was the water pressure, but that the act was done in the manner intended, and consequently the unexpected result did not constitute "accidental means." The dissenting opinion emphasized the fact that in view of the disastrous result, the act must not have been done in the manner intended, and that the amount of the pressure was unforseeable, unexpected and unusual, and hence was the "accidental means." When one looks to the distinction drawn by the Court of Appeals[13] between the case at bar and the *New Amsterdam* case, he finds merit in the contentions made by the Court of Appeals and the dissent in the principal case. The Court of Appeals pointed out that in the *New Amsterdam* case the insured did nothing but that which he intended to do, while in the case at bar the act quite obviously was not done in the manner intended. Such an interpretation of the principal case seems to be in conformity with the holding in the key case of *United States Mutual Accident Association* v. *Barry*. D. A. W.

LABOR LAW

The Nature of a Strike

The term "strike" is as old as organized labor. The problem of defining it has often been before the courts. Many cases have turned upon the question of the existence or non-existence of a strike.

Strike clauses in contracts have given rise to some litigation in this area.[1] Surety bonds with saving clauses releasing the surety in the event the loss involved was caused by a strike have made such a determination essential.[2] And cases have arisen with respect to employee group insurance,[3] strike clauses in insurance policies,[4] demurrage costs during delay caused by strikes,[5] and the payment of union strike benefits.[6]

Social legislation of quite recent enactment lends new importance to the problem of clearly analyzing the strike concept. Some states have statutes which provide that no employer shall advertise for help *while a strike is in progress* in his place of business without stating the fact in such

[13] 62 Ohio App. 54, 28 Ohio L. Abs. 653, 15 Ohio Op. 406 (1939).

[1] McLeod v. Genius, 31 Neb. 1, 47 N.W. 473 (1890); Consolidated Coal Co. v. Jones & A. Co., 232 Ill. 326, 83 N.E. 851 (1908); and see 11 A.L.R. 1004.

[2] Uden v. Schaefer, 110 Wash. 391, 188 Pac. 395, 11 A.L.R. 1001 (1920).

[3] Roehrig v. Mo. State Life Ins. Co., 251 Ill. App. 434 (1929).

[4] Brous v. Imperial Ins. Co., 224 N.Y. Supp. 136, 130 Misc. 540 (1927); *aff'd* 227 N.Y.S. 777, 223 App. Div. 713 (1927).

[5] United States v. Russian Volunteer Fleet, 22 F. (2d) 187 (1927); Riviera Realty Co. v. Ill. Surety Co., 165 App. Div. 114, 150 N.Y. Supp. 116 (1914); General Commercial Co. v. Butterworth-Judson Corp., 198 App. Div. 799, 191 N. Y. Supp. 64 (1921).

[6] Martin, The Modern Law of Labor Unions (1910), sec. 282.

advertisement.[7] Several states have enacted laws which, in effect, *suspend the right to strike* for stated periods of time following notice of intent to strike.[8] Any action brought pursuant to these statutes would necessarily involve a determination of whether a strike did or did not exist. Similarly, the National Labor Relations Board must, unless it finds that a cessation of work has been caused by an unfair labor practice, determine whether or not a strike has been in progress when an employer's liability for the payment of back pay to reinstated employees is in issue.[9]

The Federal Social Security Act[10] provides that no state unemployment compensation plan shall be approved by the board if benefits are denied to workers who refuse to accept positions "vacant due directly to a strike, lockout, or other labor dispute." This requirement has been met by all the state unemployment compensation acts.[11] The inclusion of "other labor disputes" may relieve the courts from the necessity of deciding, in most cases, whether or not a *strike* is in progress. However, Ohio and some other states have provided that "No benefits shall be paid to any individual who has lost his employment *by reason of a strike* in the establishment in which he was employed, *as long as such strike continues*; . . ."[12] The application of this provision demands a determination in each instance of the existence or non-existence of a strike.[13] These statutes, and many others still being considered by state and federal legislatures with a view to preventing strikes in defense industries, make the problem of clearly defining the term "strike" one of current interest and improvement.[14]

The following definition is consistent with the language of many courts: "A strike is an agreed cessation of work—intended to be temporary—by employees in an effort to obtain from their employer more favorable terms or working conditions than the employer furnishes or is willing to furnish."[15] A perusal of strike definitions, by dictionary or court, reveals more uniformity than difference.[16] The acute problem

[7] Wis. Stat. (1927), sec. 103.34; and see Ohio Gen. Code, sec. 896-3 (d).

[8] Col. Ann. Stat., 1930, secs. 3472c-3472v; Michigan Labor Relations Act, sec. 9; Minnesota Labor Relations Act, sec. 6.

[9] 49 Stat. 449, 29 U.S.C.A. 151.

[10] 49 Stat. 620, 42 U.S.C.A. 1301-1305 (1939 Supp.).

[11] 3 Law & Contemp. Prob. 20-23 (1936).

[12] Ohio Gen. Code, sec. 1345-6c.

[13] United States Coal Co. v. Board of Review, 30 Ohio L. Abs. 509, 16 Ohio Op. 323 (1939); *motion to certify denied*, 13 Ohio B.A.R. 47 (1941). *See* Rhea Mfg. Co. v. Ind. Comm., 295 N.W. 749 (Wis., 1939), Note (1940) 24 Minn. L. Rev. 287.

[14] H.R. 2850, 77th Cong., 1st Sess.; H.R. 2695, 77th Cong., 1st Sess.

[15] 24 Ohio Jur. Labor, sec. 46.

[16] Iron Moulders' Union v. Allis Chalmers Co., 166 Fed. 45, 52 (1908); Jeffrey-De Witte Insulator Co. v. N.L.R.B., 91 F. (2d) 134 (C.C.A. 4th, 1937); Restful Slipper

lies in the application of the several elements to specific combinations of facts.

Locating the commencement of a strike is not so difficult as other aspects of the problem. For the limited purpose of computing union strike benefits, the day of the issuance of the strike order (or other day consistent with union rules) may be marked as the day of commencement.[17] But this rule is limited to a single purpose. The actual cessation of work is probably the most positive act that can be located to mark the beginning of the strike.[18]

Common to all definitions of a strike is the cessation of work.[19] If every cessation of work by employees were a strike the fact would be relatively easy to establish and further refinement of the concept would be unnecessary. But it is clear that every cessation does not constitute a strike. The idea of *collective* action is inherent in the concept; the cessation must be concerted action. One Ohio court has said: "The refusal of one employee to work does not constitute a strike of employees in the legally accepted definition of the term strike."[20] It may be safely said that a strike must have the element of *group rather than individual* action.[21]

Every collective cessation of work by employees does not constitute a strike. There must be an intent on the part of the "striking" employees to resume the employment relation if and when certain demands have been met. The mere cessation of work with no intent to resume the employment relation lacks an essential element.[22]

If it be established that the cessation of work has been brought about by the concerted action of a group of employees, and that such cessation is intended to be temporary, it becomes profitable to examine the causes of the employees' action. Many grievances are not deemed strike-causes by the courts. Men who refuse to work because of stormy weather,[23] an employer's refusal to pay,[24] fear of an epidemic,[25] hesitation to work in a dangerous section of a mine,[26] or the observance of a holiday[27] are

Co. 1. United States Leather Union, 116 N.J. Eq. 521, 174 Atl. 543, 545 (1934); OAKES, THE LAW OF ORGANIZED LABOR AND INDUSTRIAL CONFLICT (1927) sec. 308; ROTWEIN, LABOR LAW (1939) sec. 38; BALLENTINE, LAW DICTIONARY (1930), defining the word "strike."

[17] *Supra*, n. 6.

[18] GRIFFIN, STRIKE, p. 86.

[19] *Supra*, n. 16.

[20] Saltzman v. United Retail Employees' Local, 10 Ohio Op. 6 (1937).

[21] Oeflein v. State, 177 Wis. 394, 188 N.W. 633 (1922).

[22] *Supra*, n. 2.

[23] Hagerman v. Norton, 105 Fed. 996 (C.C.A. 5th, 1901).

[24] *Supra*, n. 1.

[25] Stevens v. Harris, 57 L.T.R. (N.S.) 618 (1887).

[26] New York Coal Co. v. Pittsburg Coal Co., 86 Ohio St. 140 (1912).

[27] *Supra*, n. 23.

not "on strike." Grievances arising from working conditions within the control of the employer and capable of being remedied by him have usually been held to be strike-grievances, and cessations for the purpose of curing such grievances or gaining shorter hours or higher pay have generally been called strikes.[28] If the grievance is such that a cessation will cure it without further concessions or affirmative action, it is not probable that the resulting cessation will be termed a strike.[29] The cases do not offer a rule-of-thumb by which strike-causes may be clearly distinguished. It may be conceded, however, that a stoppage of work, collective in nature and intented to be temporary, must be for the purpose of enforcing a demand or adjusting a grievance if it is to be properly called a strike.[30]

In *Hamilton Tailoring Co. v. Clothing Workers*, the determination of whether or not a strike existed was based upon the existence or non-existence of a trade dispute.[31] This approach does not differ in any essential from the criteria already considered, but loose employment of the terms "trade dispute" and "strike" has resulted in some confusion. One Ohio court offered this: "A trade dispute *can only exist* where there is a *stoppage of work*, or lockout by the employer, and an intention and a reasonable expectation upon the part of both employees and employer to resume the relation of employee and employer upon the satisfaction of certain specified conditions. . . ."[32] It is submitted that this language describes a strike rather than a trade dispute. It includes a temporary stoppage of work, an intent to resume the employment relation, and a grievance which provides a reason for the cessation. While the cessation of work is an essential element in a strike, cases which have turned upon the existence or non-existence of a trade dispute indicate that such a dispute may exist where no cessation of work can be found.[33]

The point assumes more than academic proportions when statutes are framed in terms of strike situations rather than trade disputes. Unemployment compensation statutes of the several states are of both kinds. The Ohio Unemployment Compensation Act denies benefits to any employee who is unemployed *because of a strike*.[34] In *The United States Coal Co. v. Board of Review*[35] the court was confronted by a borderline set of facts which demanded precise analysis of both concepts.. Pro-

[28] Cases cited *supra*, n. 16.
[29] *Supra*, notes 23, 24, 25, 26, and 27.
[30] ROTWEIN, p. 27; GRIFFIN, p. 20.
[31] Hamilton Tailoring Co. v. Clothing Workers, 4 Ohio App. 495 (1935).
[32] Park Hotel v. Union, 22 Ohio N.P. (N.S.) 257, 30 Ohio Dec. 64 (1919).
[33] See generally the comment in (1940) 6 O.S.L.J. 334, and cases cited therein.
[34] OHIO GEN. CODE, sec. 1345-6c.
[35] 24 OHIO JUR. LABOR, sec. 46; and see note 13, *supra*.

tracted negotiations between the United Mine Workers and the mine owners had delayed the signing of a new working agreement. The old contract had expired and work had ceased. Here was a cessation of work, a grievance or a demand, and an intent that the cessation should be temporary. Here was both a strike and a labor dispute. This court found a clear distinction between the two ideas, and the opinion carefully marks out the limits of one and the scope of the other.

A labor dispute, reasoned the court, can exist without any *positive action* by the disputing employees, but a strike can obtain only when the employees have taken some positive, hostile action in response to their state of mind. The cessation of work in the instant case was found to be a "state of inertia," and not an adversary act which might properly be described as the act of striking. A motion to certify the record was denied by the Ohio Supreme Court, so this element of positive, hostile action may be usefully added as an essential element of a strike.

A word should be added relative to one element of a strike which is implied rather than expressed in the characteristics considered above. The cessation must be by *employees*. One Ohio court held that a legal strike cannot exist unless there is the relation of employer and employee.[36] The concerted stoppage of work must be by employees or by those who have been customarily employed.[37]

To locate the point of termination, the courts have applied various tests. The intent of the parties is not helpful. In the view of the employer, the employment relation ends when the workers leave their benches and he is free to hire on the open market. In the view of the employees, a relation survives the cessation of work which gives them a continuing interest.[38] But somewhere this striker-employer relation must terminate, leaving the parties mere strangers and making further hostile action by the strikers mere intermeddling with the employer's business.[39] An early Ohio case[40] is frequently cited for the proposition that the employment relation ends completely when the employee ceases to work.[41] Thus viewed, the holding is at odds with later authority which concedes that strikers are more than mere strangers to the employer.[42]

[36] *Supra*, n. 31.
[37] Garment Co. v. Union, 15 Ohio N.P. (N.S.) 353, 27 Ohio Dec. N.P. 675 (1913).
[38] OAKES, sec. 309.
[39] 24 VA. L. REV. 661, 666 (1938).
[40] N.Y., L.E. & W.R.R. v. Wenger, 9 Ohio Dec. Rep. 815 (1887); see also National Fireproofing Co. v. Mason Builders Ass'n., 145 Fed. 260 (1906).
[41] MARTIN, sec. 25.
[42] Iron Moulders' Union v. Allis-Chalmers Co., 166 Fed. 45, 91 C.C.A. 631, 20 L.R.A. (N.S.) 315 (C.C.A. 7th, 1908); State v. Personett, 220 Pac. 520 (1923); Greenfield v. Central Labor Council, 104 Ore. 259, 207 Pac. 168 (1922); Tri-City Central Trades Council v. Am. Steel Foundries, 238 Fed. 728, 151 C.C.A. 578 (C.C.A. 7th, 1916); OAKES, sec. 309.

It is submitted, however, that the Ohio case says no more than that an employee is a trespasser when he invades his employer's property.

If strikers take action showing that they have no intention of returning to their former employment, the relation (and the strike) is terminated.[43] But the employer by merely declaring that the strikers are fired cannot terminate the relation or the strike.[44]

Some courts have held that a strike is over when the employer is operating his business in a "normal and usual manner."[45] Others have viewed the strike as terminated when "there are no reasonable grounds for believing that a continuance thereof will materially affect his business even though picketing and persuasion of others to keep away from such employment still continues."[46] A Massachusetts court has said that a strike is terminated when *most* of the strikers have found employment elsewhere,[47] but there is some indication in this and a subsequent Massachusetts holding[48] that *all* of the places must be filled and the business of the employer must be continuing in a normal and usual manner. A New York court decided that a strike had ended when the places of the strikers had been filled with *efficient* help and the strike was merely "nominal."[49] Other courts have included the criterion that the places must be filled with competent or efficient help.[50]

A Wisconsin statute codifies a test which is likely to extend the legal life of the strike over the longest period.[51] "A strike or lockout shall be deemed to exist as long as the concomitants of a strike or lockout exist; or unemployment on the part of the workers affected continues; or the payment of strike benefits is being made; or publication is being made of the existence of such strike or lockout." This statute makes the existence or non-existence of a strike "turn upon whether the union has or has not given up the struggle."[52]

The termination issue doesn't seem to have been placed squarely

[43] Mooresville Cotton Mills v. N.L.R.B., 1 N.L.R.B. 539 (1936).

[44] Densten Hair Co. v. United Leather Workers' Union, 237 Mass. 199, 128 N.E. 450 (1921).

[45] Dail-Overland Co. v. Willys-Overland Co., 263 Fed. 171 (D.C., Ohio, 1919).

[46] West Allis-Foundry Co. v. State, 186 Wis. 24, 202 N.W. 302 (1925).

[47] M. Steinert & Sons v. Tagen, 207 Mass. 394, 93 N.E. 584, 32 L.R.A. (N.S.) 1013 (1911).

[48] Moore Drop Forging Co. v. McCarthy, 243 Mass. 554, 562 (1923); and see 1 Lab. Rel. Rep. 515 (1937).

[49] Yates Hotel Co. v. Meyers, 195 N.Y. Supp. 558 (1922).

[50] Allen v. Cutters and Butchers, (Cal. Super. Ct. for Los Angeles) 1 Lab. Rel. Rep. 324 (1937); Mode Novelty Co. v. Taylor (N.J. Ch. Ct.) 1 Lab. Rel. Rep. 515 (1937).

[51] See WIS. STAT., 1927, sec. 103.34.

[52] WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932) p. 18, n. 1; FRANKFURTER AND GREENE, THE LABOR INJUNCTION, p. 174, n. 162. And *cf.* West Allis-Foundry Co. v. State, *supra*, n. 46.

before an Ohio court. But if the language of two Ohio cases[53] be applied, the employees' reasonable expectation of re-employment appears the probable test. So long as such a reasonable expectation existed the strike would continue.

Rules which may be abstracted from the strike cases do not constitute as sound a basis for prediction as their logical pattern might indicate. Some of the criteria, particularly in the termination cases, are descriptive of the case in issue and couched in language which gives them the color of essential requirements. But careful examination yields the idea that in many instances the elements of the strike described are not essential to the holding, but are simply permitted by the peculiar facts of the case.[54] With litigation in the strike area increasing in volume and importance, existing cases are useful for the broad outlines they have sketched. The fine lines of the strike concept are being drawn by carefully reasoned opinions in current cases.[55] R. M. A.

LEGISLATION

The Soldiers' and Sailors' Civil Relief Act of 1940.

On October 17, 1940, the Federal Soldiers' and Sailors' Civil Relief Act of 1940[1] became effective. This act applies to all persons on active duty on that date and to all who enter the service before May 15, 1945, unless the United States is then engaged in a war, in which event the act shall remain effective until six months after a peace treaty has been proclaimed by the President.[2] Much of the act is the same as the Soldiers' and Sailors' Civil Relief Act of 1918. What effect does the new act have? What is its purpose? How does it work? What must the man in the service do in order to enjoy its benefits? It is the purpose of this comment to state in as concise a manner as the subject permits the effect of this law.

Purpose

The act in no way cancels or annuls any debts or obligations; its primary purposes are (a) to provide for a suspension of due dates on obligations until the man in the service has had a sufficient time to

[53] Park Hotel v. Union, *supra*, n. 32; Hamilton Tailoring Co. v. Clothing Workers, *supra*, n. 31.

[54] *Supra*, notes 47 and 48.

[55] United States Coal Co. v. Board of Review, *supra*, n. 13.

[1] U.S.C.A., Title 50, Apx. secs. 501-585 incl. For a discussion of the Act's constitutionality, see A.B.A.J. for Jan. 1, 1941, at p. 23, and 2 Wash. & L. L. Rev. 1 at 34.

[2] Secs. 101(1)(2), 604.