RECENT CASES

Annulment—Nature of the Fraud Necessary to be Proved for Annulment of Marriage—To plaintiff's bill for support of herself and child, defendant filed cross-claim for annulment of marriage. Defendant had had an illicit relation with plaintiff, who subsequently informed him that she was pregnant with his child, and would prosecute if he failed to marry her. Four months after their marriage a child was born. Defendant introduced Blood-Grouping Tests[1] to prove non-paternity of the child, and lower court annulled marriage. Plaintiff appealed on the ground that this evidence is inadmissible. *Held,* Affirmed. Such evidence is admissible, and together with the other evidence constitutes sufficient fraud to grant annulment. *Anderson v. Anderson,* N. Y. L. J. p. 1, col. 3, Sept. 16, 1942 (C. C. of Cook Co., Ill.).

The difficulties confronting the court were not resolved with the holding, in line with modern authority,[2] that this evidence was sufficient to overcome the strong presumption that the child is legitimate;[3] for, even after admitting the evidence, there is the broader question as to whether a fraudulent misrepresentation as to the paternity of an unborn child is sufficient fraud on which to base an annulment, since it is difficult to show clear-cut duress.[4] The traditional rule has been that the fraud must "go

1. It is understood that the Landsteiner Test cannot establish proof of paternity, but can conclusively determine non-paternity where the blood types of husband, wife, and child are all available, as in instant case. Note the developing attitude that the tests are scientifically certain in *Report of the American Medical Association's Committee on Medicolegal Blood Grouping Tests* (1937) 108 JOUR. OF AM. MED. ASSN. 2138-2142; WIGMORE, EVIDENCE (Supp. 1934) §§ 165a, 165b; HEKTOEN, *Biologic Tests for Medicolegal Purposes* (1928) 199 NEW ENG. JOUR. OF MED. 120-126.

2. Beach v. Beach, 114 F. (2d) 479 (C. C. A. D. C. 1940); Arais v. Kelensnikoff, 10 Cal. (2d) 428, 74 P. (2d) 1043 (1937); Commonwealth, *ex rel.* v. Visocki, 23 D. & C. 103 (Pa. 1935).

3. Westfall v. Westfall, 100 Ore. 224, 197 P. 271 (1921); Pinkard v. Pinkard, 252 S. W. 265 (Tex. Civ. App. 1923).

The courts have used most positive language to characterize the kind of evidence which will be sufficient to overcome the presumption. Franks v. State, 26 Ala. App. 430, 161 So. 549 (1935) ("highest proof"); Rankin v. Dunn, 243 Ky. 784, 49 S. W. (2d) 1018 (1932) ("convincing"); *In re* McAnany's Estate, 91 Pa. Super. 317 (1927) ("clear, direct, satisfactory, and irrefragable").

Cf. Bove v. Pinciotti, C. P. No. 6 of Phila. Co. (Pa. 1942), apparently the most recent case in Pennsylvania on evidence overcoming the presumption of legitimacy. In this case, the only evidence of illegitimacy introduced was oral testimony offered by husband and wife that the child was illegitimate. The bill for annulment was dismissed, but Bok, J., in his opinion filed July 28, 1942, made it clear that he hoped the case would be appealed to get the point settled. Note that the evidence on which such appeal would be based would not be expert testimony, and not even free from a suspicion of bias; whereas in the instant case the evidence was not only expert, but almost conclusive; and completely independent of any possibility of partiality for either plaintiff or defendant. For a résumé of Bove v. Pinciotti, see 107 LEG. INT. 239, col. 1 (Aug. 18, 1942).

See, on the general relation of the Blood Grouping Tests to the law, and collected cases involving the tests, (1934) 1 CHI. L. REV. 798; (1937) 21 MINN. L. REV. 671, 680; and (1937) 17 ORE. L. REV. 177, 190.

4. The agreed facts showed that defendant, after being threatened by plaintiff, went home and talked the situation over with his mother, who advised him to get married. The court, however, tried to make out duress, citing only Short v. Short, 265 Ill. App. 133 (1932) in support. That case is distinguishable, in that the petitioner had been kept in court under custody, without liberty to leave, until he decided to go forward with the marriage. This was unquestionably duress of imprisonment, and quite distinguishable from the facts in instant case. Yet, as noted, the court held duress as well as fraud. *Contra:* Jacobs v. Jacobs, 146 Ark. 45, 225 S. W. 22 (1920); *cf.* Kibler v. Kibler, 180 Ark. 1152, 24 S. W. (2d) 867 (1930).

to the essence of the marital relationship".[5] Where the health of the parties would be endangered,[6] or where for any reason consummation of the marriage would be unlawful,[7] clearly the fraud "goes to the essence". But the instant case, where the consummation would be perfectly legal and harmless to the parties' health, presents a situation on which the authorities are divided.[8] Each view purports to be based on public policy: the one favoring annulment focusses attention on the unenviable predicament of the husband;[9] the other on that of the child, who is not only deprived of his presumed legitimacy and his support, but even of a name.[10] Proponents of the latter view also argue that such representation of paternity is enough to put a reasonable man on inquiry.[11] On closer analysis, however, this would be simply penalizing the man for the woman's fraud;[12] moreover, the child, whatever the presumptions as to its legitimacy, has been in fact proved illegitimate. It seems therefore that the cases granting the annulment are more logical, although hard on the guiltless child. Some states have remedied this dilemma by statute;[13] but even in the absence of a statute the instant decision appears to be proper, since the evidence of fraud is of such considerable weight and since all the variable[14] equities favor a decree.

5. Mayer v. Mayer, 207 Cal. 685, 279 P. 783 (1929); Johnson v. Johnson, 257 Ill. App. 587 (1931).

6. Aufort v. Aufort, 9 Cal. App. (2d) 310, 49 P. (2d) 620 (1935); Doe v. Doe, 165 Atl. 156 (Del. Super. 1933).

7. Wemple v. Wemple, 170 Minn. 305, 212 N. W. 808 (1937).

8. *Accord,* Lyman v. Lyman, 90 Conn. 399, 97 Atl. 312 (1918); Shonfeld v. Shonfeld, 260 N. Y. 477, 184 N. E. 60 (1933); Barden v. Barden, 3 Dev. 548 (N. C. 1832); Winner v. Winner, 171 Wis. 413, 177 N. W. 680 (1920); *cf.* Steele v. Steele, 96 Ky. 382, 29 S. W. 17 (1895). *Contra:* Arno v. Arno, 265 Mass. 282, 163 N. E. 861 (1929); Fairchild v. Fairchild, 43 N. J. Eq. 473, 11 Atl. 426 (1887); Bryant v. Bryant, 171 N. C. 746, 88 S. E. 147 (1916); *cf.* Todd v. Todd, 149 Pa. 60, 24 Atl. 128 (1896).

Note that there are decisions both ways in some jurisdictions.

9. The Michigan court in the leading case of Gard v. Gard, 204 Mich. 255, 267-8 (1918), speaking through Fellows, J., stated:

"It has been said that there are three parties to the contract of marriage, the two contracting parties and the public. Can it be that a wise public policy requires in the name of home the maintenance by the husband of an establishment presided over by one who has deceived him as to the paternity of the little one who daily sits at his board, who bears his name, who will in the absence of testamentary disposition inherit his property, the offspring of another, a stranger to his blood? Most assuredly not."

10. Hardesty v. Mitchell, 302 Ill. 369, 134 N. E. 745 (1922); Murrell v. Industrial Commission, 291 Ill. 334, 126 N. E. 189 (1920). This situation led to the statement in Caruso v. Caruso, 104 N. J. Eq. 588, 146 Atl. 649 (1929) that the court, except for gross fraud, should not annul a marriage and place on a child begotten before wedlock the stigma of bastardy—but it neglected to state what constituted gross fraud.

11. Said the court, in the leading case of Foss v. Foss, 94 Mass. 26, 29 (1866): "He (the husband) took no steps to ascertain the truth of her statements concerning the paternity of the child, but, relying solely on her assurances on that subject, he entered into the contract of marriage. It seems to us that on these facts he was guilty of a blind credulity, from the consequences of which the law will not relieve him. His knowledge of the respondent's unchastity and her actual pregnancy was sufficient to put a reasonable man on his inquiry."

12. In Lyman v. Lyman, 90 Conn. 399, 409, 97 Atl. 312, 315 (1918) the court said: "We can conceive of few graver frauds than this, . . . and we can see no good reason why . . . the one thus defrauded should be compelled to endure in silence the situation which has thus been brought upon him, . . . and all by reason of his efforts to play the manly part and repair his supposed wrong to the best of his ability. That seems to us to be imposing a grievous punishment for a purely laudable action."

13. In Colorado, Kansas, New York, Pennsylvania, Tennessee, and Wisconsin statutes save the child's legitimacy after annulment; in others, laws have been passed making such fraudulent misrepresentations grounds for divorce. The N. J. DIVORCE ACT § 1 (6), 2 COMP. ST. 2022 (1910); IOWA CODE § 10476 (1931) are representative of this.

14. The equity weighing in the child's favor is constant in all cases.

Criminal Law—Single Agreement with Several Illegal Objects Constitutes a Single Violation of Conspiracy Statute—Defendant was convicted under Section 37 [1] of the Criminal Code, upon several counts of an indictment, each charging conspiracy to violate a different provision of the Internal Revenue laws. The Circuit Court imposed a separate sentence for each count. There was evidence of only a single agreement. *Held,* judgment reversed. Evidence of a single agreement can sustain conviction for only a single violation of the conspiracy statute. *Braverman v. United States,* 11 U. S. L. Week 4027 (U. S. 1942).

At common law the gist of the crime of conspiracy was the agreement by the conspirators to commit illegal acts.[2] The crime was complete with the agreement; that the contemplated acts were never committed was immaterial, for on their commission the conspiracy was merged in the primary offense.[3] Under the federal conspiracy statute the lower courts were divided on the interpretation of a conspiracy: one line of authority holding that the conspiracy could be subdivided into as many offenses as it had illegal objects; [4] the other, that the crime, regardless of its numerous objects, was single.[5] The court in the instant case adopted the latter interpretation, asserting that the gist of the conspiracy was the agreement; [6] that a single agreement with diverse illegal objects was a single offense under the statute. It distinguished two situations: where a single act is amenable to punishment under two statutes; [7] and where each of a series of acts in a single transaction is punishable under a statute.[8] That the same evidence sufficient to sustain a conviction for one conspiracy is necessary to conviction for another will preclude prosecution for the second conspiracy, for such prosecution would fall within the constitutional prohibition against double jeopardy.[9] However, if more or different evidence is required to sustain conviction for the second conspiracy, an acquittal in a previous trial cannot be pleaded in defense to the second prosecution.[10] Thus, in the absence of a bill of exceptions bringing up the record of the trial evidence, a multi-count indictment for several conspiracies under the statute has been sustained.[11] In the instant case, as conceded by Government counsel, there was evidence at the trial of but a single agreement,

1. 18 U. S. C. A. § 88 (Supp. 1940), "If two or more persons conspire whether to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000. or imprisoned not more than two years, or both."

2. 2 BISHOP, CRIMINAL LAW (9th ed. 1923) § 179; HARRISON, LAW OF CONSPIRACY (1924) 63.

3. HARRISON, LAW OF CONSPIRACY (1924) 73.

4. Montrose Lumber Co. v. U. S., 124 F. (2d) 573 (C. C. A. 10th, 1941); *cf.* Olmstead v. U. S., 19 F. (2d) 842 (C. C. A. 9th, 1927); Beddow v. U. S., 70 F. (2d) 674 (C. C. A. 8th, 1934); Meyers v. U. S., 94 F. (2d) 433 (C. C. A. 6th, 1938).

5. U. S. v. Mazzochi, 75 F. (2d) 497 (C. C. A. 2d, 1935); Powe v. U. S., 11 F. (2d) 598 (C. C. A. 5th, 1939); U. S. v. Anderson, 101 F. (2d) 325 (C. C. A. 7th, 1939).

6. Instant case at 4028.

7. Blockburger v. U. S., 284 U. S. 299 (C. C. A. 7th, 1931).

8. Ebeling v. Morgan, 237 U. S. 625 (1915). In this case the defendant had cut open a number of mailbags while engaged in a single robbery. The statute under which he was indicted, prohibited the cutting of any mailbag, making it a specific offense for each mailbag cut, and the statute was so interpreted by the court. The defendant was thus convicted separately for each mail bag he cut. Albrecht v. U. S., 273 U. S. 1 (1938).

9. Short v. U. S., 91 F. (2d) 614 (C. C. A. 4th, 1937).

10. Morey v. Commonwealth, 108 Mass. 433 (1871), is the basis of the law on this point. The federal courts follow the rule laid down therein. *Cf.* Piquett v. U. S., 81 F. (2d) 75 (C. C. A. 7th, 1936); Slade v. U. S., 85 F. (2d) 786 (C. C. A. 10th, 1936).

11. Fleisher v. U. S., 91 F. (2d) 404 (C. C. A. 6th, 1937).

the objects of which were to violate several provisions of the Internal Revenue Code; the court properly held that this constituted only one crime under the conspiracy statute. The punishment provided by the act is for the conspiracy, not for the illegal objects it may have.[12] To multiply the crime by its number of illegal objects would be to increase the statutory punishment without legislative authority.[13]

Labor Law—Prosecution for Disorderly Conduct of Picket in a Secondary Boycott—Member of striking Newspaper Guild of New York peacefully picketed[1] a bakery[2] which advertised in the newspaper whose employees were on strike. The picket was convicted (one justice dissenting) of disorderly conduct.[3] *People v. Fleishman,* 36 N. Y. S. (2d) 559 (Mun. Ct. 1940).

Originally the courts' major control of labor problems was by the application of criminal laws,[3a] but the modern trend has been toward the adjudication of rights in labor disputes in the civil courts.[3b] The majority of the court approached the case as if it involved only the question of the illegality of the secondary boycott[4] in which the defendant was engaged, basing its decision upon precedent.[5] The dissent advanced three distinct views: that the case was controlled by a later New York decision;[6] that peaceful picketing is protected by the constitutional guarantee of freedom

12. Short v. U. S., 91 F. (2d) 614, 622 (C. C. A. 4th, 1937).
13. *Ibid.*

1. The defendant carried a sign which read: "Unfair. This place advertises in the 'Day' which is on strike. Newspaper Guild, N. Y. CIO." The picketing was conducted in a peaceful manner and free from actual disorder.

2. The bakery, outside of advertising regularly in the newspaper, had no connection with the "Day" or with the newspaper business.

3. PENAL LAW, § 722, subd. 2: "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: . . . Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others." The defendant was convicted of an offense under this statute. It might be noted that disorderly conduct was not a crime at common law and exists only as a statutory offense, People v. Barbera, 127 Misc. 863, 214 N. Y. Supp. 778 (1926).

3a. Early strike cases were considered under the crime of criminal conspiracy. Lord Mansfield in Rex v. Eccles, 1 Leach CL 273, 168 Eng. Rep. 240, stated: ". . . a combination not to work under certain prices is an indictable offense." TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940), § 40: "It is in connection with picketing that the sanction of breach of the peace or disorderly conduct has been most generally applied."

3b. The famous case, *In re* Debs, 158 U. S. 564 (1894) recognized the weapon of the injunction and in effect made criminal sanctions of secondary importance by making courts of equity the arbiters of labor disputes.

4. The term "secondary boycott" as employed here refers to pressure put on third parties to bring the adversary party to terms. *Cf.* TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940), § 122.

5. People v. Bellows, 281 N. Y. 67, 22 N. E. (2d) 238 (1939). In this case a store was picketed because it had purchased a neon sign from a manufacturer with whom the union was involved in a dispute. The opinion in the instant case, at 563, stated: "As in the Bellows case . . . we conclude . . . that although the picketing was done in a peaceful manner and free from actual disorder the act of picketing was such that a breach of the peace might be occasioned. We cannot escape the conclusion that the picketing in the instant case as in the Bellows case 'constituted a secondary boycott and was illegal'."

6. People v. Muller, 283 N. Y. 281, 36 N. E. (2d) 206, 136 A. L. R. 1450 (1941), (1941) COL. L. REV. 1444. Here defendants picketed a retail store which had installed a burglar alarm under a leasing and servicing agreement with the company against which the pickets were striking. The court refused to hold the pickets guilty of disorderly conduct and found the activity to be in a "labor dispute."

of speech;[7] that a criminal court is not the proper tribunal for the adjudication of rights in a labor dispute.[8] The New York anti-injunction statute[9] would have the effect of preventing the issuance of an injunction here to prohibit the picketing because there was a "labor dispute" involved.[10] But the effect of the decision was to permit the complainant, the proprietor of the newspaper,[11] to do indirectly through the criminal courts that which he could not do directly through the civil courts. Picketing was, by this decision, as effectively halted as if an injunction had been issued; and the complainant did not have to comply with any of the procedural requirements of the Anti-Injunction Act.[12] The trend in American decisions and legislation has been toward a recognition of labor's right to pursue legitimate labor practices,[13] and the right to peaceful picketing has been accorded the constitutional protection of free speech.[14] The *Thornhill* and *Carlson* cases involved the enforcement of penal statutes against picketing in labor disputes, and while nowhere mentioned in either opinion, it might be fairly inferred that the motivating force behind the decisions was a desire to prevent the application of penal laws in determining rights in labor disputes. The instant decision represents a repudiation of the prin-

7. Free speech is now the doctrinal protection of peaceful picketing. A dictum in Senn v. Tile Layers Union, 301 U. S. 468 (1937) was the basis for this doctrine. More recent decisions are American Federation of Labor v. Swing, 312 U. S. 321 (1941), (1941) 89 U. OF PA. L. REV. 825; Thornhill v. Alabama, 310 U. S. 88 (1940), (1940) 1 BILL OF RIGHTS REV. 59; Carlson v. California, 310 U. S. 106 (1940). For a criticism of the identification of the right to picket with freedom of speech, see TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940), § 136 and Supp. § 136; Teller, *Picketing and Free Speech* (1942) 56 HARV. L. REV. 180.

8. Dissent in instant case, p. 569: "In view of the present development of our labor law, it is indeed strange that a court existing to administer the criminal law should be called upon to decide the legality of peaceful picketing conducted by a labor organization, when the right to obtain relief against such picketing in the civil courts is in doubt. . . . If we should hold that peaceful picketing may constitute disorderly conduct, a strange and illogical situation results. A magistrate, sitting in a criminal court without a jury, could sentence the picket for peaceful picketing to imprisonment. Yet, if the same picket were charged in the civil courts with contempt for peacefully picketing in violation of an injunction previously granted, the picket would be entitled to a trial by jury."

9. The New York anti-injunction statute is substantially similar to the Federal statute, the Norris-La Guardia Act. In both a "labor dispute" is defined in the following terms: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee." 47 STAT. 73 (1932), 29 U. S. C. A. § 113; CIVIL PRACTICE ACT § 876-a, subd. 10c.

10. Davega City Radio, Inc. v. Randau, 166 Misc. 246, 1 N. Y. S. (2d) 514 (Sup. Ct. 1937). Defendants picketed advertiser in newspaper whose employees were on strike. It was held to be a "labor dispute" under N. Y. Civil Practice Act, and an injunction was denied. Alliance Auto Service, Inc. v. Cohen, 341 Pa. 283, 19 A. (2d) 152 (1941). *But cf.* B. Gertz, Inc. v. Randau, 162 Misc. 786, 295 N. Y. Supp. 871 (Sup. Ct. 1937); Mlle. Reif, Inc. v. Randau, 162 Misc. 247, 1 N. Y. S. (2d) 515 (Sup. Ct. 1937). See Galenson and Spector, *The New York Labor Injunction Statute and the Courts* (1942) 42 COL. L. REV. 51, 68-71.

11. It should be noted that in all cases cited the complainant was the proprietor of the picketed premises but in the instant case, the complaint was initiated by the operator of the business on strike.

12. Both the New York and the Federal anti-injunction statutes provide substantially similar procedural requirements preliminary to the granting of an injunction in any labor dispute. CIVIL PRACTICE ACT, § 876-a, subd. 9. In addition, certain findings of fact must be made by the court before an injunction may be granted. *Id.* at subd. 1; 47 STAT. 71 (1932), 29 U. S. C. A. § 107.

13. TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940), §§ 76 and 77.

14. See note 7 *supra*.

ciple implicit in those cases. To subject to criminal prosecution a picketer whose activity under the Anti-Injunction Act would not be enjoinable [15] vitiates the policy of that Act by leaving to the courts power effectually to prevent labor agitation without the findings of fact prerequisite to the issuance of an injunction.[16]

Labor Law—Effect of Certification by Labor Board of Bargaining Agent on Existence of "Labor Dispute" under Anti-Injunction Act—Petition for injunction by employer against picketing by defendant union (CIO) where closed shop agreement had been executed between employer and union (AFL) certified as collective bargaining agent for company employees, after election conducted by State Labor Relations Board. Lower court granted injunction *pendente lite;* reversed in Appellate Division on grounds of insufficient complaint.[1] *Held,* (three judges dissenting) [2] reversed. "Labor dispute" within meaning of Anti-Injunction Act was terminated by certification of bargaining agent by Labor Board; trial court is not precluded by that statute from issuing injunction. *Florsheim Shoe Store Co. v. Shoe Salesmen's Union,* 288 N. Y. 188, 42 N. E. (2d) 480 (1942).

Generally, the existence of a contract between an employer and a union representing its employees is insufficient ground, in the absence of certain findings of fact required by Anti-Injunction Acts,[3] for the issuance of an injunction against picketing by another union;[4] that the employer is an impartial bystander in a union jurisdictional dispute is immaterial.[5] In these situations the courts have broadly defined the term "labor dispute", thus narrowing their jurisdiction to grant injunctions against union activity.[6] But where a contract has been executed between the employer

15. See note 10 *supra.*
16. N. Y. CIVIL PRACTICE ACT, § 876-a, subd. 1.

1. 24 N. Y. S. (2d) 923 (Sup. Ct. 1940), *rev'd,* 262 App. Div. 769, 27 N. Y. S. (2d) 883 (2d Dep't 1941).
2. Lehman, Ch. J., Desmond and Loughran, JJ.
3. N. Y. CIVIL PRACTICE ACT (Cahill, Supp. 1936) § 876-a. This is virtually identical in all respects with the provisions of the Norris-La Guardia Act, 47 STAT. 71 (1932), 29 U. S. C. A. § 107; consequently, the federal decisions in note 4 *supra* are in point.
4. Fur Workers Union Local No. 72 *et al.* v. Fur Workers Union no 21238 *et al.,* 105 F. (2d) 1 (C. A. D. C. 1939), *aff'd,* 308 U. S. 522 (1939); Wilson & Co. v. Birl *et al.,* 105 F. (2d) 948 (C. C. A. 3d, 1939); Donnelly Garment Co. v. International Ladies' Garment Workers Union, 99 F. (2d) 309 (C. C. A. 8th, 1938); Blankenship v. Kurfman, 96 F. (2d) 450 (C. C. A. 7th, 1938); Lund v. Woodenware Workers Union, 19 F. Supp. 607 (D. Minn. 1937); *cf.* Stillwell Theatre, Inc. v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932). *Contra:* Stalban v. Friedman, 171 Misc. 106, 11 N. Y. S. (2d) 343 (Sup. Ct. 1939), *rev'd,* 259 App. Div. 520, 19 N. Y. S. (2d) 978 (1st Dep't 1940).
5. Lauf *et al.* v. E. G. Shinner & Co., 303 U. S. 323 (1938). *But cf.* Union Premier Food Stores v. Retail Food C. & M. Union, 98 F. (2d) 821 (C. C. A. 3d, 1938).
6. Lauf *et al.* v. E. G. Shinner & Co., 303 U. S. 323 (1938); New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552 (1938); May's Furs & Ready to Wear, Inc. v. Bauer, 282 N. Y. 331, 26 N. E. (2d) 279 (1940); Goldfinger v. Feintuch, 276 N. Y. 28, 11 N. E. (2d) 910 (1937); *cf.* Exchange Bakery and Restaurant, Inc. v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927). *But cf.* Thompson v. Boekhout, 273 N. Y. 390, 7 N. E. (2d) 674 (1937).
By statute in Wisconsin the definition of "labor dispute" has been narrowed to mean "any controversy between an employer and the *majority of his employees in a collective bargaining unit* concerning the right or process or details of collecive bargaining or the designation of representatives." (Italics added.) 1939 WIS. LAWS, c. 25; WIS. LAWS ANN. (Mason, 1942) § 103.62 (3).

and a certified bargaining agent, it may be protected by equity proceedings.[7] The court in the instant case was faced with a delicate balance of interests: on the one hand, the interest of the public, the employer and the recognized union in stability of labor relations;[8] on the other, the interest of labor in picketing as it has been identified with the constitutional right of freedom of speech.[9] Since the Labor Board had certified one union as collective bargaining agent of the employees, the majority reasoned that no labor dispute existed;[10] hence, the injunction did not fall within the prohibition of the Civil Practice Act.[11] But the dissenting

7. Oberman & Co. v. United Garment Workers of America, 21 F. Supp. 20 (W. D. Mo. 1937); Euclid Candy Co. v. Summa, 174 Misc. 19, 19 N. Y. S. (2d) 382 (Sup. Ct. 1940), *aff'd*, 259 App. Div. 1081, 21 N. Y. S. (2d) 614 (2d Dep't 1940); Stalban v. Friedman, 171 Misc. 106, 11 N. Y. S. (2d) 343 (Sup. Ct. 1939), *rev'd*, 259 App. Div. 520, 19 N. Y. S. (2d) 938 (1st Dep't 1940); *cf.* Matter of Triboro Coach Corp. v. State Labor Relations Board, 286 N. Y. 314, 36 N. E. (2d) 315 (1941). *But cf.* Fur Workers Union Local No. 72 *et al. v.* Fur Workers Union No. 21238 *et al.*, 105 F. (2d) 1 (C. A. D. C. 1939), *aff'd*, 308 U. S. 522 (1939).

It has been observed that the authority of the *Oberman* case was impaired by the *Lauf* and *New Negro Alliance* cases, in which the Supreme Court imposed stringent restrictions on the federal courts' jurisdiction to issue injunctions in labor disputes. See *Fur Workers* case, *supra* at 13.

8. "Such a result is the only conclusion possible in consonance and harmony with the public policy of the State as declared in the Labor Relations Act which was to prevent or bring to an end strikes and other forms of industrial strife and unrest and to encourage and effect industrial peace among employers and employees. . . . The Legislature did not intend or propose that the procedure for that purpose should be meaningless or that it might be flaunted and made meaningless by a group of employees who, themselves, had invoked the procedure to settle their dispute." Instant case, at 197-8, 484.

Similarly, a majority of the court consisting of the same judges, over a dissent by the dissenting judges in the instant case, set aside a Labor Board cease and desist order against an employer's unfair labor practices where the employer, having contracted with one union, refused to negotiate with a bargaining agent subsequently certified by the Labor Board. It was asserted that stability of labor relations and the sanctity of contracts properly arrived at impelled the protection of the existing contract. Matter of Triboro Coach Corp. v. Labor Relations Board, 286 N. Y. 314, 36 N. E. (2d) 315 (1941).

9. Thornhill v. Alabama, 310 U. S. 88 (1940); Carlson v. California, 310 U. S. 106 (1940); A. F. of L. v. Swing, 312 U. S. 321 (1941), *rehearing denied*, 312 U. S. 715 (1941); *see* Senn v. Tilelayers Protective Union, 301 U. S. 468, 478 (1937). See Teller, *Picketing and Free Speech* (1942) 56 HARV. L. REV. 180; Note (1941) 90 U. OF PA. L. REV. 201.

10. The majority purported to find in the complaint allegations of intimidation and false representations in connection with the picketing which in themselves would have been sufficient ground for sustaining the complaint. Instant case, at 201, 485; Busch Jewelry Co. v. United Retail Employees Union, 281 N. Y. 150, 22 N. E. (2d) 320 (1939). None of these allegations was noticed by the dissent; rather the union's activities were characterized as "peaceful persuasion". Instant case, at 205, 487.

11. "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee." N. Y. CIVIL PRACTICE ACT (Cahill, Supp. 1936) § 876-c.

On the language of the statute it is difficult to conclude but that a labor dispute existed in the instant case; however, the majority decided in effect that the Board's certification procedures constricted this definition. This conclusion was reached despite the fact that the State Labor Relations Act specifically provides that "nothing in this Act shall be construed to interfere with, impede or diminish in any way the right of employees to strike or engage in other lawful, concerted activities." N. Y. LABOR LAW (McKinney, 1940) § 713. Thus, it appears that the majority would have been on somewhat surer ground had it rested its decision upon the allegations of unlawful activities which it purported to find in the complaint. See note 10 *supra*.

opinion, following *Stillwell Theatre Inc. v. Kaplan*,[12] asserted that the unrecognized union's right to picket peacefully is guaranteed by the Constitution;[13] that this right could not be extinguished by the Board's certification of a bargaining agent.[14] That picketing has been identified with freedom of speech does not preclude its confinement within an "allowable area of economic conflict;"[15] for freedom of speech cannot be enjoyed completely uninhibited by legal restraints.[16] But where by the terms of a statute injunctive relief in the face of a labor dispute is expressly limited, the court should be bound by those limitations. As pointed out in the dissenting opinion, certification by the Board of a bargaining agent gives no added sanctity to a contract between it and the employer;[17] the Board's statutory authorization is restricted to the designation of the proper employees' representatives and the protection of the bargaining process.[18] The existence of this administrative machinery permits no expansion of the courts' equity jurisdiction in labor disputes, for the Anti-Injunction Act and the Labor Relations Act were intended to be complementary, neither encroaching on the other's operation.[19] Further, the Supreme Court has asserted that labor's right to express itself publicly by peaceful picketing does not depend on the determination by a state court that a labor dispute exists.[20] Consequently, in the absence of a statute[21] removing this situation from the prohibitive area of the Anti-Injunction Act, it would seem that the court should withhold its injunctive powers.[22]

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12. 295 N. Y. 405, 182 N. E. 63 (1932). The court there asserted, "(To grant the injunction) . . . would thereby give to one labor union an advantage over another prohibiting the use of peaceful and honest persuasion in matters of economic and social rivalry. . . . It is not within the province of the courts to restrain conduct which is within the allowable area of economic conflict." *Id.* at 412, 66.

13. See note 8 *supra*.

14. "Perhaps they (defendants) should have accepted in good faith the results of the election . . . but it is a right and not manners or sportsmanship that we are concerned with." Instant case, at 205, 488.

15. Stillwell Theatre, Inc. v. Kaplan, 259 N. Y. 405, 412, 182 N. E. 63, 66 (1932); Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U. S. 740 (1942); Carpenters and Joiners Union of America v. Ritter's Cafe, 315 U. S. 722 (1940).

16. Schenck v. U. S., 249 U. S. 47 (1918); Gompers v. Bucks Stove and Range Co., 221 U. S. 418 (1911). See also Chambers v. Florida, 309 U. S. 227 (1940).

17. Instant case, at 204, 487.

18. *Cf.* Virginian Railway v. Federation, 300 U. S. 515 (1937); Lund v. Woodenware Workers Union, 19 F. Supp. 601 (D. Minn. 1937).

19. Fur Workers Union Local No. 72 *et al.* v. Fur Workers Union No. 21238 *et al.*, 105 F. (2d) 1 (C. A. D. C. 1939), *aff'd*, 308 U. S. 502 (1939). But this case expressly reserved decision on the effect of certification of a bargaining agent by the NLRB. *Id.* at p. 12, n. 9. *But cf.* Oberman & Co. v. U. G. W. A., 21 F. Supp. 20 (W. D. Mo. 1937).

20. ". . . one need not be involved in a 'labor dispute' as defined by state law to have a right under the 14th Amendment to express a grievance in a labor matter by publication unattended by violence, coercion or conduct otherwise unlawful or oppressive." Bakery Drivers Local v. Wohl, 315 U. S. 769, 779 (1942).

21. Pennsylvania has passed such a statute, making anti-injunction provisions expressly inapplicable where there is a labor dispute "in disregard, breach or violation of" a valid subsisting labor agreement arrived at between an employer and employees' representatives designated in accordance with the Labor Relations Act's provisions. PA. STAT. ANN. (Purdon, 1941) tit. 43, § 206-d (a). Pando v. Bartenders' International Alliance, Uniontown Local No. 78 *et al.*, 37 D. & C. 169 (1940); *cf.* Tankin *et al.* v. Hotel & Restaurant Workers Industrial Union, Local No. 356 *et al.*, 36 D. & C. 537 (1939).

22. See Galenson and Spector, *The New York Labor-Injunction Statute and the Courts* (1942) 42 COL. L. REV. 51; Jaffee, *Inter-Union Disputes in Search of a Forum* (1940) 49 YALE L. J. 424.

Public Utilities—Carrier's Status Determined by the Nature of its Services—A contract carrier, previously operating under contracts with four department stores in Philadelphia was granted an amendment to its permit by the Public Utility Commission allowing it to extend its services to twenty-six retail specialty shops. Plaintiff, a common carrier, protests the approval of the application, asserting that applicant had assumed the status of a common carrier. *Held,* (one judge dissenting) appeal dismissed. Carrier is a contract carrier. *Merchants Parcel Delivery Inc. v. Pennsylvania Public Utility Commission,* 28 A. (2d) 340 (1942).

The test generally recognized is that a common carrier is obliged, within the limits of its ability, to serve all the public who apply, while a contract carrier is under no such obligation.[1] Both the majority and dissent, in the instant case, agree upon the basic concept that the nature of the service offered[2] rather than the number of contracts held, is the decisive criterion.[3] The majority bases its decision upon the ground that the services performed by the carrier are specialized services, offered to a limited group, and concludes that because these services are so specialized they are not public in nature. The dissenting opinion, however, asserts that the scope of the carrier's business may assume such proportions that it is actually serving the business of the general public.[4] It is difficult to draw precisely the line beyond which the scope of the business changes the status of the carrier from contract to common.[5] It is evident however, that the decision in the instant case has extended this point farther than ever before in Pennsylvania.[6] In previous cases carriers operating under

1. A common carrier is defined as any person or corporation "holding out, offering or undertaking directly or indirectly, service for compensation to the public for transportation of passengers or property. . . ."

A contract carrier is defined, in effect, as a carrier which does not hold itself out to serve the public at large and which operates intra-state for compensation. PA. STAT. ANN. (Purdon, 1941) tit. 66, § 1102.

2. "Again it is clearly not the manner in which the carrier is actually hauling goods which determines his status, but the manner in which he offers to haul goods. It seems clear that a carrier might well be willing to serve anyone, but if only one person happens along to engage him and the carrier serves this one person under a contract, can anyone say that the carrier is any less a common carrier because he happened to get only one customer." Canon, *What Constitutes a Common Carrier?* (1931) 15 MARQ. L. REV. 67, 68.

3. In the much cited case of Michigan Public Utilities Commission v. Duke, 266 U. S. 570 (1924), the Court stated: "Plaintiff is not a common carrier. . . . He does not undertake to carry for the public and does not devote his property to any public use. He has done nothing to give rise to a duty to carry for others. The public is not depending on him for the use of his property for service, and has no right to call on him for transportation."

4. Note (1942) 20 TEX. L. REV. 323.

5. Many decisions express the view that operation under several contracts does not destroy the carrier's contract status.

Terminal Taxicab Co. v. Kutz, 241 U. S. 252 (1916); Film Transportation Co. v. Michigan Public Utilities Commission, 17 F. (2d) 857 (E. D. Mich. 1927). In the latter case the plaintiff was engaged in transporting picture films for 150 theatres under special contracts. The court held it to be a contract carrier within the rule of the Duke case, *supra,* even though it carried under so large a number of contracts. This is an extreme case. *Cf.* Phillips v. Public Service Commission, 127 Pa. Super. 345, 191 A. 641 (1937).

6. As stated in the dissenting opinion: "It has been not only the practice and the policy of this commission, but also of its predecessor, to hold that contract carriage vanished when the number of contracts was increased through solicitation to the point where the application 'contract carriage' became merely camouflage for common carriage. . . . I have been unable to discover *one* case before the appellate courts of Pennsylvania where a carrier, engaged solely in the transportation business, serving a class of shippers to the extent proposed to be served in this case, has not been held to be a common carrier." Instant case, at 346.

as few as eighteen,[7] fifteen,[8] eleven,[9] seven,[10] and five [11] contracts have been held to be common carriers. Some states have used the number of contracts obtained as a rule of thumb to determine the status of a common carrier: [12] in Wisconsin three; in Texas, five. In the Pennsylvania cases the implicit ground for the decisions has been the scope of the business of the carrier as reflected by the number of contracts held. The majority in the instant case gave little consideration to this significant factor. The effect of this decision upon the regulation of carriers and stabilization of the industry seems to be contrary to the general trend of the cases. It is concededly futile to seek unity in this field by regulating a part of it, while permitting the rest to operate uncontrolled.[13] The restrictions imposed on the common carrier's activity places it at a serious disadvantage in the competitive struggle with the contract carrier.[14]

7. In Keystone Warehousing Co. v. Pub. Service Comm., 105 Pa. Super. 267, 161 A. 891 (1932) the carrier solicited eighty various business houses in Philadelphia for the business of transporting packages from their stores to customers in the City and surrounding counties. It secured the business of eleven of them and entered into written contracts which were practically uniform. The Court held this a common carrier. This case is similar in almost all respects to the instant case.

8. In Bingaman v. Pub. Serv. Comm., 105 Pa. Super. 272, 161 A. 829 (1932). A carrier operating under eighteen private contracts was held a common carrier.

9. In Marshall v. Pub. Serv. Comm., 129 Pa. Super. 272, 275, 195 A. 475, 476 (1937) the carrier operated under contracts with seven oil companies. The opinion stated: "Although the intrastate transportation was confined to but three companies, it extended to all points in the state, and to more than twenty towns and cities. The large number of trucks and trailers inscribed with 'Transportation Petroleum Products', used extensively by appellant in interstate and intrastate transportation, indicates quite clearly that the services offered by him were a general holding out of his willingness to serve all who applied to the limit of his capacity." This reasoning could equally well be applied to the operation of the "United Parcel Service of Penna., Inc."

10. In Gornish v. Pub. Util. Comm., 134 Pa. Super. 565, 572, 4 A. (2d) 569, 572 (1938) the carrier held fifteen contracts. "By solicitation and by advertising the extent of their business was swelled. This was of itself an admission that they were engaged in a public business and they were holding themselves out as ready to serve the public generally."

11. Spackman v. Pa. Pub. Util. Comm., *et al.*, 141 Pa. Super. 169 (1940).

12. Michigan Pub. Util. Comm. v. Krol, 245 Mich. 297, 222 N. W. 718 (1929); Gornish v. Pub. Util. Comm., 134 Pa. Super. 565, 4 A. (2d) 569 (1938); Spackman v. Pub. Util. Comm., 141 Pa. Super. 161, 14 A. (2d) 839 (1940). In Texas the Public Utility Commission has followed a rule of thumb by which an operator is deemed a common carrier if he has contracts with more than five different shippers. Note (1942) TEX. L. REV. 325. The fact that a carrier operated under three contracts in the *Duke* case has caused much confusion and has led some state commissions seemingly to adopt an arbitrary rule and say that any carrier operating under three or less contracts is a private carrier and therefore not subject to regulations and control by state commissions. Cannon, *op. cit. supra* note 2.

13. *See* Note (1938) 86 U. OF PA. L. REV. 404, 413. "It is our belief that the trend of future decisions will be gradually to include as common carriers more of the so-called contract carriers. This will come about for the reason that regulation of common carriers is stabilizing the industry, and lack of regulation of contract carriers is tearing down the industry. Therefore the public will itself demand more regulation and the various regulatory bodies, will in keeping with this demand, attempt by regulation to include more and more operators." Cannon, *op. cit. supra* note 2, at 75.

14. As noted in Note (1942) 20 TEX. L. REV. 343. "The recognized common carrier, observing the restriction imposed on his activity by law, is at a serious disadvantage in the competitive struggle with the contract carrier." This is developed by simple arithmetic in the dissenting opinion of the instant case, at 348. It states in effect that in 1938 the applicant for a permit as contract carrier grossed $817,224.00 in operations in four months. Under the law, as a contract carrier, it contributed nothing toward paying Commission regulatory expenses. In the same year *for the full year* the protestant grossed $130,784.00. (Italics added.) On that sum it paid as a common carrier an assessment of $738.80. For the year 1939, the applicant did a gross business of about $1,940,000.00 with the four department stores. It will pay no assessment on that volume. For the same year, the protestant did a gross business of $152,731.00. Although the assessment for 1939 has not as yet been determined, protestant will be required to pay further assessment for regulation of the motor vehicle industry and applicant will pay nothing.