with respect to compliance with the Ohio statute. The plaintiff need only have elected a proper and available remedy by bringing his action against the bankrupt, reducing his claim to judgment, and filing against the insurer thereafter. R.M.A.

# LABOR LAW

## Limitation on Definition of a Trade Dispute— Picketing as an Exercise of Free Speech

The plaintiff, operator of an exclusive restaurant in the City of Cleveland, petitioned for an injunction restraining the officers and members of three unincorporated labor unions from picketing her place of business. The defendants were picketing in an attempt to persuade her to discharge her employees unless they became members of one of the defendant unions. The plaintiff-employer ran an open shop, did not attempt to persuade or dissuade her employees from joining any of the defendant unions, made no inquiry as to union affiliations when hiring employees, never discharged an employee for union activities, had no dispute with her employees about the wages or conditions, and did not undersell restaurants employing union help exclusively. The trial court rendered a decree restraining all picketing, bannering, and boycotting of plaintiff's restaurant. On review the Court of Appeals permitted peaceful picketing and boycotting. The Supreme Court of Ohio reversed the Appellate Court decree and rendered final judgment in conformity with the Common Pleas Court decree, Judges Zimmerman and Day dissenting.[1]

The instant case is the first in which the Supreme Court of Ohio has been faced with the determination of whether or not the picketing union's members must be, or have been, employees of the picketed employer in order for a trade dispute to be in existence. The Courts of Ohio have for many years held that the right to picket peacefully is dependent upon the existence of a trade dispute,[2] but the question has continually arisen as to exactly what that term connotes. The majority in the instant case cite *La France Electrical Construction & Supply Co.* v. *I.B.E.W.*,[3] which held a trade dispute to exist when former employees were seeking to secure the right to work under terms of employment

[1] Crosby v. Rath 136 Ohio St. 352, Ohio Bar, March 11, 1940 (1940). The decision in this case was rendered on the ground that there were no acts of violence.

[2] La France Co. v. Elec. Workers 108 Ohio St. 61, 140 N.E. 899 (1923); Lundoff-Bicknell Co. v. Smith 24 Ohio App. 294, 156 N.E. 243 (1927); Driggs Farms, Inc. v. Milk Drivers' Union, 49 Ohio App. 303, 3 Ohio Op. 212 (1935); 2 O.S.L.J. 301.

[3] 108 Ohio St. 61, 140 N.E. 899 (1923).

different from those which their employer was requiring. Judge Zimmerman points out in his dissent that the *La France* case did not attempt to define the only instance in which there could be a trade dispute, but merely held that under such circumstances as those in that case there was such a dispute. There have been numerous lower court decisions in Ohio involving this question, the majority of which have been in accord with the principal case,[4] a considerable minority, however, holding to the contrary.[5] In the future it is to be expected that the courts of Ohio will follow the narrow definition of a trade dispute as indicated by the Supreme Court in the instant case and refuse to recognize the possibility of its existence unless there is a controversy between the employer and his employees, the latter of which have an intention and reasonable expectation that they will return to work for the former.

Twenty-three states[6] have Anti-Injunction statutes forbidding the courts to issue injunctions in labor disputes, thirteen of which define a labor dispute in the words of the Norris-La Guardia Act as "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 *regardless of whether the disputants stand in the relation of employer-employee.*"[7] Of the 13 states which have this definition, the courts of most of the jurisdictions have followed the probable intent of the statutory draftsmen and refused to issue an injunction in a labor dispute even

[4] Saltzman v. Retail Employees', 25 Ohio L. Abs. 354, 10 Ohio Op. 6 (1937); Brown v. United Mine Workers, 25 Ohio N.P. (N.S.) 485 (1925); United Tailors v. Joint Board of Amalgamated Workers, 26 Ohio N.P. (N.S.) 439 (1926); White-Allen Chevrolet v. Auto Mech. Union, 27 Ohio L. Abs. 273, 12 Ohio Op. 288, 3 Lab. Rel. Rep. 205 (1938); Mulholland v. Waiters' Union, 13 Ohio Dec. (N.P.) 342 (1902); Park v. Hotel Employees, 22 Ohio N.P. (N.S.) 257; Hellman v. Salesmen's Assn., 23 Ohio N.P. (N.S.) 177 (1919); Markowitz v. Retail Dry Cleaners Union, 19 Ohio L. Abs. 445, 3 Ohio Op. 366 (1935); Driggs Farms v. Milk Drivers' Union, 49 Ohio App. 303; 3 Ohio Op. 212 (1935). For further discussion see Notes 4 O.S.L.J. 110 (1937), 5 O.S.L.J. 236 (1938), and Ohio Bar, March 21, 1938, 703.

[5] Clark Lunch Co. v. Cleveland Waiters Local, 22 Ohio App. 265, 154 N.E. 362 (1926); Wiley v. Retail Clerk's Assn., 32 Ohio N.P. (N.S.) 257 (1934); McCormick v. Local Union, 13 O.C.C. (N.S.) 545, 32 Ohio C.C. 165 (1911); Frankel Chevrolet v. Meerchaum, 27 Ohio L. Abs. 425, 12 Ohio Op. 387 (1938).

[6] States which have Anti-Injunction statutes following the Norris-LaGuardia Act definition: Colo. Sess. Laws (1933); c. 59; Idaho Sess. Laws (1933 c. 215; Ind. Acts (1933) c. 12; La. Laws (1934) Act. No. 203, p. 600; Md. Laws (1935) c. 574; Minn. Stat. (Mason Supp. 1936) sec. 4256 *et seq.*; N.Y. Laws (1935) c. 477; N.D. Laws (1935) c. 247; Ore. Code Ann. (Supp. 1935) sec. 49-1901 *et seq.*; Utah Rev. Stat. (1933) sec. 49.2.6-12; Pa. Laws (1937) No. 308; Wash. Laws Extraord. Sess. (1933) c. 7; Wis. Stats. (1933) sec. 103.51-103.63. States which have Anti-Injunction statutes but do not follow the Norris-LaGuardia Act definition: Ariz.; Calif.; Ill.; Kan.; Mass.; Mont.; N.H.; N.J.; Okla.; Wyo. See further *The Fiction of Peaceful Picketing*, Frank E. Cooper, 35 MICH. L. REV. 73 (1936); *State Anti-Injunction Legislation*, W. P. Riddlesbarger, 14 ORE. L. REV. 501 (1935); *Statutory Definitions of "Labor Dispute,"* Orval Etter, 19 ORE. L. REV. 201 (1940).

[7] Italics added.

though none of the plaintiff's employees were members of the defendant-union.[8] Other courts in this group of states having such statutory definition have, however, taken a narrower approach, holding that there can not be a legitimate trade dispute where the picketing parties were not employees or former employees of the plaintiff-employer.[9]

In the absence of a statute defining a trade dispute as does the Norris-LaGuardia Act, the majority of courts have rendered decisions in accord with the Ohio Supreme Court definition.[10] Some few courts have taken a broader view of the problem and held a trade dispute could exist where none of the plaintiff-employer's employees were members of the picketing defendant-union.[11]

Judge Day, in his dissent, attacks the majority's holding as a deprivation of defendant's constitutional right of free speech. There is a decided contrariety of opinion in the courts on the issue of whether or not an injunction against picketing is a deprivation of the constitutional guaranty.[12] In Ohio two lower courts have held this no deprivation[13]

[8] Wilson v. Birl, 27 F. Supp. 915 (1939); Lipoff v. United Food Workers Union, 33 Pa. D. & C. 599 (1938); Peak v. McElroy, 33 Pa. D. & C. 556 (1938); Bergman v. Levenson, 13 N.Y.S. (2d) 955 (1939); Fairfield Bar v. Friedman, 14 N.Y.S. (2d) 709 (1939); Bent Steel Sections v. Doe *et al.*, 10 N.Y.S. (2d) 920 (1939); Wallace v. International Assn., 155 Ore. 652, 63 P. (2d) 1090 (1936); Am. Furn. Co. v. I. B. of T. C., 222 Wis. 338, 268 N.W. 250 (1936); Senn v. Tile Layers Protective Union, 222 Wis. 383, 268 N.W. 270 (1936); Lauf v. E. G. Shiner, 303 U.S. 323, 82 L. Ed. 872, 58 Sup. Ct. 578 (1938).

[9] Bond Stores v. Turner, 14 N.Y.S. (2d) 705 (1939); Fornili v. Auto Mechanic's Union, 200 Wash. 283, 93 P. (2d) 422 (1939); Adams v. Bldg. Employees Union, 197 Wash. 242, 84 P. (2d) 1021 (1938); Safeway Stores v. Retail Clerks Union, 184 Wash. 322, 51 P. (2d) 372 (1935).

[10] McKay v. Automobile Salesmen's Union (Cal.) 89 P. (2d) 426 (1939); Duplex Printing Co. v. Deering, 254 U.S. 443, 41 Sup. Ct. 172, 65 L.Ed. 349 (1921); American Steel Foundries v. Tri-Central Trades Council, 257 U.S. 184, 42 Sup. Ct. 72, 66 L.Ed. 189 (1921); Waitresses' Union v. Benish Restaurant Co. (1925, C.C.A. 8th) 6 F. (2d) 568; Keith Theatre v. Vachon, 134 Me. 392, 187 Atl. 692 (1936); Swing v. A. F. of L., 372 Ill. 91, 22 N.E. (2d) 857 (1939); Motor Truck Co. v. Assn. of Machinists (Ill. App.), 22 N.E. (2d) 969 (1939); Meadowmoor Dairies v. Milk Drivers' Union, 371 Ill. 377, 21 N.E. (2d) 308 (1939); Quinton's Mkt. v. Patterson (Mass.), 21 N.E. (2d) 546 (1939); Bull v. Alliance of Stage Employees, 119 Kans. 713, 241 Pac. 459 (1925); Mkt. St. Corp. v. Workers' Local, 118 N.J. Eq. 448, 179 Atl. 689 (1935).

[11] Blumauer v. Operator's Union, 17 P. (2d) 1115 (1933); Exchange Bakery v. Rifkin, 214 N.Y. App. Div. 777, 245 N.Y. 260, 157 N.E. 130 (1927); J. H. & S. Theatres v. Fay, 260 N.Y. 315, 183 N.E. 509 (1932); Empire Theatre v. Cloke, 53 Mont. 183, 163 Pac. 107 (1917); Steffes v. Operators Union, 136 Minn. 200, 161 N.W. 524 (1917); United Theatres v. Operators Union, 50 F. (2d) 189 (1931).

[12] It is interesting to note that the courts seldom, if ever, distinguish between bannering, boycotting and picketing, as an exercise of free speech. The writer has failed to find any court drawing a distinction between these three when discussing the constitutional guaranty. This appears to be an expansive approach of the courts since picketing and bannering do not necessarily involve speech as it is usually defined, no actual utterance being present. However, this would appear to be a correct interpretation by the courts, since speech, besides the oral, involves the elements of expression and communication. There may be more of an expression and communication by a group of men walking back and forth in front of a store than there would be in the same men standing in front of the store and orally attempting to dissuade customers from entering the store.

[13] Hellman v. Salesmen's Assn., 23 Ohio N.P. (N.S.) 177 (1919); Foundry Co. v. Molders' Union, 20 Ohio N.P. (N.S.) 161 (1917).

and one has discussed the issue but based its judgment on other grounds.[14] Several courts in other states have recognized the right to picket as an exercise of the constitutional guaranty of free speech,[15] one even going so far as to hold that the right to picket is unlimited and should be applied to any and all disputes between a business man and groups of citizens who may differ with him on a question of policy.[16] On the other hand, there have been about an equal number of courts holding that issuing an injunction against picketing is not a deprivation of free speech.[17] The Ohio Supreme Court in quoting from the syllabus in *Meadowmoor Dairies* v. *Drivers' Union*,[18] a recent Illinois case, succinctly states the usual line of thought of those courts that hold that there has been no deprivation. That syllabus reads "the right to contract, the right to do business and the right to labor freely and without restraint are all constitutional rights equally sacred, and the privilege of free speech cannot be used to the exclusion of other constitutional rights nor as an excuse for unlawful activities in interference with another's business, as the right to acquire and protect property is an inherent right not given but declared by the constitution." It appears that the courts first decide if an injunction will issue; if it will, then they state that freedom of speech is a consitutional right which must be exercised so as not to interfere with other constitutional property rights. The Ohio case of *Hellman* v. *Salesmen's Ass'n*.[19] is an example of this reasoning. The court there discussed the two conflicting rights, one of property and one of personal liberty, and stated that there must be an attempt to harmonize the two in every case. From that point on the court stresses the infringement upon the employer's property rights by the unlawful interference by the defendant-union, that "unlawfulness" merely consisting of bannering of plaintiff's place of business as "unfair." The defendant-union, then, has no opportunity to stand on its constitutional guaranty, because, before that issue is discussed, the bannering and picketing is said to be unlawful solely because it infringes on plaintiff's constitutional property guarantees. If the courts were to reverse their order of discussion and

[14] Brown Mfg. Co. v. Local Union, 12 Ohio Dec. N.P. 753 (1902).

[15] *In re* Heffron 179 Mo. App. 639 (1913); Lindsay & Co. v. Mont. Fed. of Labor, 37 Mont. 264, 18 L.R.A. (N.S.) 707 (1908); *Ex Parte* Lyons, 27 Cal. App. (2d) 293, 81 P. (2d) 190 (1938); Senn. v. Tile Layers Protective Union, 301 U.S. 468, 81 L. Ed. 1229, 57 Sup. Ct. 857 (1937); People v. Harris, 104 Colo. 386, 91 P. (2d) 989 (1939).

[16] *Ex Parte* Lyons, note 16, *supra.*

[17] Cooks & Waiters Union v. Papageorge (Tex. Civ. App.), 230 S.W. 1086 (1921); Jordahl v. Hayda, 1 Cal. App. 696, 82 P. 1079 (1905); Meadow-moor Dairies v. Drivers' Union, Note 10, *supra*; Swing v. A. F. of L., note 10, *supra*; Am. Fed. of Labor v. Buck's Stove & R. Co., 33 App. D.C. 83 (1909); Robison v. Hotel Employees, 35 Idaho 418, 207 Pac. 132 (1922).

[18] Note 10, *supra.*

[19] Note 13, *supra.*

hold that the defendant's bannering and picketing is in accord with its constitutional right, then perforce these courts would have to hold that the issuance of an injunction against such bannering would be unlawful. The ultimate decision would rest on which constitutional guaranty is emphasized first. The effort of those courts using this line of reasoning is in accord with the early tendency of the courts of this country to uphold property rights where in conflict with personal liberties, but it is doubtful if it is in accord with the more modern trend protecting civil liberties.[20]

Some further light on the constitutional issue raised by Judge Day is afforded by the United States Supreme Court's recent opinions in the two cases involving anti-picketing statutes, *Thornhill* v. *Alabama*,[21] and *Carlson* v. *California*.[22] Although these decisions of the high court of the country concerned the validity of flat proscriptions of picketing by legislative fiat as distinguished from the judicial order restraining picketing approved by the Ohio Supreme Court in the instant case, both type-situations find a common denominator in the new constitutional doctrine that no state can, consistently with the supreme law of the land, deprive any person of the liberty of free speech. In the *Thornhill* opinion Mr. Justice Murphy includes *Dorchy* v. *Kansas*[23] in his footnote support for the proposition "that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist." The *Dorchy* case found Mr. Justice Brandeis, for the Court, sustaining a Kansas statute restricting the use of the strike weapon, in its application to a union effort to enforce a stale and questionable claim. Quite recently, in a *per curiam* opinion not referred to by the Court's newest member, the Court dismissed an appeal from a Maine decision[24] which had not found invalid a state statute for criminal conspiracy in its application to non-employee union officials conducting a strike for a closed shop.[25] It would appear, then, that there remains to the state a power "to set the limits of permissible contest open to industrial combatants."[26] What those limits are, in the light of present-day emphasis upon civil liberty guaranties, only the interstitial process of case-by-case litigation can tell. There is

[20] Hague v. C. I. O., 307 U.S. 496, 83 L. Ed. 1423, 59 Sup. Ct. 954 (1939); Lovell v. Griffin, 303 U.S. 444, 82 L. Ed. 949, 58 Sup. Ct. 666 (1938); Schneider v. State, 308 U.S. 147, 5 Lab. Rel. Rep. 332 (1939).

[21] — U.S. —, 84 L. Ed. 659, 60 Sup. Ct. 736 (1940).

[22] — U.S. —, 84 L. Ed. 668, 60 Sup. Ct. 746 (1940).

[23] 272 U.S. 306, 71 L. Ed. 248, 47 Sup. Ct. 86 (1926).

[24] State v. Mackesy, 135 Me. 488, 200 Atl. 511 (1938).

[25] Mackesy v. State, 305 U.S. 570, 83 L. Ed. 359, 59 Sup. Ct. 230 (1938).

[26] Justice Murphy in Thornhill v. Alabama, Note 21, *supra*.

some basis in the *Thornhill* opinion for believing that the Federal Supreme Court views non-violent picketing as impregnable from governmental attack, whatever the circumstances of its use. Mr. Justice Murphy's statement that "in the circumstances of our times the dissemination of information concerning the facts of a labor union dispute must be regarded as within that area of free discussion guaranteed by the Constitution" is indicative of such an approach. Yet the opinion is also susceptible of the interpretation that the Court was bent only upon striking down statutes so all-inclusive as to deny to labor the picketing weapon in any and all circumstances. "The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute. . . . We think that Section 3448 is invalid on its face." Although in neither of the Federal Court cases were the full facts regarding the matters which resulted in the picketing before the Court, it is evident that in those cases there was an actual strike between employers and employees in furtherance of which the latter were picketing, whereas in the Ohio high court case the picketing was carried on by non-employees in the absence of any strike solely to induce the employer to employ only union members. The United States Supreme Court in the *Thornhill* case continually refers to the importance of free speech in the proper dissemination of the facts of a "labor dispute." Justice Brandeis, assuming the existence of a labor dispute, had previously stated in *Senn* v. *Tile Layers Protective Union*[27] that "members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute for freedom of speech is guaranteed by the Constitution." In view of this it does not seem unlikely that the constitutional issue in the area here under consideration will, like the equity issue earlier discussed, be resolved in terms of the meaning to be given that significant phrase.

H.M.M.

[27] Note 15, *supra*.