

Contempt of Court in Labor Injunction Cases (Book Review)

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one cannot but desire to see the law in action. The union of law and equity, as far as it has been affected by the so-called merger, should be presented to the student, as far as possible, in a course in equity. It is felt that he should benefit by his course in procedure, and one course should supplement the other in developing equitable remedies and powers. Whether or not the material on arbitration and appraisal should be included in a course in equity again raises the troublesome question of whether or not the demands of the subject require that it should be treated in a course in procedure. We believe that the equitable remedies involved should be studied in a course in equity. The material might be cut down and more material inserted on merger of law and equity under codes. After all, the approach may be determined by the mental attitude of the teacher. If we are capable of teaching law "in the grand manner," in accordance with the admonition of Holmes, here is a book built in that spirit which can be used to achieve that end; and if, in the becoming process, a student masters this book, he has made a distinct advance to that farther goal—a finished lawyer.

As stated before, all lawyers should have and use this book. It should be on the study desk of every teacher of equity. Whether it can be used for class instruction, depends upon many things. If the course in equity is confined to thirty-two hour lectures, the book contains too much material, is too specialized, and in parts very difficult. If, on the other hand, this book was intended, as apparently it is, to cover the first-year course in equity, and the teacher is allowed the privilege of giving equity for the second year, in which he can treat equitable remedies against tort, bills of peace, *quia timet*, and other topics usually found in the course in equity, then this book can be highly recommended for class use in the first year.

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CONTEMPT OF COURT IN LABOR INJUNCTION CASES. By C. O. Swayzee. New York: Columbia University Press, 1935, pp. 145.

This monograph, frankly following in part the path blazed by Frankfurter and Greene in "The Labor Injunction," presents a careful study of the device of contempt of court as applied in labor injunction cases. The volume contains much valuable statistical data and, for the first time, collects a large part of the mass of "unreported" New York authorities in this field of the law. It is a painstaking compilation of the empirical data available in our leading industrial state, and it analyzes the material in scholarly fashion. Having been written immediately prior to the enactment of Chapters 298 and 299 of the 1935 Laws of New York amending the Civil Practice Act, the Penal Law and the Judiciary Law, in relation to contempts in cases involving or growing out of labor disputes (which carry into effect some of the suggested changes in the law made by the author), this book serves as a valuable summary of the law up to this turning point.

The field of law governing the labor dispute has suffered greatly from the absence of sound scholarship, as applied to the social and economic bases of trade union organization and activity. It was this lack which largely accounted for the rapid development at the end of the nineteenth and beginning of the twentieth centuries of the device of injunction and punishment for contempt of court as the method of handling the problem of the labor dispute. And, too, it was this same lack which frustrated the early attempts to adapt a technique to the problem.

The efforts to obtain the right to a jury trial in contempt proceedings go back to 1895 when the Bartlett Bill was introduced in the House of Representatives. As a reflex of the *Debs* case¹ a bill was passed the following year in the Senate of the United States providing for a jury trial in contempt proceedings, and a similar bill was introduced in each succeeding Congress. All of these efforts proved abortive. Finally, in 1914, the Clayton Act was passed, providing for jury trials of contempts for violation of labor injunctions. This provision was held constitutional in the case of *Michaelson v. United States*.² Following the Clayton Act, statutes providing for jury trial of labor injunction contempts were soon adopted in a number of states, including New Jersey, Utah and Wisconsin. At various times there have been jury trial statutes in Massachusetts, Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma and Virginia. But then the process of judicial "construction" began. It was not long before the so-called "Magna Carta of Labor" became a hollow shell. All these statutes have been nullified, either by having been declared unconstitutional or by having been so construed as to have no substantial effect.

With regard to the related efforts to obtain a limitation upon the issuance of the labor injunction, the five to four decision of the Supreme Court of the United States rendered in 1921 in the case of *Truax v. Corrigan*,³ holding a state statute unconstitutional, seemed to foreclose immediate further progress. Since 1924, while no less than nineteen bills were introduced in Congress relating to labor injunctions and contempt proceedings based thereon, all died in committee.

The turning point in the law in this field dates with the publication of "The Labor Injunction" by Frankfurter and Greene in January, 1930. In March, 1932, the Norris-LaGuardia Act was passed by both Houses of Congress and was approved by the President. This Act, primarily a brake on injunctions in labor disputes, contains provisions for a speedy public trial by jury for labor contempts (not committed in the presence of the court) and gives the defendant the right to demand the retirement of the judge sitting in the case under certain circumstances.

There is no doubt that the masterful studies of the economic, social and legal problems of labor injunctions, made by Professor Frankfurter and his colleagues and collaborators, were more than merely instrumental in securing the passage of this statute and in inducing the courts later to hold it constitutional. Following the Norris-LaGuardia Act, a number of states have passed

¹ 158 U. S. 564, 15 Sup. Ct. 900 (1895).

² 266 U. S. 42, 45 Sup. Ct. 18 (1924).

³ 257 U. S. 312, 42 Sup. Ct. 124 (1921).

anti-injunction laws and statutes providing for jury trials in contempt proceedings.

In New York both types of statutes were passed at the last session of the legislature⁴ as a result of the effective demand of the labor movement, and of the recognition that the injunction-contempt device was abused by employers, their lawyers and the courts. That the administration of justice was thus brought into disrepute is shown by the works of Frankfurter, Sayre, Landis and Brissenden.

The statutory changes which were made in New York with respect to contempts of labor injunctions were substantially two. (1) Cases growing out of labor disputes were excepted from the provisions of the Penal Law which made a misdemeanor of wilful disobedience to the lawful mandate of a court. (2) The Judiciary Law and the Civil Practice Act were also amended so as to grant trial by jury as a matter of right in all proceedings to punish for contempt arising out of the failure to obey an injunction order granted in any case growing out of a labor dispute, except contempts committed in the presence of the court.

It has fallen to the lot of the writer of this review to be the first successfully to maintain in court the constitutionality of both changes. (1) The amendment to the Penal Law was declared valid by City Magistrate Malbin in the case of *People v. Rosen et al.*,⁵ where the violation of a labor injunction was held to be no longer a criminal offense. (2) The new statute granting the right to jury trials was held to be constitutional in the case of *Kronowitz v. Schlansky*,⁶ recently decided in the New York Supreme Court. The result reached by Mr. Justice Steinbrink in his learned opinion was largely induced by the recent work of scholars in the field of labor law. There were two main grounds upon which these statutes had previously been held unconstitutional. The first was the theory that the power of summary punishment for contempt by the judge without a jury was an "inherent" attribute of the court. The second was that legislation limited to labor disputes was "class legislation."

In disposing of the first objection, Mr. Justice Steinbrink relied upon the brilliant concurring opinion of Mr. Justice Maxey of the Supreme Court of Pennsylvania in the case of *Penn Anthracite Mining Co. v. Anthracite Miners of Pennsylvania*.⁷ Mr. Justice Maxey's opinion was definitely based upon the results of recent legal scholarship and contains an able summary thereof to show that the entire premise of "inherency" is false.

In dismissing the second objection, Mr. Justice Steinbrink acknowledged his indebtedness to legal research as follows:

⁴ The anti-injunction law was enacted by Chapter 477 of the Laws of New York of 1935, the jury trial provisions by Chapter 298 of the Laws of New York of 1935, and Chapter 299 of the Laws of New York of 1935 abolished criminal prosecution of labor contempts.

⁵ City Mag. Ct., 5th Dist. Brooklyn, July 27, 1935, no opinion; see also, dictum of City Magistrate Perlman, in *People v. Smith*, 4th Dist. Manhattan, June 14, 1935, 94 N. Y. L. J. 57, July 6, 1935.

⁶ Supr. Ct. Kings Co., Spec. I, Steinbrink, J., N. Y. L. J., Aug. 29, 1935.

⁷ 318 Pa. —, 178 Atl. 291 (1935).

"The social and economic forces underlying labor disputes with its (*sic*) resulting wide public interest, the plethora of legal research on the subject, the declaration by various legislatures, including the Congress of the United States and the Legislature of this state, that there are abuses to be met in the existing procedure applicable to labor disputes, all negative any possible inference that legislation limited in its application to labor disputes is arbitrary, oppressive or capricious or based upon no real distinction."

The present volume therefore represents a work in a field of the law where there has been a crying need for creative scholarship and where such works have proven of distinct value in helping to eliminate abuses in the administration of justice, which abuses resulted from the judicial failure to mold the law to meet with realities of economic and social life. This volume with its mass of data will no doubt exert appreciable influence upon both the legislature and the courts.

However, when one reaches the final chapter of the volume, which gives Professor Swayzee's "Suggestions and Conclusion," one cannot help feeling regret that the empirical method employed by the author has produced no truly fundamental constructive result. True, the author properly distinguishes between "direct" and "indirect" contempts. With respect to the latter, defined as "any contempt committed outside the presence of the court," the author proposes that these are:

- "1. To be tried by any court having competent criminal jurisdiction, but only after indictment," and
- "2. That the jury to determine (1) whether a contempt has in fact been committed, (2) punishment (within statutory limitations) for disregard of the court's authority, (3) damages, if any, to be paid to the party injured by the contempt."⁸

In other words, the author suggests that labor contempts be tried by a jury in the *criminal* courts. The present New York law provides for jury trial in the *civil* courts. There are procedural advantages to labor in either forum, and valid objections to both. The fact that there is to be a jury trial will no doubt serve to eliminate many of the abuses growing out of the use of the injunction-contempt technique in labor disputes. However, it is submitted, no truly fundamental cure for the evil can be found short of the complete elimination of the labor injunction. The author has sought to state his argument "in terms of the relationship of labor-contempt analysis to general economic theory and problems." Yet, to all attorneys who have actually been engaged in the handling of labor injunction and contempt cases, it has long been apparent that the law will never meet with the realities of our present-day economic and social life until some method other than the injunction and contempt is devised to deal with the labor dispute. The empirical approach of Professor Swayzee

⁸ P. 114.

would seem to be the approach which should lead to the formulation of such a new technique, based upon non-interference by the courts with legitimate trade union organization, activity and collective bargaining.

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PUBLIC UTILITY VALUATION FOR PURPOSES OF RATE CONTROL. By John Bauer and Nathaniel Gold. New York: The Macmillan Company, 1934, pp. xxii, 477.

There are two methods open to the law writer who would make any worthwhile contribution to any branch of law: one is by compiling, arranging and analyzing in convenient form the controlling cases relating to that branch of law; the other is by presenting the subject matter from a critical standpoint in order to reform the law in some particulars by pointing out the errors into which it has fallen and making constructive suggestions by way of substitution. The latter kind of book is the more valuable contribution. Such is the book under review. It deals with the subject of valuation, the most vital phase of rate control. Its aim is not only to state what the law is, but what it ought to be. It examines the adjudicated cases, presents the historical development of the principles of law evolved by the Supreme Court, shows how their application to administrative action has rendered rate regulation ineffective, and finally presents a plan of revision designed to remedy existing defects.

Part I sets forth how the "fair value" concept evolved. The division of its historical development into three periods is both novel and helpful. Each period is set off against the background of economic and social forces that impelled the legislative or administrative action that came up for judicial review. The judicial determinations assume added significance when read in the light of the conflicting public and private interests which the courts aimed to satisfy and safeguard. The historical background also helps to explain the inability of the courts, in the absence of direct legislative sanction, to evolve a systematic method of valuation for purposes of rate control.

This latter phase, however, is overemphasized by the authors at the expense of a comprehensive analysis of adjudicated cases. In this respect, the book shares the failing of a great deal of the literature dealing with rate base valuation. So much is usually said about the shortcoming of the conventional method of valuation that not enough is said of the law itself. As an example of what the reviewer has in mind, mention may be made of the basic judicial concept that underlies most, if not all, the decisions involving valuation procedure and determinations, *i. e.*, that the courts will not sanction "any rule or formula which changed conditions might upset" but will require that all determinations of "fair value" be a matter of sound judgment, involving fact data.¹ The authors fail to analyze or trace the development of this often

¹ Los Angeles Gas & Electric Corp. v. Railroad Commission of California, 289 U. S. 287, 53 Sup. Ct. 637 (1933).