court for the Eastern District of Kentucky and the other in the United States Circuit Court for the Southern District of Ohio. They are open to the same criticisms, not differing in essentials from that just noticed. Nor is it necessary to discuss orders or injunctions issued on the complaints further than to speak of their vagueness, comprehensiveness, and utter recklessness and disregard for justice, legal formalities, and private rights, of which they contain conclusive proof.

I have also before me as part of the House hearings the complaint in Hitchman Coal & Coke Co. *v.* John Mitchell and others. This complaint is exceedingly profuse, setting forth many transactions, industrial conditions, and isolated facts of individuals in different parts of the country, but falling far short of an injury to property or property right, as if the pleader were describing the incidents of a political campaign and its effect on business. This complaint is a slight variation from the usual form in the matter of parties. Instead of making the half dozen large labor organizations parties defendants, it seeks to bring in their memberships, whether within the judicial district, in the Eastern or Western States, or in Alaska, and to subject them to the order then and there made, by suing their officers in a representative capacity. This is merely a slight variation of the abuse of process and of fraudulent and bogus procedure. The charges, as you would see if you examined the complaint, are of acts and conduct forbidden by the order on the sole ground of their unlawfulness. The legal mind can not conceive of such a thing as proceeding by representation in such a case. It is a maxim of the law that there can not be an agency created to violate the law, nor any such thing as joint recovery against or joint liability of tort-feasors, nor can individuals be joined as parties defendant in such a case unless they can be shown to have conspired together as such or to have acted or to be acting in concert. But you will search in vain through this complaint to find an allegation showing a coming together in any act of illegality such as would either show concert of action or anything upon which to proceed against them, except the bare fact that those named were officers of labor organizations and that the vast number not designated by any name were members of such organizations.

The prayer simply asked, in minute detail, for restraint and prohibition upon every act and proceeding conceivable or which could be imagined tending toward success of the unionists in their attempt to unionize the miners in that region and improve the deplorable conditions there existing, and the order followed the prayer, with a few extra dashes and colors. If obeyed according to its letter and spirit, it completely stilled the tongues and paralyzed every activity of the defendants and of their associates and sympathizers. No one reading this record can fail to see that neither the corpus nor the possession of property was endangered or threatened and that the sole purpose of the proceeding was to exile from the district all not willing to renounce their union connections and peacefully and submissively accept employment with the company on its own terms and conditions.

Such complaints and orders have common phases, features, and purposes. The injury to property is seldom the thing sought to be provided against, nor is the protection of property or property rights the object in view. Organized strikers always respect property rights. They seldom even disturb peaceful possession. The purpose of these suits is the unfair use of a powerful weapon against labor's side in these legitimate trade conflicts.

Rule 86 of the Supreme Court, placed in the Senate hearings at page 68, contains nothing in conflict with the provisions of this section, and the two Supreme Court decisions which I have cited may be treated as a proper construction of the rule.

IRREGULARITIES IN BRINGING IN PARTIES DEFENDANTS.

I wish now to point out in a more general way than heretofore the evils which have resulted, and are likely to continue to result, in the matter of parties defendants. Men have been hauled before courts and fined and imprisoned for acts which, though within the terms of an injunction, were not necessarily connected with the controversy between the parties.

It is obvious that in such a case the judge assumes jurisdiction to try the party without indictment, information, or jury, himself the sole judge of the party's guilt, and his will, sometimes his prejudice or passion, the measure of punishment. It is also clear that such a practice might be so extended that jury trials and the usual formalities in criminal cases, always deemed essential to the preservation of freedom, might be entirely eliminated, especially in times of strife and excitement, and each judge of a court of equitable powers become an absolute sovereign within his domain.

Much needless fear is exhibited by Mr. Hines, counsel for certain railroads, because of the alleged difficulties of obtaining the names of those who are to be enjoined and of procuring service upon them where a railway strike occurs. His information with respect to the mode of living of railway employees and their residential status appears to be more limited than that of the average citizen having no connection with railroad business. He grossly exaggerates the difficulties and inconveniences of reaching and serving those whom it is found or thought necessary to serve in case of the issuance of an injunction or restraining order. The facts, as any railway employee except, perhaps, Mr. Hines, knows are that the nature of the employment is such that permanency of residence is absolutely necessary in the case of any employee whose employment is not merely temporary and free from personal responsibility. Moreover, there can never be the slightest difficulty in getting their names and addresses. It would be shown by the pay rolls. Nor is there anything in the assertion that the operations of a railway strike extend over an extensive territory. Such is seldom the case, but even where that condition exists the inconveniences of getting service are negligible. With respect to such acts of vandalism as damaging engines and boilers and separating the cards attached to freight cars, no injunction could anticipate them, no matter how completely or promptly served.

Section 266c naturally divides itself into two separate and distinct propositions, contained in two paragraphs, the first of which reads thus:

SEC. 266c. That no restraining order or injunction shall be granted by any court of the United States, or a judge or judges thereof, in any case between an employer and employees, or between employers and employee, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury or to a property right of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

The words occurring therein—"between an employee and employers, or between employers and employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment"—were con-

stantly called to the attention of the committee by counsel in opposition as a feature giving the bill the distinctive stamp of class legislation.

Were it not for the discriminations between classes in exercising the jurisdiction, this provision, like many others in the bill, might be stricken out without great public detriment. The paragraph would then state the law as it is uniformly administered between parties where no labor dispute is involved. In many cases where employers seek injunctions against laborers with whom they have a dispute the language of this paragraph is turned around to read thus:

That restraining orders and injunctions may be freely granted by the cuorts of the United States, or the judges thereof, in any case between employers and employees, * * * involving or growing out of a dispute concerning terms or conditions of employment, whether necessary or not to prevent irreparable injury to property or a property right, the party making the application, being a business man, whether or not the party has an adequate remedy at law. In such case no property or property right need be particularly described or even mentioned in the application.

The first clause of this paragraph to which I shall direct special attention reads thus:

Unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law.

I will call attention to High on Injunctions, fifth and latest edition, section 20b, which is a new section, and to a long list of authorities therein cited, old and new. He says:

Equity has no jurisdiction to restrain the commission of crimes or to enforce moral obligations and the performance of moral duties, nor will it interfere for the prevention of an illegal act merely because it is illegal; and in the absence of any injury to property rights it will not lend its aid by injunction to restrain the violation of public or penal statutes or the commission of immoral and illegal acts.

Speaking of the remedy by injunction, Pomeroy says:

It is necessary to show irreparable injury to a substantial property right, and if such injury is not clearly made out, relief will be refused. (Pomeroy Eq. Juris., vol. 5, sec. 323.)

As equity deals with property rights alone, an injunction will not issue to restrain political acts of public officers. (Pomeroy Eq. Juris., vol. 5, sec. 324.)

Having shown by these authorities that equity protects property and property rights only, the next proposition is that "Business is not property or a property right." Authorities: E. & A. Encyclo. L., p. 59; E. & A. Encyclo. L., p. 251; Bouvier's L. Dict., title "Property"; Black's L. Dict., title "Business"; Schuback *v.* McDonald, 65 L. R. A., 136; Worthington *v.* Waring, 157 Mass., 421.

Legally speaking, what is property? What is a property right? I will first discuss the property right. It is a right essentially connected with property, and I emphasize these words—entirely dependent upon the ownership legally or equitably of property. Such being the essential characteristic, there is no real difference between property and the property right. Whoever owns the right owns the property, legally or equitably.

In the English and American Encyclopedia of Law, at page 59, we find this definition of property:

Property means that dominion of indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others. Property is ownership, the exclusive right of any person freely to use and enjoy and dispose of any determinate object, whether real or personal.

From Bouvier's Law Dictionary (latest edition) I read the following definition of property:

The sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe. The right to possess, use, enjoy, and dispose of a thing.

On page 261 of the English and American Encyclopedia we find this definition of the property right:

In its proper use the term "property right" applies only to the rights of the owner in the things possessed.

Now, let's ascertain how business is defined and we shall see that it does not come within either of these definitions.

Black's Law Dictionary:

* * * A matter or affair that engages a person's attention or requires his care; an affair receiving or requiring attention; specifically, that which busies or occupies one's time, attention, and labor as his chief concern; that which one does for a livelihood; occupation; employment; as "his business was that of a merchant"; to carry on the business of agriculture.

That which is undertaken as a duty or of chief importance, or is set up as a principal purpose or aim. For instance, "the business of my life is now to pray for you." (Fletcher, Loyal Subject IV, 1.)

Black, Anderson, Bouvier, Century, and Webster, all the lexicographers, agree in their definitions of property and business.

Business is of innumerable forms. It may be incident to the ownership or use of property or entirely foreign to such use and ownership. It is the business of the naturalist to travel and investigate. What I am now doing and what the members of this committee are doing is business, just as much as what any employer of labor is doing or has been doing.

All of any employing corporation's property, including its good will, its assets, is the product of labor. Part of that labor and not part of that property is the doing of business.

One element of all the definitions of property is that it may be disposed of; that is to say, it is assignable. The only exception is in the case of what is known as a pure equity. One's business has no quality of an equity, and so that need not be considered. Hence, lacking the essential element of assignability, it is neither property nor a property right. It is an indeterminate natural and personal right. If a man die, all his property, including the good will, if any, created by exercising the rights to labor—that is to say, by exercising the rights to do business—is distributed to his next of kin or devisees. But his business ends. It is gone forever. This applies to men of all conditions and classes. Within the legal definitions there is hardly a man in the world without a business. Even if a man be sick and bedridden, he has as his chief concern to get well if he can.

The reasoning in boycott cases is the same as in strike cases. For the same reasons that an employer has no vested or property interest in his employees or in their capacity to serve him, a dealer has none in his customers.

Now, let us take any boycott case before a court for an illustration of my argument. Nobody is threatening to injure the plant or other real property of plaintiff. What is left as property or as a property right to support the action for an injunction? Merely that imaginary thing—the plaintiff's business.

Now, I undertake to demonstrate, as a legal proposition, that business is a mere abstraction and is not and can not be proved or argued into the legal meaning of property or property right by any amount of proof or argument.

I have sought in the opinions of judges a good expression of my idea, and found it in Schubach *v.* McDonald (a Missouri case reported in 65 L. R. A., p. 136), where the court, speaking of the right which can be made the basis for an injunction, said:

> The abstract right must assume a concrete form before it became property in the judicial sense, capable of judicial protection.

If "business" be not property, much less is the abstract right designated as "the right to do business." The right to do business clearly belongs in the class of personal rights; for instance, with one's right to practice law, his right to travel. A complainant's business and right to do business are as unsubstantial and purely ideal and personal as that of a metal polisher or foundryman to seek and obtain employment.

As the question of judicial interference in disputes between labor and capital has never been discussed in any of the cases with any special reference to this point, and as judicial views as well as the decisions, are in conflict, I desire to illustrate this point, and I will begin with a truism and a maxim. My truism is that each man is the equal of every other man before the law. My maxim is that "Equity delighteth in equality." Now, for the illustration. Here is a man; we will say his name is Smith. He enters the employ (as a polisher) of Mr. Jones, who was the proprietor 30 years ago of a stove factory. By entering such employment he becomes a business man as well as an employee. He is engaged in a business pursuit. He is not engaged in philanthropic work, but business. Polishing stoves is his business. In other words, he is exercising the right to do business. He has police protection against personal annoyance. Would anyone be so absurd as to contend that he could protect by injunction his bare right to polish stoves; that is, his right to accept employment and perform the duties of a stove polisher? He receives his compensation in definite stated sums at stated periods. There is Mr. Jones, his employer. He stands in the place of the corporation, subsequently succeeding Mr. Jones in business, and the illustration holds good. Mr. Jones works at the same establishment, but mostly with his brains. He gets his pay in the form of profits when there are any. His pay is uncertain and somewhat speculative as to its amount, but that is wholly immaterial. As to all his tangible property, real and personal, and as to all his property rights, such as choses in action and incorporeal hereditaments, he may in a proper case be protected by injunction, but not as to his personal right to do business.

We will suppose that Mr. Jones dies and the corporation takes his place as proprietor and takes over the business. It of course succeeds to no greater personal right to do business than its predecessor enjoyed or that any other business man enjoys. Mr. Brown becomes president and continues devoting labor to the business. He is as much entitled to injunction to protect his employment as Smith, the polisher, to protect his job, or as the corporation to protect its business; that is to say, the corporation has no such right.

The magnitude of the corporation's business cuts no figure. It is in no better position than a match peddler in this respect.

Suppose now that Smith—that's the polisher, the employee—hears that the corporation intends to discharge him and files a bill to enjoin it. The corporation's managers would be utterly astounded, as well they might be. And yet that corporation has no more a vested or property right in that abstract thing called business than the workingman has in the use of his hands and faculties. Now, urely it will not be contended that the courts can discriminate in this matter or that any chancellor could establish what we term discriminating, or, to use a vulgar phrase, "jug-handled," equity.

At the Fifty-ninth Congress the question of good will and the mooted question of its connection with the right to do business, again brought up before the Senate committee, was brought up and met by me, I think, fully; and any member of this committee will be furnished with a copy of my argument in answer to Mr. Davenport on that subject. At the close of the Fifty-ninth Congress I presented and filed a reply to a report to a subcommittee which brought up that proposition, and I went into it still more elaborately. A copy of that can be obtained by any member of this committee, and I will take special pains to see that any member of the committee that wants it gets a copy. The opposition to the bill have seemed to acknowledge their error in confounding good will and business after hearing the distinction clearly pointed out, as it was by me, both at the hearing in the fifty-ninth session and in my reply to the report of the subcommittee filed at the same session. At any rate, they have ceased to harp on it.

Good will and business are clearly distinguishable. It often requires some legal acumen to distinguish between things which are similar and yet not identical. But there should be none here. Our conceptions of the difference between good will and business ought to be clear.

Permit me to call attention to a fact which ought alone to remove good will from the domain of discussion. No case of injunction growing out of a labor dispute can be found in which the good will was ever referred to, and, indeed, it is impossible to conceive of an attack being directed against the good will by the disputants on either side of such a controversy.

Good will as property is produced in the same way that any other property is produced; that is, by labor, by exercising the right to do business.

In fact, the good will is a mere fiction as property, and under the modern régime of trade-marks and trade names and registry laws for these the good will never alone becomes the subject of litigation. The trade name covers the good will and is practically the only evidence of its existence. There can not, in the nature of the case, be any infringement of the property right in good will separate and distinct from infringement of the trade name. Infringement can only consist in duplication or simulation. It is enjoined because it is a fraud upon the public as well as upon the owner of the trade name. An infringement is never involved in a dispute between employers and employees nor in any matter involving, relating to, or growing out of a labor dispute.

The good will, after its creation, through the exercise of the right to do business, being property, may be sold or inherited after the business is terminated. For illustration, I could cite the case of a

large publishing house in New York which, after a long and successful career, failed in business, its failure having resulted mainly from disagreements with its employees; but the most valuable asset of the insolvent after its doors were closed was its good will, and that was sold to a new company for a large sum.

In Worthington *v.* Waring (157 Mass., 421) we have a case whose principle and language is a statement in a slightly different form from that I have been using. The facts appear in the part of the opinion I am about to read:

> We take the substance of the petition to be that the petitioners were weavers by trade and had been employed by the Narragansett Mills, a corporation in Fall River, and that they demanded higher wages, which the corporation refused to give; and they then left work, and the defendants sent their names to the officers of other mills in Fall River, on a list which is called a "black list," and which informed these officers that the petitioners had left the Narragansett Mills on what is called a "strike"; whereupon the defendants conspired together and with the officers of other mills, and agreed not to employ the petitioners, with intent to compel them either to go without work in Fall River or to go back to work for the Narragansett Mills at such wages as that corporation should see fit to pay them. It does not appear by the petition that any of the petitioners had existing contracts for labor with which the defendants interfered. If the petition sets forth such a conspiracy as constitutes a misdemeanor at common law—on which we express no opinion—the remedy is by indictment. If the injury which had been received by the petitioners at the time the petition was filed constitutes a cause of action—on which we express no opinion—the remedy is by an action of tort, to be brought by each petitioner separately.
>
> The only grievance alleged, which is continuing in its nature, is the conspiracy not to employ the petitioners, and there are no approved precedents in equity for enjoining the defendants from continuing the defendants either to employ the petitioners or to procure employment for them with other persons. (See Workman *v.* Smith, 155 Mass., 92; Carleton *v.* Rugg, Mass., 550, 5 L. R. A., 193; Smith *v.* Smith, 148 Mass., 1; Raymond *v.* Russell, 143 Mass., 295, 58 Am. Rep., 137; Boston Diatite Co. *v.* Florence Mfg. Co., 114 Mass., 69, 19 Am. Rep., 310.) It is plain, however, that the petition was drawn with a view to obtain some equitable relief. It is well known that equity has, in general, no jurisdiction to restrain the commission of crime or to assess damages for torts already committed. Courts of equity often protect property from threatened injury when the rights of property are equitable or when, although the rights are legal, the civil and criminal remedies at common law are not adequate; but the rights which the petitioners allege the defendants were violating at the time the petition was filed are personal rights as distinguished from rights of property.

Since we have here become so accustomed to the use of the word boycott, I beg leave to submit that here was an instance of a boycott—one of the most vicious and reprehensible imaginable—only it was called a black list.

In the Debs case it was not held that a court could, without property right as a basis, enjoin a body of strikers. On the contrary, it was clearly recognized that a basis of property right was essential. In that case (158 U. S. P., 583) the court said:

> It is said that equity only interferes for the protection of property and that the Government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill.

And the court proceeds to discuss such property in the mails, citing cases.

All such cases as the Debs case, all obstructions of railway transportation, can be enjoined by the Government if this bill should pass as before. (See Debs case, 158 U. S., 587, and cases cited.) Injunctions will issue in such cases as heretofore, not only to protect property, but because such obstructions constitute public nuisances.

In the memorandum of authorities placed in the record by Mr. Hines we find an extract from section 20 of High on Injunctions, reading thus:

The subject matter of the jurisdiction of equity being the protection of private property and of civil rights, courts of equity will not interfere for the punishment or prevention of merely criminal or immoral acts unconnected with violations of private rights.

This was produced to give a color of justification to the use of injunctions in labor disputes for the assertion and enforcement of such personal rights as that of doing or continuing business, inasmuch as they belong to the class designated "civil rights." But if the whole of that section 20 were inserted it would clearly appear from the context that the purpose of using the words "civil rights" was to exclude from the category of acts which might be enjoined those rights which are infringed by criminal violations of the law. This is also shown by section 20b of the same authority, as before quoted by me.

It has been often remarked that liars should have good memories. This does not, of course, refer to the counsel in opposition to the bill, because from the nature of their employment they must be regarded and treated as eminently respectable members of the bar. But they appear unable to avoid occasional lapses of memory in recitals of their respective parts in the farce of killing time before committees and during those lapses inadvertently admit the fundamental limitation of equitable jurisdiction to property rights. As instances in point, I quote the following:

Mr. MONAGHAN (p. 87). Under and by virtue of the Constitution of the United States no citizen can be deprived of life, liberty, or properly without due process of law. When by proper procedure a litigant presents to a Federal court in equity facts showing that irreparable harm is threatened and that no adequate remedy at law exists "due process of law" entitles him to the issuance without notice and hearing of a restraining order to the end that his property may be preserved. The denial of this right is a denial of due process of law.

Mr. DAVENPORT (pp. 22, 23, pt. 3). Under the decision of the United States in this Adair case, and supported by a very large number of decisions everywhere, those things that in the Pearre bill were sought to be declared not to be property rights are property rights, and would be covered by the first clause of this bill. But the bill goes on, then, to say that a certain class of acts attacking your property shall not be enjoined against, and this is the way it reads.

Senator SUTHERLAND. May I interrupt you again? I had understood—I do not know where I saw it or where I heard it—that it had been claimed that the provision in this bill now pending, with reference to property rights, would not include the right to do business. I wondered what the foundation of that was.

Mr. DAVENPORT. In construing this bill I suppose the courts would say that what the courts have said time out of mind are property rights would be covered by that first section, and that when it says that unless to prevent irreparable injury to property or to a property right whatever fell within that definition of property would be covered by the terms.

Senator ROOT. You do not find anything in this language, do you, which undertakes to change the law in that respect?

Mr. DAVENPORT. Not in that respect.

Mr. HINES (pp. 30, 31). Limitation to property rights seem designed to exclude remedies to protect the person and to protect personal freedom, although those remedies are particularly necessary in labor disputes.

The limitations absolutely to property or to property rights seems to narrow, at least somewhat, the basis for equitable intervention. Pomeroy, in the sixth volume of his work on equity, page 579, seems to recognize that equity will intervene to protect the right of personal freedom of a man to come to and from his work and puts the intervention on the ground of protecting that element of personal freedom. We find in other cases the general statement that while equity jurisdiction will not be

exercised for the enforcement of criminal law, yet it may be exercised for the protection of civil rights. It is true generally, and perhaps it is particularly true in the case of a railway company, that it will always be possible to demonstrate the existence of a property right; but nevertheless, if the general doctrine of equitable intervention is somewhat broader than that, it seems particularly unwise to put this limitation here, where undoubtedly one of the things which is most infringed is the right of personal liberty.

The CHAIRMAN. Would that term include the mere right to do business; for example, where a man has a stock of goods, the goods themselves not being interfered with? Could you say that the right of that man to continue his business and dispose of his goods was a property right?

Mr. HINES. I should say it would be an open question in the construction of this section. Undoubtedly he has a right equity ought to protect, and this section would seem to make it a question whether it is such a right that equity would protect in the labor disputes. The point I urge is, in view of the doubt that is cast upon the extent of the foundation of equitable interference in these cases, that the provision ought to be omitted, because if there is any class of cases where equity ever goes beyond these bare property rights, certainly this is the class of cases where it ought to do that thing, because the things that are involved here are so largely matters of liberty and so largely matters of protection of the persons of individuals who ought to be regarded as entitled to equitable protection when no other remedy is available.

Mr. DILLARD (pp. 8 and 9, pt. 3). I trust it will not be extended; I hope it will not be. I desire to call attention to the fact, however, in passing, and in doing so to say this: The purpose of the injunction sought is, we will say, for the preservation of property. This being true, if it appears to the judge by a preponderance of the evidence that irreparable injury is likely to result, that property is likely to be destroyed, then it would seem to me sufficient foundation has been laid for the issuance of the injunction.

Senator O'GORMAN. I have always understood that to be the accepted rule in all jurisdictions, and the case you speak of seems to be the exception.

Mr. DILLARD. I am sure the rule as I stated it has been held in several jurisdictions.

Counsel in opposition are utterly destitute of English authority for their extraordinary contention that injunction can properly issue to protect the mere right to do business and other personal rights. There are none, and consequently none are produced. But in an effort to make plausible an objection against a point of practice covered by a provision in the bill they bring forward two decisions of the Supreme Court establishing one of the most important propositions for which labor has ever contended, namely, that nothing has been added to the jurisdiction in equity since the adoption of the Constitution.

Mr. Monaghan quoted from Pennsylvania *v.* Wheeling Bridge Co. (13 Hows., 563) as follows:

> In exercising this jurisdiction the courts of the Union are not limited by the chancery system adopted by any State, and they exercise their functions in a State where no court of chancery has been established. The usages of the high court of chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the Government it has been observed.

Mr. Herrod quotes the same doctrine from the Debs case (158 U. S., 564) and cites Mississippi, Mills *v.* Cohn (150 U. S., 202).

ERRONEOUS DECISIONS HAVE ORIGINATED BY LOSING SIGHT OF FUNDAMENTAL PRINCIPLES.

I cite: Kidd *v.* Horry, 28 Fed. R., 774; Arthur *v.* Oakes, 63 Fed. R., 310; Nat. Protect. Assn. *v.* Cumming, 170 N. Y., 315; 58 L. R. A., 135.

It will be found upon close scrutiny of the cases that in many of the State cases where injunctions were issued in labor cases the juris-

diction was acquired under statutes expressly conferring the jurisdiction and that they found sanction in the decisions of the English courts, which was likewise conferred by statute. And the Federal judges in, I dare say, the most of the cases overlooked this fact and based their decisions on precedents which, if they had been closely scrutinized, would have been found not authoritative.

Attention is also called to this by Mr. Justice Bradley, presiding at circuit in Kidd *v.* Horry (28 Fed. R., 774).

The English statute, after which some of the State statutes are patterned, reads in part as follows:

> In all breaches of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may claim a writ of injunction against the repetition or continuance of such breach of contract or injury, etc.

In part, Justice Bradley said in Kidd *v.* Horry:

> As the high court of justice established by the judicature act of 1873 was an amalgamation of all the courts of original jurisdiction of Westminster Hall, including the court of chancery, which became merely one of the divisions of the high court, it follows that the court of chancery became invested with the jurisdiction which was given to the common-law courts by the common-law procedure act of 1854, and hence became invested with the power to grant injunctions to prevent the continuance or repetition of an injury which was actionable in any court, and for which an action was brought, although the power to grant injunction in cases of libel was resisted, in several instances, by very high authority; as in the case of Prudential Assur. Co. *v.* Knott (10 Ch. App., 142), by Lord Chancellor Cairns and Lord Justice James, and in that of Beddow *v.* Beddow (9 Ch. Div., 89), by Sir George Jessel. The practice of issuing such injunctions, however, finally prevailed.
>
> This statute law of Great Britain is sufficient to account for the English cases relied on by the complainant, and is undoubtedly the basis on which they really stand.

The error in the first of these decisions occurred in the same way that most erroneous decisions are given; that is, by overlooking fundamental principle and failing to reexamine the ancient and well-established boundaries of the jurisdiction. If we go back to the period of the struggle between the law and chancery courts, we find the limitation of equity in injunction cases to property and property rights often referred to and discussed.

Subsequently it was so well understood that it was deemed necessary to only occasionally refer to it. Bulwarks of erroneous decisions have been erected on other subjects, to be subsequently demolished. Some isolated erroneous decision was tamely and blindly followed as a precedent, without investigation as to whether it was sustained by principle or not, the supposed exigency or hardship of a case before the court being elaborated and the precedent being accepted as binding, or if not binding, at least strongly persuasive.

Next we have the requirement added to the foregoing provision that the restraining order or injunction shall not be granted unless the property or property right be described in the complaint or application "with particularity." Much error and abuse in labor cases are due to defects and shortcomings of complaints upon which restraining orders and injunctions are granted at the outset. I deduce three causes, any one of which, or all together, may operate to bring about the miscarriage of justice seen in each instance. These are, first, an insufficient complaint; second, a mistaken view of duty as a matter of law; third, an unfortunate environment preventing a comprehensive view of the rights of citizenship, or a false conception of the relation between capital and labor. But I discuss now only the insufficiency of complaints.

I may safely assert, as a general proposition to which, if there be an exception, I have not seen it, that on two essential facts in all the cases the complaints are insufficiently specific to warrant the granting of the relief prayed. The complaints do not show (1) specifically that any property or property right is menaced with injury, or (2) in what way or by what means an irreparable injury would result if the alleged threatened act were done.

INSUFFICIENT DESCRIPTION OF PROPERTY RIGHT.

I need not here make any such point as that the right to carry on business is not property. For present purposes—that is to say, in this immediate connection—that is waived. But I make the point that the allegations in the complaints with reference to property and property rights are insufficiently specific.

In Hitchman Coal & Coke Co. *v.* Mitchell (172 Fed. Rep., 963), in which one of the restraining orders already noticed was granted by Judge Dayton, taking that as fairly representative, the complaint recited that the complainant owned valuable coal mines, mining machinery, etc., that it had large capital invested, that its operations were extensive and its sales large. Figures of aggregates were given in connection with some of the recitals and there was a general assertion of damages. No interruption of its operations was alleged up to the date of filing the complaint, nor any shown to be imminent. Whether, therefore, any property or property right was involved at all in what the defendants were alleged to be doing was left to inference and conjecture.

DEFECTIVE ALLEGATIONS OF IRREPARABLE INJURY.

But the complaint fell still further short of the legal requirement that irreparable injury must be specifically alleged. Nothing is better understood, as the authorities used in the report from the House committee show, than that a mere general allegation of irreparable injury is not sufficient. And yet that is all that the complaint in the Hitchman case contained.

The complaint asserted, as also in the case of Adams *v.* Typothetæ of America, brought in the District of Columbia, that the strikers were under contract, which, by striking, they were violating; but it will be borne in mind that a long line of decisions, among which is Arthur *v.* Oakes, has settled the rule that courts have no power to forbid men to strike merely because of their being under contract to serve for a term which has not expired, and any other rule would violate the constitutional amendment against slavery and involuntary servitude.

And there is another reason recognized in all other cases, but too often ignored in strike cases, namely, that a violated contract is compensable and hence reparable in damages. But there is ordinarily, in fact, no damage or injury whatever in strike cases, because the injury actually suffered is such as was designated in National Fireproofing Co. *v.* Mason Builders' Association and other cases, as damnum absque injuria; that is to say, injury suffered by a party by action of another in the exercise of a lawful right.

The complaint in the Hitchman case, like those in many others examined by me, was, notwithstanding its glaring defects, exceed-

ingly verbose and voluminous, as if to make up in quantity what it lacked in quality. But it and the others contained the defects above noted and others as well.

To take up even one of these cases, analyze the pleadings, and apply the law to the many and complicated facts, and then present the arguments necessary to overthrow the fallacies of counsel and subtle errors which have crept into the decision of the court, would be a serious and stupendous undertaking. The fact is not to be overlooked that the wealth of the complainants in these cases enable them to employ the ablest counsel, to produce witnesses without limit, and to make extensive preparation precedent to sending out the thunderbolt in injunctive form; also that strikers have not the advantages and facilities just mentioned at hand to meet such a situation. There is always present the most important fact of all—that whether an injunction be issued rightfully or wrongfully, it usually does its fatal work, paralyzes the defendants, and ties the hands of their leaders, before even such presentation as they could make is heard.

Hence the importance of the establishment of correct rules to govern the courts, the same to be in force before the injunction or restraining order issues; hence also the importance and justification of the prohibitions contained in the second clause of section 266c.

IMPORTING A NEW ELEMENT INTO STRIKE CASES.

Of recent years counsel for employing corporations became conscious that, without the importation of a new theory or doctrine into the law, most of the applications for injunctions in strike cases must be denied, upon well settled principles. Hence they imported the element of motive, and made a distinction founded upon the purpose or incentives with which a strike was instituted. They undertook to analyze the feelings at work in the bosoms of the strikers.

It must be apparent to all fair-minded and thoughtful members of the legal profession that where the thing done is itself lawful the motive with which it is done or undertaken is unimportant, and that to allow courts of equity to sit in judgment upon the question of mental attitude in such cases is to completely unsettle all the law governing them and set up the chancellor in the midst of the labor organization at the inception of a strike as an arbiter of their conduct as well as a controller of their fates. It is not difficult to foresee the utter disruption and dispersion of labor organizations and complete failure of all efforts of workingmen, through organization and association, to improve conditions if the attitude toward them thus assumed by the courts be maintained and no relief he afforded by legislation. It is exceedingly difficult to see or even to admit any consistency or possibility of a reconciliation between the views of those who stand for such a doctrine and their professions of a belief in the right of wage earners to freely assemble, to discuss without restraint those business and social matters which vitally concern them, to form and maintain an organization; in short, to exercise in a collective or organized capacity any rights except such as are purely academic and consistent with subjection to such industrial conditions as employers choose to impose upon them, however tyrannical, miserable, and inhumane.

If the Federal judges, sometimes overawed by the presence before them as litigants of financial magnates and powerful interests, and often unduly impressed with the importance of large property interests and the promotion of commercial prosperity as against the lesser interests of labor, are to pass upon the motives or moral incentives instigating labor's side in a labor dispute, then every word and act at their assemblages and meetings are proper subjects for investigation and scrutiny, such, and only such, allowance to be made for human frailty, excitement, passion, and bias of self-interest as the judge sees fit to make. Under such a dispensation what becomes of the constitutional guaranty of free assemblage, freedom of movement, and free speech? What becomes of the prohibition against involuntary servitude embodied in the thirteenth amendment, so eloquently expounded in Robinson *v.* Baldwin (165 U. S., 292), and more recently in Arthur *v.* Oakes (63 Fed. R., 310)?

Could any more complete and despotic one-man power over organized labor be conceivable than will result if this new absolutism be not stayed? It was first evolved and enforced by Judge Taft in Moores *v.* Bricklayers' Union (10 Ohio Dec., 165; 23 Ohio L. J., 48), while he served as a judge of the superior court at Cincinnati, and was followed up in similar cases decided by him while on the Federal bench.

The language of Judge Noyes in National Fireproofing Co. *v.* Mason Bricklayers' Association (145 Fed. R., 260) is the mildest and most reasonable statement of that false doctrine that we have found. And yet it is not difficult to see that if the question of whether, in deciding to strike, the men are influenced by good or bad motives, is to be judicially injected into a case, it means the trial in each instance of an issue of reasonableness or unreasonableness of their demands upon the employer and gives the court an almost unlimited discretion. Especially is this so since there is no jury trial in such cases, they being treated as of purely equitable cognizance.

Another and more recent application of this device for dealing with strikers is found in Paine Lumber Co. *v.* Neal, in which an injunction was issued in the southern district of New York in October, 1911, but not yet reported. But there have been many such subsequently to Moores *v.* Bricklayers' Union. I can not discuss them with any attention to details, although some account of them can be found in the hearings before the House Judiciary Committee, especially those the Fifty-ninth and the present Congresses.

It is well, however, to state and to show that the new element above discussed has not been admitted into such cases without differences among the judiciary and a consequent conflict of authority. While the tendency to accept it as settled law is clearly evinced in a few Federal decisions, a respectable number, if not a majority, of the State courts of last resort which have spoken have rejected it.

Now, let us carry along in adverting to a few State cases what Justice Bradley said in Kidd *v.* Horry, already cited, and remember that if I have a legal right to do an act my motives are absolutely immaterial.

In McCawley Bros. *v.* Tierney (19 R. I., 255) the court said:

> To maintain a bill on the ground of conspiracy, it is necessary that it should appear that the object relied on as the basis of the conspiracy or the means used in accomplishing it were unlawful. What a person may lawfully do a number of persons may

unite with him in doing without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful.

In Clemmitt *v.* Watson (14 Ind. App., 38) the court, in passing upon the conduct of the defendants in a strike case, said:

What each one could rightfully do, certainly all could do if they so desired, especially when their concerted action was taken peaceably, without any threats, violence, or attempt at intimidation.

Chief Justice Parker, speaking for the court of appeals in National Protective Association *v.* Cumming (170 N. Y., 315), said:

Whatever one man may do alone he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of an act.

In Vegelahn *v.* Guntner (167 Mass., 92) Justice Holmes, now of the Supreme Court, but then a member of the Supreme Judicial Court of Massachusetts, in a dissenting opinion, said:

But there is a notion, which lately has been insisted upon 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.

In Lindsay & Co. *v.* Montana Federation of Labor (37 Mont., 273) the Supreme Court of Nebraska said:

But there can be found running through our legal literature many remarkable statements that an act perfectly lawful when done by one person becomes, by some sort of legerdemain, criminal when done by two or more persons acting in concert, and this upon the theory that the concerted action amounts to a conspiracy; but with this doctrine we do not agree. If an individual is clothed with a right when acting alone, he does not lose such right merely by acting with others, each of whom is clothed with the same right. If the act done is lawful, the combination of several persons to commit it does not render it unlawful. In other words, the mere combination of action is not an element which gives character to the act.

A review of judicial history bearing on the question immediately under consideration discloses that this modern doctrine of the Federal courts and some of the State courts is a resurrection, to meet the supposed necessities of particular cases, of an ancient English decision holding that the preconcerted refusal of certain workingmen to continue their employment, even though an advance of wages was their object, constituted a criminal conspiracy, which was an indictable offense at common law, although the same act done by only one individual would not have been unlawful. (See Rex *v.* Journeymen Tailors, 8 Mod., 11.) Of course the case just cited is not the only case of that and the immediately ensuing period holding to that view; but a further investigation discloses that most or all of them were controlled by drastic and harsh statutory enactments of that period. Judge Parker called attention to this and to probable neglect of the courts to note the statutory origin of these early English decisions in the case decided by him as before cited.

The next clause requires that "the application must be in writing and sworn to by the applicant or by his agent or attorney." Many allegations in complaints and affidavits filed in labor cases are made upon information or belief, which is a violation of well-settled rules of pleading. No provision in this bill is aimed at that reprehensible practice. It was probably thought that none was needed because defendants may always make that defect a ground for objection.

The defect can be seen in bills of complaints placed in the hearings by counsel in opposition at the present session.

The second paragraph of section 266c reads as follows:

> And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or 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 means so to do; or from paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto.

The words "and no such restraining order or injunction," in this paragraph, limits all that follows. First, the acts mentioned in this paragraph which can not hereafter be forbidden must be such as are done in cases where employers and employees, etc., are parties; and, secondly, such as are done in cases "involving or growing out of a dispute concerning terms or conditions of employment."

And the order or injunction shall not prohibit "any person or persons from terminating any relation of employment."

I have already shown how the bogus element of malicious motive has been introduced into strike cases, and there have been some statements by opposition counsel, and consequently some misrepresentation, as to what Justice Harlan actually decided in Arthur *v.* Oakes (63 Fed. R., 310, 317). But really there is no room for a misconstruction. He said:

> The rule, we think, is without exception that equity will not compel the actual, affirmative performance by an employee of merely personal service any more than it will compel an employer to retain in his personal services one who, no matter for what cause, is not acceptable to him for service of that character. The right of an employee engaged to perform personal service to quit that service rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one case or the discharging in the other is in violation of the contract between the parties, the one injured by the breach has his action for damages; and a court of equity will not, indirectly or negatively, by means of an injunction restraining the violation of the contract, compel the affirmative performance from day to day or the affirmative acceptance of merely personal services. Relief of that character has always been regarded as impracticable.

Sitting with Justice Harlan at circuit in that case were other learned jurists, but there was no dissent from these views.

And in this connection I call attention to the priority of Judge Taft's decisions in Moores *v.* Bricklayers' Union, in the Thomas case, in the Toledo and Ann Arbor case to this decision of Justice Harlan. It would appear, however, that Mr. Taft has never seen or had his attention called to the decision in the Arthur *v.* Oakes case. This must be true, because the most recent expression of his views are directly opposed to those of Justice Harlan as expressed in that case.

The most extreme opponents of effective legislation, formally at any rate, concede great latitude in the matter of severing the relation of employer and employee; in other words, the right to strike. But they make the concession with reservations and qualifications which deprive their concession of nearly all its value. They say to the wage earners, "Yes; you may strike for a lawful purpose, but if

the circumstances give warrant to a belief that you are inspired by malicious motives in striking, then your act of striking falls within the definition of conspiracy." This view was fairly expressed by President Taft in the June number of McClure's Magazine, 1909 (p. 204). In that article Mr. Taft refers to several cases of injunctions granted by himself when a judge into which, for the purpose of giving effect to an injunction greater saction of authority, he had imported from afar the theory of a boycott and strike combined. But he finally reached the strike question pure and simple and showed his complete surrender and subservience to everything that is extreme and hostile to workingmen in the shape of judicial utterance, by approving the doctrine of his own early decision in which we first meet the strange doctrine that a court may inquire into the motives of strikers. In the same article he attributes the growth of organized labor in recent years to such injunction decisions as he had rendered in the Bricklayers', the Phelan, the Toledo and Ann Arbor, and similar cases. But he did not fairly or truly state the result of the Arthur case. He stated that "it was left open as an undecided question whether men who were inciting employees to quit their employer in a violation of some legal duty might be restrained from doing so." In that case the court clearly and emphatically denied the jurisdiction of a court of equity to restrain men from striking in violation of a contract, as is shown by words just quoted from the opinion.

The twisting and perverting a boycott element into strike cases, a feature of every decision of Judge Taft, in order to give some color of legality to an injunction, subsequently became a feature of many strike injunctions. It was a feature in Paine Lumber Co. *v.* Neal in the District Court for the Southern District of New York, not officially reported, and in Sailors' Union *v.* Hammond Lumber Co., decided by the circuit court at San Francisco in 1907.

Opposition counsel, in referring to what Justice Holmes said in Vergelahn *v.* Guntner (167 Mass., 92), never omit to mention the fact that he was giving the opinion for the minority in that case, but never do mention the fact that these have since become the settled law in that State. I refer to Pickett *v.* Walsh (192 Mass., 572), already quoted.

The next limitation upon the power of the courts to be noticed is that whereby they are forbidden to enjoin any person or persons "from ceasing to perform any work or labor."

In discussing this provision Mr. Hines, as representative of the railroads, said:

> Section 10 of the act to regulate commerce imposes penalties not only upon the common carrier which violates provisions of the act, but also upon agents or persons acting for or employed by such common carriers.

Now, section 10 of the interstate commerce act contains many penal clauses of a similar character. Is each of them to stand as a separate argument against any legislation to regulate the issuance of injunction now and forever? It would be difficult or impossible ever to make any such regulations unless the regulation of interstate commerce and of the conduct of carriers were simultaneously abandoned. It should be a sufficient answer to all that to say that the Constitution of the United States supersedes the jurisdiction of courts of equity and prohibits involuntary servitude.

Justice Harlan, in Arthur *v.* Oakes, said something about certain circumstances under which men might be enjoined even from striking. Although it was a dictum, I respect it. He clumsily expressed the idea which Justice Holmes made clear in Aikens *v.* Wisconsin (195 U. S., 205). Any constitutional right may cease to become such when embraced within a comprehensive scheme of illegality. And that holds true whether or not a labor dispute exists.

But here we must distinguish between a mere strike and a scheme of illegality extending beyond and outside the strike. A strike which includes trespassing or destroying property or interfering with possession and use of property can of course be enjoined in so far as the strike becomes a component part of the conspiracy, but no further. On the other hand, if the act in contemplation be merely a strike the motives are immaterial.

The argument of Mr. Hines is too broad and is easily reducible to absurdity by extension to other duties or liabilities of railroad companies. A conclusive answer is that both the companies and employees are subject to penalties, and the companies are not prohibited from discharging unfaithful employees.

Human nature can not be dealt with by statutes, directing persons to continue in incompatible relations, or to endure intolerable conditions. The most solemn and formal contract is merely a social treaty, and contracts for personal service are in their very nature terminable. Specific performance through injunction process, even if practicable at all, would be a cruel remedy. Even with respect to domestic relations, injunctions are confined to property rights.

The next clause with its connection forbids an order or injunction to prevent any one "from recommending, advising, or persuading others by peaceful means, so to do"; that is, to terminate the relation of employment, or to cease to perform any work or labor.

This is fully covered by what has been or will be said under other heads.

We next have the prohibition against restraining or enjoining any person or persons "from attending at or near a house or place where any person resides or works, or carries on business, or happens to be, for the purpose of peacefully obtaining or communicating information, or peacefully persuading any person to work, or to abstain from working."

The objections to this clause are based wholly on misconstruction. Indeed, the only way to even plausibly oppose it is to extend its meaning by false construction. Even without the word "peacefully," as here used, the courts would never construe it to authorize an illegal act. Counsel in opposition, either innocently or willfully overlook the fact that the formation of a conspiracy is itself an illegal act. And as to the difficulty of drawing the line between legality and illegality, it is not real but purely imaginary. At any rate, any practical difficulty of discriminating would be no reason for opposing the legislative assertion of a correct legal principle. (Hale *v.* Henkel, 201 U. S., 43.)

Though out of its proper order, it seems more conducive to a clear understanding to here call attention to the last clause which qualifies and gives its tenor and tone to all the other clauses in the last paragraph. It will be for the courts to construe the section; and if any one attempts to defend a conspiracy, coercion, threats, or any illegal act however peaceable in form, because the word "peaceably" or

"peacefully" is used, the court will give effect to the entire section and read the last clause into every part of it as evidence that Congress did not intend to sanction as single unlawful act. The last stands as a saving clause, though appearing to be scarcely needed, since all the acts and conduct specifically mentioned in section 266c of the bill are lawful at all times and under all circumstances. Who will say that it is unlawful for any one to terminate, for any cause appearing to him sufficient, the relation of employer and employee? If conditions become intolerable one should be, and is by law, excused for ceasing to perform any work or labor; and surely the giving of advice, whether wisely or unwisely, so to cease in performance should have no legal trammels upon it.

We have next these words:

> Or from attending at or near a house or place where any person resides or works or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information.

Counsel have striven to place upon these words a construction which would authorize a serious invasion of private rights. But statutes are construed reasonably and in the light of conditions and of any evils existing at the time and which are sought to be remedied. If you should examine the court orders that I have called to your attention you would see the evil and the need of a remedy. But you can see it in the official reports of cases. In addition to a few matters which upon sufficient allegations—whether true or false I need not now discuss—the defendants are properly forbidden to do, such as trespassing upon private property, they are forbidden to persuade, peaceably or otherwise, the employees of the plaintiff to quit or unemployed persons not to enter his employ, and are sometimes forbidden to speak to them at all, or even to approach them. I do not see how it would be possible for any court to construe that clause as legalizing the entering of anyone's house without his consent, or transgressing a law, or even violating any social proprieties in any residence or other place. If so construed it would be unconstitutional as relating to private residences, and I am sure we do not seek any unconstitutional legislation.

Moreover, outside of and untouched by this provision stands the police power. In addition to the constitutional right of all persons to defend and protect their homes from hostile or even unwelcome intrusion is the right to call for police protection, and as against a complaint or grievance of that sort there is no pretense that the police are not ready to afford protection. Nor can any such showing be made, because the police are not only always ready but too willing to use their authority and force on such occasions.

I will in this connection refer for a moment to the attempt of counsel for several railroads, Mr. Hines, to give a construction to this provision which would enable crowds to assemble on railroad property and obstruct transportation. The answer is the same as before. There is only one direction in which railroads have ever looked for protection against all such interferences, and that is toward the police power. They must look to and rely upon that hereafter as heretofore. Whether this bill passes or not, injunctions would be as ineffectual hereafter as they have been in times past.

The word "peacefully," used here, might have been safely omitted, but is inserted in order to remove all doubt.

PEACEFUL PICKETING.

The conduct here exempted from injunctions has come to be known as picketing. Picketing is undertaken to preserve the status quo created by a strike. The act of picketing does not stand on the same basis as the strike. Though incidental thereto, it is nevertheless in most or all aspects an independent proceeding affecting the employer with whom the strikers have their dispute, indirectly. In picketing, whether by peaceful methods or with violence, the picketers deal directly with third persons. Hence, it has always seemed that allegations concerning acts done by way of picketing a strike were foreign to the issue and totally irrelevant in complaints against strikers. It is otherwise of course where the picketing consists in or amounts to trespasses upon the premises of complainant or otherwise inflicts upon him a direct loss. But I need not discuss cases of picketing involving trespass, because trespass disturbs the possession of property and is unlawful. Only lawful acts are covered by this bill.

Here is an excerpt from the opinion in Pierce *v.* Stablemen's Union (156 Cal., 70). It would read better, and be at least relevant if not material, if used in an action at law brought by the party impeded by the picketers while in quest of employment. I do not read it because I think it good law, but as an instance of a perverted and erroneous view of the law. It is as follows (p. 79):

> The inconvenience which the public may suffer by reason of a boycott lawfully conducted is in no sense a legal injury. But the public's rights are invaded the moment the means employed are such as are calculated to and naturally do incite to crowds, riots, and disturbances of the peace. And as illegally interfering with his business the employer may justly complain when the rights of his nonunion employee and the rights of the public are thus invaded.

It is the last sentence to which I take exception.

PRESENT LAW AS TO PICKETING.

In picketing cases it is obvious that, unless the picketers resort to trespasses on the premises of the complainant, the conduct of the defendants complained of, if unlawful, is without essential connection with avowed purposes of the union, while if peaceable, amounting to no more than persuasion, the picketing should be exempt from injunctive restraint. Nevertheless, Federal and some State courts of equity have on several occasions exercised a power herein which was virtually police power, and have gone even further in coercion and restriction than the police would be warranted in going.

That the act of picketing is distinct from the dispute proper, often governed by different principles, and requiring separable judicial treatment, was recognized by the Supreme Court of California in the case just referred to of Pierce *v.* Stablemen's Union. And the court in that case, while affirming an order granting an injunction, placed in the forefront of the opinion the assertion previously quoted which reads rather strangely, and appears somewhat out of place in an equity case brought against an organization of wage-earners, or an association formed for any other legal purpose.

The term "picketing" has been applied in all that class of cases where a party complains that he was being injured or his business

was being interferred with by efforts of members of unions to prevent the places which they had vacated being filled or held by persons who sought employment, or who might otherwise be employed in their stead. In some instances picketing has been resorted to in furtherance of a boycott, but such are exceptional.

In the category of picketing cases, are the cases where the picketers are also strikers, or are instigated by strikers, even where such strikers have term contracts with their employers but have found conditions of employment, outside the express terms of employment, intolerable, or have found other pretexts for terminating the service, and nevertheless attempt to prevent the employment of others in their stead. Whatever we may think of the morality of such conduct, it is evident that, in the final analysis, the jurisdiction in equity has no other basis than a theory that the employer has a vested property interest in the unattached labor of the vicinage. There have been many injunctions granted in such cases. Hitchman Coal & Coke Co. *v.* Mitchell, Pierce *v.* Stablemen's Union, Sailors' Union of the Pacific Coast *v.* Hammond Lumber Co., Adams *v.* Columbia Typographical Union, and Kansas & Texas Coal Co. *v.* Denny were picketing cases. Pierce *v.* Stablemen's Union (156 Cal., 70) may be selected as a typical case.

The court forgot or completely ignored the distinction between legal and equitable jurisdiction, as is evident from language found in the opinion (p. 78), where it said:

> The two classes of persons to whom we have adverted and whose rights necessarily become involved where a picket or patrol is established are: (1) The rights of those employed or seeking employment in the place of the striking laborers; and (2) the rights of the general public.

Now, unless the employing capitalist has a property interest in mere labor power, holding true even in the absence of a contract of employment with the persons whose labor he requires, who are total strangers to the immediate dispute and whose names and identity may be unknown, it is impossible to find a basis for the jurisdiction in such cases. And without such interest, all else being conceded, it is apparent that the only persons injured, in legal sense, by the acts or conduct on the part of picketers complained of, are the persons themselves whom he otherwise might be able to employ, but who are never made parties to the suit; at any rate in no case thus far reported.

Here, then, we have an additional reason for the provision in the clause we are now discussing which forbids the issuance of an injunction or restraining order against peaceful persuasion in furtherance of a labor dispute. The same defect of jurisdiction exists, of course, where the picketing amounts to threats of violence, but it is thought that labor will be sufficiently safeguarded if the bill be worded in the form as presented, that part to be considered in connection with other parts.

Were it not for a popular prejudice or perverted view, amounting when found in the judicial mind to a class bias, the applications for the injunctions in cases of mere picketing would never be entertained for an instant.

Competition, with its strifes, hardships, sacrifices, and losses is the price we pay for liberty. There is no end or cessation of competition between those engaged in what in restricted sense we designate as "business." Overpersuasion, misrepresentation, deception, all forms

of overreaching, with a freqeunt resort to coercion and force, constitutes what later-day progressives of all parties call "unfair competition." But these have ever been incidents of competition and probably will always be found, anything Congress or other legislatures or the courts may do to regulate business to the contrary notwithstanding. But the competition between labor and capital each for its share of the rewards of industry, and between persons seeking employment, which is also limited as is trade, goes on likewise, characterized by the same regretable but inevitable incidents.

Those who criticize and condemn the efforts of workingmen at organizing and striving in an organized capacity to prevent their places being taken by others, justifying the use of injunctive process against them, assert the right of every man willing to labor to obtain employment. That whole contention is based on the false assumption that there is employment in the world for every man desiring and competent for it. The sad truth is otherwise, and the concentration of industry in corporate form with the more efficient use of machinery on a large scale intensifies and constantly extends the evil of nonemployment.

The next clause reads thus:

Or from ceasing to patronize or to employ any party to such dispute.

The act which the courts are, by these wards, forbidden to enjoin, has been sometimes called the "primary boycott." The cases in which illegality attaches to the conduct thus described arises from conspiracies and must extend beyond the original parties. It is then called a "secondary boycott." The whole subject is more conveniently discussed under the next head.

We now come to the clause reading:

Or from recommending, advising, or persuading others, by peaceful means, so to do.

That is to say, no party to a labor dispute shall be enjoined from recommending, advising, or pursuading others by peaceful means to cease patronizing or employing any party thereto.

A preliminary question to be answered is, Who are the original parties to a dispute concerning terms or conditions of employment?

This is a question which, if fully exploited, would require repetition and overlapping much that has been already said. But in order to clear up the fogs and mists raised by much misstatement tending to establish the impression that this clause legalizes, or at least forbids injunctive relief against secondary boycotts, the question of who are and who are not the parties to a dispute resulting in a boycott or blacklist should be here answered, if possible. In answering this question we have the answer to the question of the distinction between the primary and secondary boycott.

Some courts have denied the existence of any real difference between a primary and secondary boycott. For instance the Supreme Court of Califordia in Pierce *v.* Stablemen's Union (156 Cal., 70). I think myself that it is unwise statesmanship on the part of our judicial lawmakers to make any such distinction when they assume the task of enacting special laws for special cases in the form of injunctions. But the courts do recognize a technical distinction and this bill follows the courts in that respect. So that regardless of any personal views I must follow the lines of the bill conforming to the views of the courts.

Here is an illustration of what I understand to be meant by a secondary boycott. One hundred men strike—we will say a stove and range company—the Metal Polishers' Union. They are parties to that dispute. They go all over the United States and advise or persuade its customers to cease trading with it. They have that right by this bill; they have that right now. That is the primary boycott. Now one of these firms having refused to cease buying of the Stove & Range Co., they institute a boycott against it. That is a secondary boycott. It is not touched by this bill because such firm so boycotted is not a party to the dispute.

This provision bears alike on employers and employees. No employer can be enjoined from ceasing to employ, or from peacefully recommending and persuading others not to employ any party to a labor dispute. It withholds from employers the injunctive remedy against the so-called blacklist, which is in vogue to a far greater extent than is the boycott. So the clause awards to employers and employees equal treatment. Now, let us take any employer. He has a dispute with employees and discharges them and recommends, persuades, and advises other employers not to employ them, and if they follow his advice he has blacklisted them. It is my belief that this corresponds exactly to what some courts call the primary boycott, and that was held, even by Judge Taft, to be legal.

But, now, suppose one of these other employers does not see fit to follow his advice, and in order to enforce compliance he gets others to join him in some retaliatory action toward the persons whom he has so advised. That would be going outside the dispute and he could be enjoined. The wrong might not consist in blacklisting, but that is immaterial. The essential idea is that it is a wrongful act and that two or more are acting in concert to perpetrate it. They could all be enjoined, anything in this bill to the contrary notwithstanding.

Now revert to the employee again. He ceases to patronize A, with whom he has a dispute, and recommends others to also cease. If they all cease, well and good; he is within his rights. But if B, one so advised, does not see fit to cease and the employee joins others in a boycott of B, that is a new quarrel. It can, notwithstanding anything in this bill, be enjoined, waiving for present purposes the question of property rights.

I will now give a clear instance of the secondary boycott of a slightly different kind. It is a very common instance which, however, we never hear of in the courts. There is, we will say, a manufacturer and dealer in stoves at St. Louis. It is, we will say, an excellent article and could succeed on its own merits. But the company is tempted by a scheme for greater profits through exclusive markets and higher prices. Taking advantage of the popularity of its brand of goods in a wide section, it makes exclusive contracts with the stove dealers throughout that section, especially in the smaller cities and towns, that these dealers shall put up the price of this stove and refuse to handle the stoves of that manufacturer's chief competitor in the manufacture of stoves, the advance on the usual and fair price to be divided between the manufacturer and dealer. Now that is an arrangement in restraint of trade—at any rate the general scheme is a combination in restraint of trade. So far we have only what may be also termed a primary boycott directed

against the competitor. But suppose the argeement contains a stipulation that in case the dealer buys any goods from any other manufacturer the stove maker will refuse to sell him any more stoves on any terms, and the agreement is violated in that respect, and the threat is carried out? There you have the secondary boycott. The agreement is itself a conspiracy in restraint of trade because hurtful to public interest. It is also a conspiracy because attempting to sanction a secondary boycott to be inaugurated by one of the parties against the others in the event that one of them does not persist in performing his part in the primary boycott.

Now, these are between business men. The country is overlaid with them, overlapping each other in all directions. They seldom or never come before the courts in private litigation, and although high prices are extorted through such arrangements, public officers ignore them.

The view I have here taken of the question of what constitutes illegality in strike and boycott cases is that advanced by the supreme court of Massachusetts, New York, Rhode Island, Indiana, Missouri, Montana, California, one or two other States, by Judge Sanborn in the case of Allis, Chambliss Co. *v.* Ironmolders' Union (166 Fed R., 50), and the Circuit Court of Appeals of the Second Circuit, as expressed by Judge Noyes in National Fireproofing Co. *v.* Mason Builders' Association. By these courts the law governing strikes and boycotts is simplified, and the turning point of legality or illegality is found not in the act of striking or govcotting per se, but in the means employed, or intended to be employed, to carry it on. Of course, workingmen may actually conspire in criminal sense as may others; but this bill leaves conspiracies untouched.

The provisions of this bill conform to these more recent, more humane, and more enlightened views. A few illustrative cases additional to those already discussed will be now briefly referred to.

In Jacobs *v.* Cohen (18 N. Y., 207, 211) the court, speaking of a strike, said:

> That, incidentally, it might result in the discharge of some of those employed for failure to come into affiliation with their fellow workmen's organization, or that it might prevent others from being engaged upon the work, is neither something of which the employers may complain nor something with which public policy is concerned.

The supreme court of the same State, in Mills *v.* United States Printing Co. (99 App. Div., 605; N. Y. Supp , 185, 190), said:

> There is a manifest distinction, well recognized, between a combination of workmen to secure the exclusive employment of its members by a refusal to work with none other and a combination whose primary object is to procure the discharge of an outsider and his deprivation of all employment. In the first case the action of the combination is primarily for the betterment of the fellow member. In the second case such action is primarily "to impoverish and crush another" by making it impossible for him to work there, or, so far as may be possible, anywhere. The difference is between combination for welfare of self and that for the persecution of another. The primary purpose of one may necessarily but incidentally require the discharge of an outsider; the primary purpose of the other is such discharge, and, so far as possible, an exclusion from all labor in his calling. Self-protection may cause incidental injury to another. Self-protection does not aim at malevolent injury to another.

It will be seen that Judges Loring, Noyes, Sanborn, Holmes, McKenna, Holloway, Parker, and their associates in the respective courts, refused to be moved by the pathetic appeals of counsel that some corporation or firm employing labor on a large scale was about to be financially ruined. Thay say that the rights of each of the

many, though financially small in comparison, must be preserved though great losses may result to an individual; that injury inflicted from the exercise of a lawful right is damnum absque injuria.

It is impossible for the Federal Government as now administered to consistently condemn any form of the boycott. For good and sufficient reasons, no doubt, the Government has during the last four years prosecuted 370 boycotts against seed dealers and is contemplating an extension of its boycott system. The Washington Star of July 27, 1912, contained a news item reading, in part, as follows:

> Promoters of fake orchard, irrigation, timber growing, and similar farming schemes, it is announced, can take notice that they are likely to be registered in a list of fraudulent companies now being prepared by the Department of Agriculture. The department is making a register for office reference only, but it is intended to protect investors who are wise enough to make inquiries before sinking their money in some advertised land scheme. The subject is rather a delicate and difficult one to handle, for Congress has made no provision for the department issuing a blacklist. Congress did this some years ago in the case of seed merchants selling adulterated seeds. The Secretary of Agriculture was directed to buy in the open market a certain number of seed samples, mostly forage plant seeds, annually. These were to be analyzed and the names of the venders and the results of the analyses published.
>
> This law is still in force and the list is published each year. The analyses were revelations. Many of the samples were adulterated with 50 per cent of dirt, trash, and weed seed. A few of the samples were almost pure and others had none of the forage seeds supposed to be sold at all. The publication of the names in the blacklist was remarkable, and few of the venders have ever been caught twice.

It will be observed that the Star, without the remotest semblance of propriety, places these crusades designed to deprive so-called business men of their customers in the category of blacklisting.

It is practically impossible to discuss the sociological and legal principles governing the strike and boycott and other movements of organized labor fairly and intelligently without taking a risk of being misunderstood, misconstrued, and misrepresented. In the first place the boycott is as defensible as the strike, and they are equally subjected to unmeasured and persistent condemnation by those not having the workingman's point of view. To say that men of a large class, such as wage earners of the country, may organize into unions, enjoy the right to freely speak and print their views, advocate social, industrial, and political changes, advance their collective and distinctive as well as their individual interests, peaceably assemble without limit for any and all lawful purposes, which necessarily includes the exercise of rights constitutionally guaranteed, and yet to assert a power in any branch of government to prescribe how or when or to what effect they shall organize, for what purpose they shall meet and commingle, what they shall say the one to the other relevant to their common or class interest, is not only unjust and dangerous doctrine, but partakes of the chimerical and impracticable.

The spirit of self-assertion and impulse to resent wrong, real or fancied, are too generally prevalent among a self-governing people to be controlled or subdued, even if all the courts in the country should devote their time exclusively to the attempt. How is it possible for courts of equity to deal with the innumerable, incessant, and interminable conflicts and competitions at work in every city, town, village, and neighborhood? If those between industrial classes are to have the espionage and arbitrage of the courts, why not those between communities, nationalities, and religious denominations? These questions answer themselves. We need not defend the morality

nor even the legality of strikes and boycotts, even if there were anything in this bill calling for such defense. I go to the point of saying that where there is no possible equity there is no possible jurisdiction, and since the exercise of the assumed jurisdiction without the infliction of more evil than good is inconceivable, it is well that it should cease.

To properly understand the point and application of the cases used in the report of the House committee, the fact must not be overlooked that after a labor dispute has arisen and the parties are strangers, in legal sense, that being the only condition under which the provisions of the bill are applicable, a boycott consists wholly and exclusively of words spoken or written. If the parties speak truly, of course they are immune from legal consequences. If they speak falsely, of course, an action for slander or libel lies, or a prosecution may be instituted in most jurisdictions, even for slander. But to permit a court of equity to make a special prohibitory law for the case, in advance of ascertainment of the facts, otherwise than before a jury with the privilege of cross-examination of witnesses, with penal consequences for disobedience, is of course, to arbitrarily set aside all bills of rights and constitutional guaranties of free speech and free press. And this has often been done by one man acting without responsibility, exercising an unlimited discretionary power. In Dailey *v.* San Francisco Superior Court (112 Cal., 94; 32 L. R. A., 273) the Supreme Court of California, sitting in banc, issued writs of certiorari and prohibition quashing an injunction which had been issued by the superior court. Referring to the provision in the California bill of rights, the court said:

> The wording of this section is terse and rigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish; but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write, and publish can not be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the Constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose.

The next clause to be noticed is that which taken with its connection, forbids the courts to enjoin any person or persons "from paying or giving or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value."

This, like the clauses relating to the withdrawal of patronage and employment, is limited to the parties to the dispute.

To such extremes are the opponents of the bill driven that they draw on their imaginations and suggest all sorts of impossibilities. For instance, Mr. Monaghan (p. 83) says:

> In such an event a labor union engaged in controversy with an individual manufacturer is justified not only in persuading and inducing in a peaceful manner the employees of other institutions which have beneficial business intercourse with the foundry struck to leave this work, but in addition is permitted, without the possibility of equity interference, to offer or give bribes of money or things of value to the employees of a customer who continues to make use of the products of the struck foundry in order to injure dealer or customer who refuses to join in the boycott; men who are members of labor organizations may approach the clerks or the employees of an establishment that is making use of the products of the struck foundry and offer them bribes of money or things of value for the purpose of inducing them to quit work for that employer, or for

the purpose of doing any other thing that might ordinarily assist them in that strike, provided no violence or threat of violence is used. The provision even enters into the transportation of goods by freight and into matter of inducement by bribe on the part of labor organizations to procure the employees of interstate carriers to refuse to handle the freight belonging to the struck institution.

Here we see how obsessed have become the minds of men engaged in big business and their attorneys, and to what an extent they have come to rely on injunctive processes as weapons with which to defeat labor in its struggles for better wages and conditions. They look to it as a remedy for all conceivable evils. It is true that labor organizations might resort to bribery to accomplish their ends; it is possible that in some rare instance they have already. But, to state it very conservatively, that is not the form or kind of bribery and corruption of which the public complains, or upon which its attention has been fixed, either in former or more recent times. And whoever before heard an injunction suggested as affording any protection against it?

There are, however, more conclusive answers which will readily suggest themselves to all who are not blinded by their viewpoints, as is Mr. Monaghan and most of the others who have appeared in opposition.

Other strenuous efforts have been made in argument to show that even this harmless liberty of paying strike benefits might be perverted and abused. I suppose any man with an abundance of cash could aid any other lawful organization to which he belonged in carrying out its purposes, or receive assistance from it to the same end, without his right to do so being questioned. But when the right of an association of workingmen to do so is sought to be recognized, learned counsel are sent here by employing corporations to deny the right, and to denounce its exercise as something fraught with danger. The question as to the lawfulness of the act is settled, as I agree it should be settled, by the federal courts themselves. In A. S. Barnes & Co. *v.* Berry (157 Fed. R., 883) it was held, without dissent or qualification, that—

* * * The strike benefit fund is created by moneys deposited by the men with the general officers for the support of themselves and families in times of strike, and the court has no more control of it than it would have over deposits made by them in the banks.

I note that Mr. Hines took care to call the attention of the committee to two State cases (A. R. Barnes & Co. *v.* Chicago Typographical Union (232 Ill., 424), and Reynolds *v.* Davis, 198 Mass., 294) holding contrary to my contention, but neglected to cite this Federal case, which also accords with latest English authorities, cited in the House committee's report.

The next clause to which I direct attention is this:

Or from peacefully assembling at any place in a lawful manner and for lawful purposes.

This means, of course, assemblages where they have the right of assembly in their usual places of meeting, or on grounds where the right is public, or on premises where they have permission of the owner or person in possession. Any other assembling must be by overcoming resistance, and in addition to being unlawful, could not be peaceful.

It is strange that anyone can be found to criticize this clause. And yet Mr. Monaghan, as the basis or major premise, for opposition makes this very correct but totally irrelevant statement (p. 83):

> What "lawful purposes" are is modified by what goes before. It is not now considered lawful for a body of men to assemble upon the premises of a struck manufacturing establishment, nor in the immediate vicinity of a struck manufacturing establishment, for the purpose of persuading the men in that establishment to quit their work.

And in Mr. Hines's statement to the committee fears are expressed that this may be held or may be used as a cloak for trespasses on railroad property. Though there may possibly have been instances of attempts at such assemblages he failed to mention any. But railroads have never relied upon injunctions as a protection against them and never will, no matter what may be the state of the law. They have found the police forces their sole and safe and adequate reliance.

I now have reached the final clause in the bill, being the concluding clause of section 266c, and reading thus:

> Or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto.

Though this has been discussed at some length in another connection, a brief and more critical view of it may be here properly expressed.

The great truth that the legal quality of an act is never changed by the existence of a labor dispute seems not to have dawned upon, or at any rate not have impressed the opposition, nor its twin truth that to thinking otherwise is due many abuses of the injunctive process. As has been conceded in the statement of Mr. Davenport, and as seems to be the view of the subcommittee, the word "lawfully," as here used, "colors" the entire paragraph, and must of course apply to each case as it arises. Nor with that word used, as here used, could the interpolated construction apply anywhere.

PROVISIONS OF ANTITRUST ACT NOT AFFECTED.

Considering the environment and business methods of those responsible for the opposition, their solicitude for the safety and preservation of the antitrust act is surprising and unaccountable.

The bill does not modify or touch the antitrust act. The reason is simple: It does not withdraw the injunctive process from any unlawful act. No one can claim that it touches in any way any form of contract in restraint of trade or any other description of contract, except, perhaps, contracts for personal service. And contracts for personal service are not within the act, because essentially local. (Williams *v.* Fears, 171 U. S., 270.) What else does the antitrust act reach? Why, conspiracies and combinations in restraint of interstate commerce. Conspiracy and combination within the meaning of that act mean almost the same thing and are affected exactly alike. For the purposes of this bill they are exactly identical in that they are both excluded from its operation. To form a conspiracy to carry on a nation-wide boycott, as in the Loewe *v.* Lawler case, could not be lawfully done, either in the presence or absence of a trade dispute, nor even if the Sherman Act had never been passed.

The antitrust act is a penal statute. The civil remedy is superadded. It is an unusual and exceptional use of injunctive process. Congress can of course provide any means and instrumentalities,

within the Constitution, which it sees fit. I have never denied to Congress the power to provide that or any other remedy, even for the prevention of injuries to personal rights which are committed to it to protect. For such purpose it can confer extraordinary, even unheard of, jurisdiction upon the courts. But Congress has never given the courts jurisdiction to protect by injunction any personal right other than that conferred in the antitrust act. Nor is that conferred for the protection of any individual but of the public at large.

A private party who has sustained special injury by a violation of the Federal antitrust act may sue in a Federal court for injunction under the general equity jurisdiction of the court, where, by reason of diversity of citizenship of the parties, the court has jurisdiction of the suit. (Bigelow *v.* Hecla Min. Co., 155 Fed. R., 869.)

In this case the whole question was reviewed and the conclusions reached do not conflict with decisions denying general jurisdiction to grant relief to private parties by injunction under the antitrust act.

In Leowe *v.* California Federation of Labor (139 Fed. R., 71) was involved a boycott by a local association of Triest & Co., a San Francisco firm. Jurisdiction was exercised solely on the ground of diverse citizenship, and neither the antitrust act nor interstate commerce was mentioned. The order went only against local persons.

This bill leaves the law of conspiracy untouched. Mr. Davenport gives an illustration of how, according to his view, one of these lawful acts mentioned in the respective clauses of the last paragraph of section 266c might be illegalized. His illustration is striking and flawless, and the doctrine of Aikens *v.* Wisconsin (195 U. S., 205) is unassailable. But, as already fully shown, the formation of a conspiracy is itself an independent and distinct act, legally isolated from any act mentioned in the bill.

SPECIAL PLEAS ON BEHALF OF RAILROADS.

It seems proper before closing to notice some special pleas interposed and extraordinary arguments advanced by attorneys representing the principal railroads of the country.

No one appreciates more than I the value to the public of railway service as well as the necessity of having the requirements of the interstate commerce acts complied with. But is it necessary in order to secure efficient service and compliance with the law that we leave in the hands of the judiciary those arbitrary police regulations which enable them, every time a labor dispute arises, to completely tie the hands of railway employees and drive them hither and thither like so many cattle? I think not. In fact, I know it is not. And even if I thought otherwise, I would rather see the Government take charge with an armed force when an extensive strike occurs, protecting alike the property of the railroads and the liberties of the strikers until the trouble could be adjusted, than see exercised the despotic powers which these gentlemen claim for the Federal courts. Their objections to the various provisions of this bill resolve themselves into complaints as to relative convenience of the present vogue in comparison with the inconveniences to result if the abuses and usurpations of the judiciary are discontinued. It would not change or modify my view and my attitude if I knew that every railroad employee in the country was satisfied with the present condition in which, as against the power now exercised by some of the courts,

they are as utterly helpless to assert themselves to the full limits of their rights as if they were subjects of an absolute old-time monarch. I will not give my consent to a despotic tribunal reared and sustained merely on respect for great wealth, rearing its head, casting its shadow over the land, exercising legislative and executive powers, even if I thought those whose liberties are imperiled would consent to be so degraded and enslaved.

I shall, for the most part, ignore all those recitals of the duties of carriers as to rates and prompt service to shippers. The Government has complete control of rate matters, and I feel sure that it will not oppress the railroads on account of any unavoidable failure to comply with the law. As to liabilities incurred by the carriers to shippers, the latter have always been reasonable. At any rate, liberty and the constitutional rights of men have been seldom before so coolly and deliberately measured in argument by a measure of dollars and cents.

Mr. Hines calls attention to the fact that certain duties prescribed by the interstate commerce act are the very duties interfered with by the strike of 1894, which, I believe, has gone into history bearing the name of the "Debs" strike. That strike occurring 18 years ago and standing unique and alone, has been harped on in every argument and in almost every phase of all the arguments in opposition. Its incidents, and certain phases of it which no one more seriously regrets than do the railway employees of the country, have been worked into this discussion for all they were worth. In fact, they have been overworked; because what then occurred as a basis of court proceedings and military action finds neither equitable protection nor legal sanction in any part or provision of the bill nor in the bill as a whole. Those acts constituted according to all the definitions one entire boycott and strike combined. It was what all who make such a distinction designate as the secondary boycott.

Sufficient record may be found in 158 U. S., 564, to show that it was a boycott of the Pullman Co., an industrial corporation, presenting all the phases of the Leowe *v.* Lawler case, though the latter did not interfere with the actual movement of commerce. It was peaceful but involved violence and threats. It was not attended with any regard for the rights of others, but was attended with trespasses on private property, the burning of cars, disabling of rolling stock, and the like.

Notwithstanding the attempts here made to use the Debs case as a precedent of value, there never was a clearer case for an injunction for the protection of property rights.

Mr. Hines gives the committee the benefit of extracts from a Socialistic sheet published in East St. Louis, and then recites various acts of vandalism, each of which was a trespass on property as well as a disturbance of possession.

Why didn't he make a manly and outright admission that he wishes the power left with the courts to enjoin peaceful persuasion, peaceful picketing, lawful assemblage, and all the other fundamental rights specified in the bill? With the power in one hand to collect not mere millions but billions of revenue in the form of excessive freights and fares he objects to relinquishing any part of the power held in the other hand to subjugate and enslave 1,600,000 railway employees with usurpatory, blanket injunctions. Again and again

he reverts to the public responsibilities of carriers under the interstate commerce act, as if the labor which keeps all the wheels turning were a negligible quantity in railroad operation. Does he wish to convince Congress and the public that regulation is fraught with greater evils than benefits? Is it his purpose to prove that the time foretold by Mr. Bryan has already come; that regulation has already proven a failure, and the time for complete Government control or ownership is at hand? His arguments point more directly that way than to any defects or excesses in this bill.

I shall not at this time attempt a minute criticism of Mr. Hines' argument. If I did I would find something to criticise in almost every paragraph.

I will also revert to three cases which have been referred to time and again and overworked in argument by the opposition.

THE DEBS CASE.

To see that the Debs case in the lower court can not be properly used in the discussion of any provision of this bill, in view of established legal principles already discussed, it is only necessary to look at the case itself. The gist of the case is stated in the eleventh paragraph of the syllabus (64 Fed. Rep., 725), in these words:

> Where defendants, directors and general officers of the American Railway Union, in combination with members of the union, engaged in a conspiracy to boycott Pullman cars in use on railways, and for that purpose entered into a conspiracy to restrain and hinder interstate commerce in general, and in furtherance of their design those actively engaged in the strike used threats, violence, and other unlawful means of interference with the operations of the roads, and, instead of respecting an injunction commanded them to desist, persisted in their purposes, without essential change of conduct, they were guilty of contempt.

In the principal case out of which this contempt proceeding grew the defendants were charged, as is shown in this case, with taking possession of, firing upon and setting fire to cars. (See 64 Fed. R., 728.)

As further showing the basis of the jurisdiction exercised in that case I refer to a synopsis of the points and authorities presented by counsel and relied upon, the same being one ground of the decision, of the court. The synopsis is in part as follows:

> 1. Any interference with property in the custody of the court is a contempt (citing authorities).
> 2. Such also is any act of interference by force or threats with employees in charge of such property (citing authorities).
> 3. Aiding, advising, or persuading another to do a forbidden act, or even permitting another whose action can be controlled to do the forbidden act, is contempt (citing authorities).

But another ground of the jurisdiction was that the conduct of all the defendants in combination constituted a public nuisance. I will not attempt an elaboration of the exceptional jurisdiction based upon the suppression of purprestures and missances.

It is fully expounded both by Judge Woods in this case and by Justice Brewer in the Supreme Court (158 U. S., 586–589).

THE BITTERMAN CASE.

In Bitterman *v.* Louisville & Nashville Railroad Co. (207 U. S., 205) the lower court had enjoined ticket brokers from dealing in nontransferrable railroad tickets on the ground that they were thereby

inducing the holders of such contracts (tickets) to violate their contracts. Of course the rights secured by enforceable contracts, such as these were, are property rights, and it did not require this decision to so establish so well known a principle. And the basis of the jurisdiction dwelt upon by the Supreme Court was the property interest which the railroad company retained in the tickets by virtue of the forfeiture clause, expressly held by the court to constitute a property interest.

THE ADAIR CASE.

Since the expression of Justice Harlan in the course of a rhetorical opinion to the effect that the right of a corporation to make contracts is a property as well as a personal right is of no authoritative value in a discussion of this bill, I shall not devote the time and labor which would be necessary for the purpose to criticize it. Nor shall I pay more than a mere passing notice to another expression in his tremendously brilliant discourse. He also said:

> The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. (P. 174.)

Now, the learned justice's conception of labor is that of a commodity in the market. And if it can be kept on tap, or canned up, until a purchaser appears, it is indeed difficult to see why a breach of contract to deliver it can not be enjoined. But he proceeds immediately to say:

> So the right of the employee to quit the service of the employer, for whatever reason, corresponds with the right of the employer to dispense with the services of such employee.

And in support of this very correct statement he cites numerous authorities, among which is Arthur *v.* Oakes, decided by himself.

Now, I will show the irrelevancy and worthlessness of all these cases by the words of Mr. Davenport, who made most frequent and persistent use of them:

> Under the decision of the United States in this Adair case, and supported by a very large number of decisions everywhere, those things that in the Pearre bill were sought to be declared not to be property and property rights and would be covered by the first clause of this bill. But the bill goes on, then, to say that a certain class of acts attacking your property right shall not be enjoined against, and this is the way it reads.
>
> Senator SUTHERLAND. May I interrupt you again? I had understood—I do not know where I saw it or where I heard it—that it had been claimed that the provision in this bill now pending, with reference to property rights, would not include the right to do business. I wondered what the foundation of that was.
>
> Mr. DAVENPORT. In construing this bill I suppose the courts would say that what the courts have said time out of mind are property rights would be covered by that first section and that when it says that "unless to prevent irreparable injury to property or to a property," whatever fell within that definition of property would be covered by the terms. (P. 22, pt. 3, Senate hearings.)
>
> As I stated the other day, if this bill were passed, the law would still be unchanged as to what is lawful and what is unlawful. Its sole effect and, as I understand it, the sole purpose of those gentlemen who took the responsibility of recommending it to the House of Representatives is simply that it takes away the injunction process; it is an anti-injunction bill; it merely deprives the injured party of his relief in equity.
>
> The committee will see that the purpose of this law, if it were enacted, and it had the construction which its advocates contend for, its effect would not change the law as to what property is nor to make lawful those things which are now unlawful, but simply to take away from the persons whose property rights are affected by the unlawful acts the right to go into court of equity and seek the protection of an injunction.

Indeed, if you will look at this bill closely I think the courts in their struggle to maintain the law would be very apt to say it does not even do that, because if you will look at this last section 266c, apparently the last clause colors all that has gone before, "or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto." (Senate hearings, p. 256, pt. 4.)

You can not enjoin them from doing lawful acts. A court of equity will turn you out in a minute unless you bring your case within jurisdiction of the court. You have to show that unlawful acts are being done, you have to show why they are unlawful, you have to show the injury is irreparable, and you have to show you have not that adequate remedy at law which is essential. The law now is that these things are lawful; they can not be enjoined by a court of equity; they will not be and they never are. (Senate hearings, p. 271, pt. 4.)

The substance of all this is that Mr. Davenport, leading counsel in opposition, says:

1. I am dwelling on the Adair case (and he might have included the Debs and Bitterman cases), notwithstanding that it is entirely irrelevant.
2. The bill will not admit of a construction which forbids an injunction to prevent any unlawful act, since the last clause colors and controls all the preceding.
3. The bill does not forbid equity to enjoin illegal acts, and equity will not enjoin lawful acts.

NO CONSTITUTIONAL OBSTACLE IN THE WAY.

I shall not devote much time on the question of constitutionality, though hours of the subcommittee's time has been given up for what I consider to be absurd attempts to show Congress to be destitute of power to enact this or any similar bill. I shall not interpose what might be called a constitutional argument, properly so called, since that appears to be entirely unnecessary, but in order to remove a possible doubt in any mind, I will condense a few propositions and citations.

The contentions of counsel when reduced to simplest terms mean just this: That when Congress had acted under its constitutional power and had established a Federal court, common law and equity powers of courts immediately flowed out of the Constitution into these judicial receptacles. It is only necessary to briefly examine this new doctrine to see the absurdities to which it would lead.

Here is an important fact, persistently overlooked in discussions of counsel. The common-law courts of England, from King's Bench down, in addition to administering statutory law and the common law proper, exercised certain parliamentary powers—so called to distinguish them from the legislative powers of Parliament, but which were in substance and effect powers of legislation. That is to say, they assumed the prerogative of determining what public interest and policy required, if the question had not been irrevocably settled by precedents. In our schemes of government, National and State, as has been many times decided, courts have nothing to do with the policy of laws. It is their function to ascertain and declare what the law is, leaving questions of policy to the legislature. In the English system the legislative and judicial departments were, and are, entirely independent of each other. It is true that the courts are bound by acts of Parliament, as construed by them, but outside the statutes their powers were as free from limitations as those of Parliament itself, they being there the exponents and final arbiters of public policy for the Kingdom. Many common-law rules and principles were established in the exercise of these ultrajudicial powers. The framers of the Constitution were familiar with all this, and their

knowledge of it was no doubt a predominating reason for rejecting the common law as a part of our system. The result is that our Federal courts possess the equitable jurisdiction of English chancery courts, but do not possess their extra-judicial, or legislative, powers.

When we speak of the powers of our courts we mean their jurisdiction, including what may be termed their implied jurisdiction, meaning those powers which are necessarily incidental to the effective exercise of the jurisdiction. And when Congress sees fit to limit or subtract from the jurisdiction the incident, to wit, the power, falls with the principal thing. It is true that in the part of the Constitution providing for the judiciary, jurisdiction is confined as there specified without limitation or reservation. It does not follow, however, that the jurisdiction is not without limitation in the Constitution. It is necessarily subject to such limitations and exceptions as may be imposed by Congress, which by the same instrument is given power to establish the courts, and by necessary implication to define and limit, as well as from time to time to subtract from the jurisdiction.

But it is said that to concede this would be conceding to Congress the power to destroy the courts. This is undoubtedly true, but what of it? There never has been a time from the assembling of the First Congress to the present when Congress had not the power to destroy, not only the courts, but the executive department, and even itself. This is well known, and the methods by which it might do this are obvious; but a supposition that the Congress would ever do any such thing is so ridiculous that the topic need not be pursued in detail.

The authorities in support of the foregoing propositions are ample. In Cary *v.* Curtis (3 How., 236, 254) the Supreme Court said:

> The courts of the United States are all limited in their nature and constitutions, and have not the powers inherent in courts existing by prescription, or by the common law.

In section 720 of the Revised Statutes of the United States we have a statute prohibiting the courts from issuing injunctions in certain cases, and the constitutional validity of that statute was upheld in Sharon *v.* Terry (36 Fed. R., 365). And an examination of the judiciary act of 1789 will discover therein many limitations upon jurisdiction, not to mention subsequent statutes. The cases of Ex parte Robinson (19 Wall., 505) and Finck *v.* O'Neal (106 U. S., 272) may also be cited as authority to the same effect. In the latter case, it appeared that Congress had taken from the court all power to enforce its judgments, and the act of Congress was upheld by the Supreme Court. In the opinion we find these highly significant words:

> The United States can not enforce the collection of a debt from an unwilling debtor except by judicial process. They must bring a suit and obtain a judgment. To reap the fruit of that judgment they must cause an execution to issue. The courts have no inherent authority to take any one of these steps, except as it may have been conferred by the legislative department; for they can exercise no jurisdiction, except as the laws confer and limit it.

A number of State cases have been desperately resorted to by opposing counsel to supply the lack of Federal authority. But the constitutions of the various States themselves provide for and estab-

lish the courts, partition the powers of government in detail, prescribing safeguards and limitations; whereas, in the federal system full and complete control of the matter has been delegated to Congress. Nor should the fact be overlooked that State decisions on the subject are often based upon precedents of the common law, which, as is well known, is no part of the Federal system. A striking illustration of this divergence of State from national view is seen in Ex parte McCowan (139 N. Car., 95), where it was said:

> We are satisfied that at common law the acts and conduct of the petitioner, as set out in the case, constitute a contempt of court, and if the statute does not embrace this case and in terms repeal the common law applicable to it, we would not hesitate to declare the statute in that respect unconstitutional and void.

CONCLUSION.

I have not, in what I have said, sought to arouse any feeling of passion for or against any class or interest. The issue is broader than any class interest. Our institutions can not endure if any large class be deprived for any considerable length of time of equal rights and equal treatment in the courts; and since Congress has long neglected relief against the unjust discriminations herein, I insist that it should interpose its power without further delay.

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