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LABOR AND THE LAW AS VIEWED BY THOSE WHO REPRESENT EACH—By GRAHAM R. TAYLOR

Probing the Causes of Unrest

XXV

THE twenty-fifth of a series of interpretations of the work of the United States Industrial Relations Commission, written especially for THE SURVEY.

IF ANYONE cherishes a lingering suspicion that the courts operate with equal justice for poor and rich and that labor has no just complaint against the law of the land, he would have found much food for thought at the hearings of the federal Industrial Relations Commission in Washington on labor and the law. He would have found it not only in the stories of those who feel that the law has worked injustice to themselves, but also in the deliberate utterances of men who stand among the foremost administrators and students of the law itself.

The "rabble" that led the "attack on the courts" this time included the chief justice of a state supreme court, a university professor, and a former president of the American Bar Association. And it seemed that their criticisms were given added emphasis by the zealous defense of the judiciary that came from the attorneys who represented employers' organizations. One of these made the flat statement that he "wouldn't recommend any change in the law" and that "the present laws are sufficient to deal with union organizations."

The attitude of the courts on boycotts, the issuance of injunctions in labor disputes, the unconscious bias of judges because of their corporation experience, the folly of common law precedents that determine present-day decisions on the basis of conditions long obsolete, the "delay of justice which is a denial of justice," excessive bail, the fine system that puts the poor at a disadvantage as compared with the rich, the usurpation of power to decide constitutionality of laws,—these were some of the counts in the indictment of our system of justice that were advanced most tellingly by Walter Clark, chief justice of the North Carolina Supreme Court; Stephen S. Gregory, of Chicago, former president of the American Bar Association; Prof. Henry R. Seager, of Columbia University, and Gilbert E. Roe, New York attorney and former law partner of Senator LaFollette.

"I don't recognize the right of a man who lived four hundred years ago and who knows nothing of present conditions, to say how I should decide between A and B in this day and generation," declared Judge Clark in discussing common law, which he characterized as "judge-made law." The court should take into consideration, he said, pure equity unless there is specific legislation to prevent. And he paid his respects to some of the legislation on the statute books by declaring that "you know as well as I do that paid lobbies are constantly seeking to influence congress and the state legislatures, and some of these lobbyists occupy seats as members."

Nor did he confine his criticisms to generalities. "I do not like to criticize the courts," he declared but "as an American citizen I do not concur with them in the Danbury hatters' case. Men collectively should not be compelled to suffer for the excesses of a few."

The power of the federal courts to declare laws unconstitutional is a cause of unrest, said Judge Clark, and so also is any unjustifiable usurpation of power. The exercise of such power, he contended, should be prohibited by law. His views along this line were at variance with those expressed later by Prof. Frank J. Goodnow, recently inaugurated as president of Johns Hopkins University. Professor Goodnow said that "the acquiescence of the people for one hundred years in exercise by the courts of the power to pass on the constitutionality of laws warrants any such usurpation if there was any."

Professor Goodnow, however, shared the opinion of the others mentioned with reference to the likelihood of unconscious bias on the part of the judiciary. "One of the main troubles," said he, "in selecting judges from the bar is that they have been accustomed to defend private rights and not public interests."

Judge Clark pointed out that "courts have been composed of elderly men, most of whom have been employed by big corporations, unconsciously biased in favor of views they held before they went on the bench." Professor Seager, however, found a healthy sign in the growing outspoken criticism of such judges and the antagonism shown toward them in popular elections. He felt that many judges are thus being made conscious of their bias and are making real effort to guard against it.

A dangerous trend in recent decisions was pointed out by Gilbert E. Roe. He referred particularly to decisions of the federal Supreme Court in the Adair case, in which a law was declared unconstitutional that forbade the discharge of an employe because of membership in a labor union, and in the case of *Coppage* vs. *Kansas*, decided January 25 last, in which a law was declared unconstitutional that forbade an employer to require of an employe that he shall not become or remain a member of a union. "Unless corrected," said Mr. Roe, "these decisions may prove to be the Dred Scott decisions of labor."

There was much discussion of the methods whereby judges could gain information concerning social and economic conditions that should be taken into consideration in the formulating of decisions. Criticism was directed especially against the failure of the law schools to include courses along this line in their curricula. As for definite machinery to supply such information to judges there was little suggestion beyond the encouragement of the tendency to supply expert testimony in given cases. Mr. Roe instanced particularly the briefs of Louis D. Brandeis as indicating a method that might be more generally followed.

Three recommendations were made by Professor Seager:

1. The change of state constitutions to bring about authoritative decisions as to the scope of the police power by the federal Supreme Court—thus developing as time goes on one controlling view of what constitutes the police power.

2. In view of the decisions declaring laws unconstitutional that forbid the discharge of employes because of union membership, the conviction of the country should be emphasized that it is intolerable for employers to organize to prevent employes from organizing. Professor Seager said he readily saw that employers would allege other reasons for discharge. But he felt that something is necessary to clarify thinking on this topic.

3. Professor Seager urged a permanent commission on industrial relations. Just as the recently created federal trade board is given power to decide what is unfair competition and prevail upon guilty parties to desist, the way out on labor questions, said he, is through a permanent commission continuously trying to bring about more harmonious relations between employers and employes, giving publicity to the affairs of employers' associations and labor organizations, and promoting collective bargaining. He felt that such a commission, or special commissions to deal with particular problems, should be composed of representatives of both sides with no members representing the general public and swinging their influence one way or the other.

Boycotts and blacklisting came in for detailed discussion by Daniel Davenport, counsel for the American Anti-Boycott Association, the membership of which he said is not made public. He dwelt at length upon the considerations that determine the exact line beyond which combinations cannot legally go in refusing to trade. If purpose to injure is involved such action becomes a boycott, he declared. This line appeared clear to him and also to Walter Drew, counsel for the National Erectors' Association, but to others it was more hazy.

That the boycott, if unaccompanied by violence or intimidation, should be legal was vigorously contended by Judge Clark who expressed also his belief that the black-list should at the same time be considered illegal. He differentiated thus between employer and worker on the ground that one concerns wares and the other human labor. Mr. Gregory also maintained that he could not see why men would not be permitted to

do collectively what each one of them can do legally as an individual. He urged that the state and federal statutes should be changed so as to permit such combinations.

The discussion of injunctions led up to the question of the invasion of civil authority by the military and drew out much interesting testimony from radicals as to their sense of righteous resistance when they feel that their rights are being trampled upon by the courts or the militia or the "armed hirelings" of employers.

Judge Clark and Mr. Gregory disapproved in no uncertain terms of the way in which a judge could deprive a man of the right of trial by jury merely by enjoining him from committing a crime and then, after he commits it, trying him not for the crime—which would mean a jury trial—but for contempt of court, which the judge alone may punish. Mr. Roe said that in labor cases the injunction is clearly not a protection of property rights but an invasion of personal rights.

The interesting contention was made by Mr. Davenport that trade unionists abandoned their position with reference to injunctions and the right to trial by jury when they advocated and secured the passage of the Clayton bill. Under certain provisions of this law, Mr. Davenport said, an unusually drastic punishment may be given for violation of an injunction, not merely fine or imprisonment but a fine to the extent of the damages inflicted in the violation. It was evident, however, from the testimony of several witnesses that the injunction is not used so frequently nor so sweepingly as in years gone by, and that in its place there is an increasing resort to military authority.

The encroachment of the military authority was felt to be most alarming by Mr. Gregory and Edgar M. Cullen, former chief justice of the New York Court of Appeals. The actions of the militia in trying and punishing persons arrested by it, Judge Cullen said were a danger to our institutions.

"If the doctrine of the West Virginia courts is followed," he declared, "it would be subversive of liberty in this country." Furthermore, he pointed out that it is inconsistent with the ruling of the federal Supreme Court in the famous Milligan case, in which a man tried and sentenced to death by military authorities in Indiana shortly after the close of the Civil War was released on writ of *habeas corpus* by the Supreme Court.

Professor Goodnow expressed the opinion that no judgment by a court martial has any influence with civil courts if the latter are in operation in the region. The question as to whether martial law is in force and the civil courts suspended must be determined by the state law. In most cases, various witnesses testified, a proclamation by the governor is necessary, but it was felt that in some cases the calling out of the troops and their presence in a community might be sufficient warrant. Professor Goodnow could not conceive of a case in which a writ of *habeas corpus* could not be used to safeguard any individual rights. But the labor representatives on the commission pointed out instances in which men in jail, without friends or money, were powerless to secure its aid.

The labor men who testified—William B. Haywood and Anton Johannsen—justified resistance to the authorities when personal rights are overridden and the local courts fail to afford protection. Commissioner Weinstock questioned them at length in an effort to get them to admit that the use of violence is not necessary under our form of government with universal suffrage and such other popular powers as the initiative, referendum and recall. But they insisted that with hired gunmen and the militia employed by the "bosses" there is nothing to do but resist when constitutional rights are set aside

Johannsen said: "If you're convinced of judicial invasion of your rights, stand by your rights and take the consequences." "The power of injunction," he declared, "does not go much beyond the courage of those enjoined."

Although still under indictment for carrying dynamite around in his suit case—he says he has never so much as seen a stick of it—Johannsen justifies the McNamara brothers as having been goaded to the feeling that violence was the only way in which they could combat the immense power of the United States Steel Corporation and its subsidiary and allied companies, whose policy of crushing all labor organizations has so far succeeded that the structural iron workers' is the only union left in the industry. He referred to Los Angeles as a "city of slaves" under the open-shop régime.

Walter Drew, who prosecuted the dynamiters convicted at Indianapolis, admitted that he was "not at all proud of the use that has been made of the open shop in Los Angeles." "Excesses come with power," said he in referring to the domination by the Merchants' and Manufacturers' Association of that city, "and we are all human and cannot stand too much power."

Witnesses already mentioned and several others discussed in plain terms the injustice that the poor man suffers because he cannot secure the same legal ability as the rich. Judge Clark pointed out that the ablest counsel are often retained by wealthy corporations to scheme out one delay after another so that the poor man's resources shall be exhausted and he will lose the popular support that ebbs away as years go by.

This inequality of legal service—"lop-sided law"—was forcibly described by Clarence Darrow who added satirically, "if in the prize ring you led out a dwarf to fight Jack Johnson, the crowd wouldn't stand for it."

Mr. Darrow, however, testified that in the anthracite coal strike he devoted four months to the cause of the strikers and secured for them an award amounting to millions of dollars, his fee being $10,000. For the defense of Moyer, Haywood and Pettibone he received $35,000 and lost his health and law practice. For the defense of the McNamaras he received $48,000 but spent it all in a defense of himself which occupied the subsequent year and a half.

He justified the McNamaras at length along the lines that Johannsen had mentioned and expressed the hope that "some day soon" they may be pardoned. He analyzed the state of mind that led to the use of dynamite and said that, although he himself never would have advised it, he did not feel that he could sit in judgment on those who had felt driven to it by their sense of the injustices under which labor suffers.

The duty of the police with reference to free speech and assemblage, and the use of "gunmen" in strikes were discussed by Arthur Woods, police commissioner of New York city. He took the position that the police should not merely permit but should protect assemblages and lawful picketing, provided only that the traffic rights of others are not overridden. He gave instances from his New York experience to show the success of this policy as compared with repression.

He described at length the activities of "Dopey Benny," leader of East Side gangs, including some of "gunwomen," who, he asserted, have hired out to strike leaders to commit violence of every description, from murder down. On the basis of "Dopey Benny's" confession, more than thirty indictments have already been found against labor union officials and gangsters. Mr. Woods said that he had no evidence of the direct use of "gunmen" by employers, but that they are often hired by detective agencies which serve employers.

An extraordinary account of persistent persecution by public authorities at the behest of employers was given by Joseph Kobylak, a Bohemian coal miner from Ohio. He had been subjected, he said, to false arrests on trumped-up charges of all sorts of crimes, including robbing, rape and treason, without even being brought to trial. He ascribed this persecution, in which his savings and his home property had been swept away by the necessities of defense, to company antagonism due to his union activities and his vigilance as check-weighman in preventing the companies from defrauding miners.

Feudalism in southern cotton mill communities and delays in the enactment of adequate child labor laws, owing to the opposition of mill owners, were discussed by A. J. McKelway, southern secretary of the National Child Labor Committee. He told of communities in which the mill-owner dominates the entire life of the people who "work in his mill, live in his houses, go to his school and listen to his preacher on Sunday."

He quoted the statistics of the federal child labor report as to low wages, showing that in 1908, out of 32,409 workers in cotton mills, those earning less than $2 a week included 251 under 12 years of age, 731 between 12 and 13 years old, 1,700 between 14 and 20 years old, and 1,085 over 21 years old. There were a total of 8,790 earning less than $4 a week.

Delays in the passage of child labor legislation he felt to be a great cause of industrial unrest, and incidentally he pointed out that if Georgia had passed the law raising the age limit to 14, as long urged by the National Child Labor Committee, Mary Phagan, the Atlanta factory girl for whose murder Leo Frank is now under sentence of death, could not have been legally employed in the factory where she met her death.