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NOTES.

RESTRAINT OF TRADE—SHERMAN ANTI-TRUST ACT—LIABILITY OF A LABOR UNION FOR INJURIES RESULTING FROM ACTS IN RESTRAINT OF TRADE—What will be two epochal decisions in the struggle between capital and labor if finally affirmed by the Supreme Court have been handed down in the *Bache-Denman Coal Company Case*.[1] Upon demurrer the Circuit Court of Appeals, Eighth Circuit, held that though unincorporated the United Mine Workers of America was suable under the Sherman Act for treble damages as an "association existing under or authorized by the laws of the

[1] 235 Fed. 1 (1916).

United States or of the states." [2] At the trial the District Court held that under its constitution the international union was liable for the acts of the local and district unions.[3]

The Bache-Denman Coal Company operated large tracts of coal land in Arkansas. Prior to April, 1914, it had been operating them on a union shop basis. Finding that the restrictions imposed by the union rules were making serious inroads on its possible profits the company in April, 1914, started on an open shop basis. On April 6, 1914, a riot occurred, and the union men beat up several of the company's non-union men, forced the rest to abandon the property, and placed their flag on the top of the tipples. By July, 1914, in spite of continual picketing and intimidation by the union men, the Coal Company had collected a sufficient force to pump the mines free of water and get ready to resume operations. On July 17, 1914, the union men, anticipating the example of the "civilized" nations and the advice of the "Christian" church that the best and only way to get what you think to be justice is by force and arms, commenced a day of frightfulness which would do credit to the most "kultured" nations. They attacked the mines in force, dynamited and burned the shafts and tipples, drove off the employees, killing or wounding several of them, and left the premises a total ruin.

A receiver was shortly appointed, by whom suit for treble damages was brought in the District Court against the international union, district union No. 21, within the district of which the mines are located, the local unions involved, various officers of the unions, and a number of individuals who were known to have participated. The acts were alleged to have been done in pursuance of the avowed policy of the union to keep non-union mined coal from competing with union mined coal as much as possible by unionizing non-union mines and preventing union mines from being non-unionized. Demurrers were filed on the grounds, among others, that the complaint did not state a violation of the Sherman Act, and that the international union and the local unions, being unincorporated, could not be sued in their own names. These demurrers were sustained specifically on the first ground, the other grounds being overruled.

Upon appeal to the Circuit Court of Appeals the sufficiency of the allegations was sustained on the authority of a long line of cases culminating in *Lawlor* v. *Loewe*.[4] This does not concern us in this article.

Taking up the other ground of demurrer, that the United Mine Workers of America and the different local unions were unincorporated and could not be sued in their own names, the court held

[2] See note 1, *supra*.
[3] Not yet reported.
[4] 235 U. S. 522 (1915).

that it also was without merit. It is true, say the court, that at common law an unincorporated association can not be sued in its own name. But this may be changed by statute; and not only by express enactment but by statutory implication. Section 7 of the Sherman Act[5] provides: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or may be found, without respect to the amount in controversy, and recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 8 of the same act[6] provides: "The word 'person' or 'persons,' whenever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country."

The question then is whether "associations existing under or authorized by" means only those organized under a particular act. If so all labor unions generally would be relieved of all liability. It was clearly not the intention of Congress, continue the court, to relieve anyone from liability for injuries caused by violations of this act. These unions comprise about 400,000 members, and are capable of great good or harm. They are existing under or authorized by law. They do not claim that they are unlawful associations. They must therefore be liable for injuries done by them or their agents. Being so liable they must be suable in their own names. Otherwise this liability could not be enforced and the law would be of no avail as to them. The law must therefore be intended to include them and they may be sued in their own names.

This case goes one step further than any previous case in America. *The Danbury Hatters' Case*[7] was a suit against the individual members of the union. In the cases of the *Eastern States Retail Lumber Dealers' Association* v. *U. S.*,[8] and *U. S.* v. *Workingmen's Council*,[9] both of which were bills in equity for an injunction, no objection was raised that the suit was against the association in its own name. In *Franklin Union No. 4* v. *People*,[10] a bill in equity, no objection was made until on appeal which was held to be too late.

[5] Act July 2, 1890, c. 647 (26 Stat. 210).
[6] See note 5, *supra*.
[7] Lawlor v. Loewe, see note 4, *supra*.
[8] 234 U. S. 600 (1914).
[9] 54 Fed. 994 (1893).
[10] 220 Ill. 355 (1906).

In equity under rule 38 of the Federal Courts the members of a large unincorporated association may be proceeded against by bringing into court its officers and such other members as may be conveniently summoned as representatives of the whole number.[11] Injunctions binding upon all the members of a labor union have been issued though only the officers and a few of the members had actually been summoned as parties to the case.[12] But there has never been an analogous rule on the law side. It has always been necessary to bring into court all whom it was desired to bind by a judgment. Unincorporated associations have not been suable by name in the absence of statutory enactment. While there is little doubt but that they could be made suable by name by express enactment, in this case suit against them was not expressly provided for. It was merely implied from the absence of an express exclusion from liability. A similar implication was made in England in regard to registered trade unions. The Act of Parliament made such associations lawful (they had previously been illegal as in restraint of trade) and gave them the power to hold property and act through agents. The House of Lords held that from this grant of capacity to hold property and act through agents could be implied the liability to the extent of that property for the torts of its agents in a suit against the union in its registered name.[13] In that case the liability as well as the right to sue by name to enforce it, had to be implied. In the American case only the right to sue by name had to be implied as the liability was imposed by the statute.

It can not be questioned that labor unions are "existing under or authorized by" law. The Clayton Anti-Trust Act excludes from its prohibitions "labor, agricultural and horticultural organisations," and provides that they shall not be held to be illegal combinations in restraint of trade.[14] The federal and state laws providing for the incorporation of labor unions regard them as existing lawful organizations before their incorporation. In none of the states are they regarded as unlawful. They have never been held in this country to be *per se* combinations and conspiracies in restraint of trade as they were in England previous to the Trade Union Acts of 1871 and 1876. The only ground for excluding them from the scope of the definition in the act is that by it are meant only such associations as joint stock companies and limited partnerships which are not corporations but are given various corporate powers including the right to sue and be sued by name, upon complying with certain preliminary requirements provided by statute. But if such only were meant, "organized under" or some similar phrase would

[11] Evenson v. Spaulding, 150 Fed. 517 (1907).
[12] Southern Rwy. v. Machinists' Union, 111 Fed. 49 (1901).
[13] Taff Vale Co. v. Amalgamated Society, (1901) A. C. 426 (Eng.).
[14] Act October 15, 1914 (38 Stat. 731, c. 323, sec. 6).

seem more suitable than the broad phrase "existing under." Clearly any lawful organization is included within the latter phrase.

The demurrers being overruled the case went back to the District Court for trial. It came up on October 23, 1917, and was completed November 22. At the close of the testimony the defendants moved to dismiss as to the international union on the ground that the strike was a purely local affair, financed and carried on by the district and local unions. This motion was dismissed for reasons which appear later and verdict was returned for the plaintiff for $200,000.00 which was automatically trebled and judgment entered for $600,000.00 and costs. Since the trial the District Court has ruled that the Bache-Denman Company may recover interest from July 17, 1914, making the verdict $240,200.00 and the judgment $720,600.00. The court has also allowed an attorney's fee of $25,000.00.

The grounds for denying the motion to dismiss were in substance the following:

The United Mine Workers of America and its constituent parts are not a federated union similar to the United States, but are centralized more on the order of France. Every man, every local, and every district union are members directly of the international union (international because including unions in Canada and Mexico). Each local and district union gets its constitution or charter from the central executive body. This central executive is the court to interpret the meaning of the provisions of the constitutions. Before final action may be taken on a strike the district union must send to the national president a statement of "the grievance complained of, the action contemplated by the district, together with the reasons therefor, and await the decision of the national president and be governed thereby." The national union has the power to discipline the local and district unions, and take away their charters if they violate its orders. This power is exercised by the national president and an executive board. Thus the absolute control of the action of every local and district union is in the national board.

The policy of the United Mine Workers of America is to unionize as many mines as possible. All the members are aided by a successful strike in any district. For all non-union mined coal comes into competition with union mined coal and makes it harder for the unions to maintain the standards which they have set. The strike in this case was therefore in accord with the policy of the national union.

Generally the national union helps the district engaging in a strike by sending in organizers and paying their expenses. Though actual participation in this strike by the national organization may not have been proved, there was evidence that the national officers knew of the riot of April 6, 1914; that they knew of the continual

picketing and intimidation between April and July; that they made no remonstrance against this unlawful violence; that after the concerted attack on July 17, 1914, the national union made no criticism, disciplined no one—on the other hand strike benefits were paid, pensions granted, and court costs in connection therewith assumed. As the national union knew of the use of force prior to July it was its duty to interfere and prevent further violence, even if disbarring all the miners involved was necessary. But not only did it fail to exercise its disciplinary control and prevent further violence, but actually condoned it, and must therefore be held responsible for the damage done thereby. The organization can not approve of acts done in carrying out its policy and accept whatever benefits are thereby attained, and at the same time escape liability.

In equity, unions and dealers' associations have been held responsible for the illegal acts of their members [15] or branches [16] or even of non-members when the members were obviously in control of the situation and could have prevented action by outsiders,[17] and have been enjoined from doing or allowing such acts. Merely instructing the picketers to avoid unlawful methods, if they actually use such methods and are unpunished, will not be a defense against an injunction.[18] Conversely, individual members have been enjoined because of unlawful acts of their officers or fellow-members which they did not disavow,[19] and in *Lawlor* v. *Loewe*,[20] were held liable in damages for such acts.

The *Bache-Denman Case* is just the logical extension of the liability to the large central organization which finances and makes possible such strikes, and for the ultimate benefit of which they are carried on.

It has been held by the Supreme Court that section 6 of the Clayton Act above referred to,[21] does not "render lawful or legitimate anything that before the act was unlawful, whether in the objects of such an organization or its members, or in the means adopted for accomplishing them." It merely prevents them while pursuing their *legitimate* objects by *lawful* means "from being considered, merely because organized, to be illegal combinations or conspiracies in restraint of trade." [22] The Clayton Act will there-

[15] Goldfield Co. v. Goldfield Union, 159 Fed. 500 (1908). Alaska S. S. Co. v. Longshoremen's Ass'n, 336 Fed. 964 (1916).

[16] Evenson v. Spaulding, see note 11, *supra*.

[17] Allis Chalmers Co. v. Reliable Lodge, 111 Fed. 264 (1901).

[18] Union Pac. v. Ruef, 120 Fed. 102 (1902).

[19] Ill. Cent. v. Machinists, 190 Fed. 910 (1911).

[20] See note 4, *supra*.

[21] See note 14, *supra*.

[22] Paine Lumber Co. v. Neal, 244 U. S. 459, 483 (1917).

fore not affect this liability to answer in damages for injuries done by acts in violation of the anti-trust acts.

Entirely aside from the legal aspects of this case it is tremendously significant socially. Heretofore the large labor unions have been able to receive the benefits from strikes made successful by unlawful methods, but have escaped all liability for the damage done. Until *Lawlor* v. *Loewe*,[23] the injured persons have been left to pursue the actual participants if they could discover them. They were mostly impecunious gentlemen from whom no satisfaction could be obtained. *Lawlor* v. *Loewe*, revealed the possibility of recovering from propertied members of the union. But this was very unsatisfactory for obvious reasons. Now under this *Bache-Denman Case* the funds of the union itself are liable when the unlawful acts constitute a violation of the Anti-Trust Laws. Almost any strike of any size during which unlawful acts are committed would violate the Anti-Trust Laws. Of course a howl of protest has gone up from the labor unions. Dues of the miners in Pennsylvania have risen from fifty cents to seventy-five cents a month. But they have no real ground for complaint. They have lost no rights which they had before; unless the ability to unlawfully destroy property without liability may be called a right. Such acts were unlawful before. They could be enjoined from doing them and often were. This decision merely places the liability where rests the power to do or prevent great harm, if not the actual responsibility. Let us hope that with the added liability will come an added sense of responsibility, and a change of methods. For it is time that our labor leaders were realizing that violence does their cause more harm than good, and that the energy used in strikes might attain much greater permanent results if directed into other channels.

It is also very probable that the anti-injunction legislation which the labor leaders desire will be more easily obtained if damages may be recovered from the unions. One of the chief reasons for the injunctions has been that after the damage is done the injured party has had no adequate redress. If he may recover damages from the union there will not be the same necessity for injunctions, which are after all no great satisfaction to those injured by infractions of them. Though the infringers may be sent to jail the party injured is seldom able to recover any damages from them as they are usually without property.

E. N. V.

[23] See note 4, *supra*.