IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

AT CHICAGO

OCTOBER TERM, A. D. 1921.

No. 3059

BORDERLAND COAL CORPORATION,

vs.

ORA GASSAWAY, et al.

BRIEF OF COUNSEL FOR BORDERLAND COAL CORPORATION.

BORDERLAND COAL CORPORATION,
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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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THE JURISDICTION OF THIS COURT IN THIS CASE AT THIS TIME.

We understand that prior to the Act of 1891, there was no appeal in a case of this sort until after final judgment or decree, that the right of appeal from the granting of a temporary injunction was conferred by that statute, and the extent to which this court may go on such appeal as in this case, is limited by that statute. The first question to be determined is the extent of the jurisdiction of this court on this appeal from the action of the District Court in awarding the temporary injunc-

tion. On appeal from a decree of a District Court in awarding a temporary injunction, this court may, if it finds no equity in the bill, dismiss it and end the litigation; but, where there is equity in the bill, this court will not disturb the action of the District Court in any particular unless there has been an abuse of sound discretion by it.

In the case of *Smith* v. *Vulcan Iron Works,* 165 U. S. 518 (41 Law Ed., p. 810), the court, after referring to this statute and quoting from it, said:

> "The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests, but also to save both parties from the expense of further litigation, should the Appellate Court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it."

Again, in the case of *Eagle Glass & Manufacturing Co.* v. *Rowe,* 245 U. S., at pages 280-281 (62 Law Ed., 289), the court in discussing this same question, said:

> "So far as the decision of the Circuit Court of Appeals dissolved the temporary injunction upon the ground that the Steubenville defendants had denied, and plaintiff had not adduced sufficient evidence to sustain, the averment of the amended bill that they had constituted Gillooly and the other original defendants, their agents and representatives and had assisted and supported them in their efforts to unionize plaintiff's employees and force plaintiff to recognize the American Flint Glass Workers' Union, we see no reason to disturb the decision.
>
> But the court went further, and directed a dismissal of the bill. Since the cause had not gone to final hearing in the District Court, the bill could

not properly be dismissed upon appeal unless it appeared that the court was in possession of the materials necessary to enable it to do full and complete justice between the parties. Where, by consent of parties, the case has been submitted for a final determination of the merits, or upon the face of the bill there is no ground for equitable relief, the Appellate Court may finally dispose of the merits upon an appeal from an interlocutory order. *Smith* v. *Vulcan Iron Works,* 165 U. S. 518, 525, 41 L. Ed. 810, 812, 17 Sup. Ct. Rep. 407; *Mast, F. & Co.* v. *Stover Mfg. Co.* 177 U. S. 485, 494, 44 L. Ed. 856, 860, 20 Sup. Ct. Rep. 708; *Castner* v. *Coffman,* 178 U. S. 168, 184, 44 L. Ed. 1021, 1027, 20 Sup. Ct. Rep. 842; *Harriman* v. *Northern Securities Co.* 197 U. S. 244, 287, 49 L. Ed. 739, 760, 25 Sup. Ct. Rep. 493; *United States Fidelity & G. Co.* v. *Bray,* 225 U. S. 205, 214, 56 L. Ed. 1055, 1061, 32 Sup. Ct. Rep. 620; *Denver* v. *New York Trust Co.* 229 U. S. 123, 136, 57 L. Ed. 1101, 1121, 33 Sup. Ct. Rep. 661. But in this case the application for a temporary injunction was submitted upon affidavits taken *ex parte,* without opportunity for cross-examination, and without any consent that the court proceed to final determination of the merits. Hence there was no basis for such a determination on appeal unless it appeared upon the face of the bill that there was no ground for equitable relief. That this was in effect the decision of the Circuit Court of Appeals is evident from the fact that it was rested upon the authority of *Mitchell* v. *Hitchman Coal & Coke Co.* In that case the same court had expressed the following opinion (131 C. C. A. 425, 214 Fed. 685, 714).

Again, in the still later case of *Meccanno, Ltd.* v. *John Wanamaker,* 253 U. S., at pages 140 and 141, the court said:

> "Decrees by Circuit Courts of Appeals are declared final by § 128, Judicial Code, in cases like the present one. We, therefore, had authority to bring this cause up by certiorari and may treat it as if here on appeal. Section 240, Judicial Code; *Harriman* v. *Northern Securities Co.* 197 U. S. 244, 287; *Denver* v. *New York Trust Co.* 229 U. S. 123,

136. The power of the Circuit Courts of Appeals to review preliminary orders granting injunctions arises from § 129, Judicial Code, which has been often considered. *Smith* v. *Vulcan Iron Works,* 165 U. S. 518; *Mast, Foos & Co.* v. *Stover Manufacturing Co.* 177 U. S. 485, 494; *Harriman* v. *Northern Securities Co., supra; United States Fidelity & Guaranty Co.* v. *Bray,* 225 U. S. 205, 214; *Denver* v. *New York Trust Co., supra.* This power is not limited to mere consideration of, and action upon, the order appealed from; but, if insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated.

The correct general doctrine is that whether a preliminary injunction shall be awarded rests in sound discretion of the trial court. Upon appeal, an order granting or denying such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. *Rahley* v. *Columbia Phonograph Co.* 122 Fed. Rep. 623; *Texas Traction Co.* v. *Barron G. Collier, Inc.* 195 Fed. Rep. 65, 66; *Southern Express Co.* v. *Long,* 202 Fed. Rep. 462; *City of Amarillo* v. *Southwestern Telegraph & Telephone Co.* 253 Fed. Rep. 638. The informed judgment of the Circuit Court of Appeals exercised upon a view of all relevant circumstances is entitled to great weight. And, except for strong reasons, this court will not interfere with its action. No such reasons are presented by the present record."

It is not claimed on this appeal, as we understand the petition and assignment of errors filed, that there is no equity in the bill, and, therefore, this court, under the statute as construed by the above cited cases, is limited to a consideration of whether or not there was an abuse of sound discretion by the District Court in awarding the temporary injunction. In determining that question, "the informed judgment" of the District Court, "exercised upon a view of all relevant circumstances is entitled to great weight."

That the District Court not only did not abuse its sound

discretion, not only was fully warranted in awarding the temporary injunction, but could not do otherwise, will fully appear, we respectfully submit, from an examination of the record as considered by it. In this connection, it is deemed proper to review the record, pleadings and proof, and to refer briefly to the law applicable thereto.

The Main Questions at Issue.

The outstanding and vital questions involved in this case and clearly presented for decision by the allegations of the bill of complaint, and as we contend, clearly supported by the evidence, are as follows:

First. The existence of an actual conspiracy entered into by contract in 1898 between the United Mine Workers of America and the coal operating companies in what is known as the Central Competitive Field, composed of the States of Illinois, Indiana, Ohio and western Pennsylvania, which conspiracy has been carried out ever since in the manner and by the means shown by the allegations of the bill of complaint, and by the evidence, and which has resulted in the wrongs complained of in the bill of complaint. That conspiracy followed the rapid increase of shipments of coal from West Virginia into the markets theretofore supplied by coal from said Competitive Field. When, at the time the conspiracy was entered into, the United Mine Workers of America made certain demands upon the operators from the Competitive Field by way of increased wages, reduced working hours, etc., they were told by the operators that the increased shipments of coal from West Virginia and other unorganized fields to their market had made the competition so keen that it was impossible for the operators of the Central Competitive Field to grant the additional concessions demanded by the United Mine Workers of

America, unless the United Mine Workers of America would undertake and agree to organize and unionize the coal mines of West Virginia for the express purpose, and with the result, of increasing the cost of the production of coal in West Virginia. The agreement or conspiracy then entered into between the said parties was, in short, that said operators of said competitive field would grant the concessions demanded by the miners, and they in turn would undertake to organize and unionize the coal fields of West Virginia, and thereby to increase the cost of production of bituminous coal in West Virginia to such an extent as to destroy the competition of West Virginia bituminous coal in the market theretofore supplied by the operators from said competitive field.

Second. A conspiracy on the part of the membership of the United Mine Workers itself to monopolize all of the labor in and about all bituminous coal mines in the United States, which would result in giving to said United Mine Workers of America a monopoly in the production of bituminous coal in the United States, and enable it to fix the amount of production, the cost of production, and the selling price of such coal.

Third. A conspiracy between the United Mine Workers of America and the coal operators of the Central Competitive Field in the execution of what is known as the check-off contracts referred to in the bill of complaint and the evidence, whereby both parties to said contracts agree that no man shall work in and about any bituminous coal mine in the United States unless he is a member of the United Mine Workers of America, or contributes to its financial resources to the same extent that a member contributes, and whereby said coal operators agree that they will deduct from the wages of all members of said union, and from all men eligible to membership therein, such fees, dues and assessments as the offi-

cials of the United Mine Workers of America may direct them to collect, and will pay over all money so collected to the officials of said United Mine Workers of America.

Fourth. That the money collected by said United Mine Workers of America under and through the provisions of said check-off contracts, was intended by the parties to said conspiracy of 1898, and those who have since become parties thereto by acquiescence therein and by uniting in similar contracts, to be used, and that it has been used, by the United Mine Workers of America, with full knowledge on the part of said operators of said Central Competitive Field, to carry on the work of organizing and unionizing the bituminous coal mines of West Virginia, by any means whatsoever, including all forms of threats, intimidation, abuse, violence, destruction of property, murder and insurrection, and that it is now being used for that purpose and in continuing said methods of so doing.

A detailed history of the activities of the United Mine Workers of America will be found in the affidavit of D. C. Kennedy filed in this case.

Fifth. That in 1912, at its convention, the United Mine Workers of America departed from its original object and policy of a trade-union, and adopted the policy and declared its intention of ultimately taking over all the bituminous coal mines of the United States without any compensation whatever to their owners.

The Allegations of the Bill of Complaint and the Evidence Sustaining Them.

The original and amended bills of complaint clearly allege the fact of the conspiracy entered into in 1898, the reasons leading up to it, the objects to be attained,

and the terms of said conspiracy which were to be performed by the parties thereto, respectively, and the continuation since that time down to the present of the activities of said United Mine Workers of America to carry out the objects of said conspiracy by the methods above stated. The evidence in support of this allegation is taken from the official records of the conferences between the United Mine Workers of America and the coal operators of said Central Competitive Field, fully set out in the bill of complaint and proven by the affidavit of D. C. Kennedy to be authentic and correctly taken from said official records. (See particularly printed bill, bottom paragraph, pages 27, 26, 25 and top paragraph, pages 32, 33 and 19.) And in addition to that, by the affidavit of said D. C. Kennedy showing his own personal knowledge of said conspiracy during his connection with said United Mine Workers of America. This positive evidence is not contradicted, except by certain affidavits filed by some of the defendants, which are in the nature of expressions of opinion, rather than statements of fact, and the judge of the District Court had no difficulty in arriving at the conclusion and in deciding that the evidence on this point was overwhelming in favor of the truth of this allegation in the bill. This is in accordance with the actual adjudication of both the District and Circuit Court of Appeals in the case of the *United Mine Workers of America* v. *Coronado Coal Company* (169 C. C. A. 549), now pending in the Supreme Court of the United States, both of said courts having found as a matter of fact that said conspiracy existed. The court said:

> "Without setting out in full all the agreements between the miners and the union operators, and the resolutions of the miners at their conventions, for the purpose of carrying out the agreements, it clearly appears from these records that the United Mine Workers were pledged and determined to unionize all coal mines in the nonunion district, for

> the purpose of protecting the operators in the district in which the mines had been unionized in competitive markets in other states, and in order to appease these operators who complained at every joint conference that they were unable to comply with their agreements with the organization and compete with the independent operators unless they are unionized."

This quotation seems to be peculiarly applicable to the facts shown in this case, but we do not have to rely solely upon that case. The Supreme Court of the United States has actually determined, as a matter of fact, that the conspiracy alleged exists and that it was formed for the very purpose alleged in the bill of complaint.

In *Hitchman Coal and Coke Company* v. *Mitchell,* 245 U. S., at pages 240 to 243, the court says:

> "The unorganized condition of the mines in the Panhandle and some other districts was recognized as a serious interference with the purposes of the union in the Central Competitive Field, particularly as it tended to keep the cost of production low, and, through competition with coal produced in the organized field, rendered it more difficult for the operators there to maintain prices high enough to induce them to grant certain concessions demanded by the union. This was the subject of earnest and protracted discussion in the annual international convention of the U. M. W. A. held at Indianapolis, Indiana, in the month of January, 1907, at which all of the answering defendants were present as delegates and participated in the proceedings. * * * Two measures of relief were proposed; first, that steps be taken to re-establish the joint interstate conferences; second, the organization of hitherto unorganized fields, including the Panhandle district of West Virginia, under closed-shop agreements, with all men about the mines included in the membership of the United Mine Workers of America. In the course of the discussion the purpose of organizing West Virginia in the interest of the unionized mine workers in the Central Competitive Field, and the probability that it could be organized only by means

of strikes, were repeatedly declared and were disputed by nobody. All who spoke advocated strikes, differing only as to whether these should be nation-wide or sectional. Defendant Lewis, in his report, recommended an abandonment of the policy of sectional settlements which had been pursued in the previous year. This recommendation, interpreted as a criticism of the policy pursued under the leadership of President Mitchell in the settlement of the 1906 strike, was the subject of long and earnest debate, in the course of which Lewis said: 'When we organize West Virginia, when we organize the unorganized sections of Pennsylvania, we will organize them by a strike movement.' And again, towards the close of the debate: 'No one has made the statement that we can organize West Virginia without a strike.' Defendant Green took part, favoring the view of Mr. Lewis that strikes should be treated nationally instead of sectionally. In the course of his remarks he said: 'I say to you, gentlemen, one reason why I opposed the policy that was pursued last year was because over in Ohio we were peculiarly situated. We had West Virginia on the south and Pennsylvania on the east, and after four months of a strike in eastern Ohio we had reached the danger line. We felt keenly the competition from West Virginia, and during the suspension our miners in Ohio chafed under the object lesson they had. They saw West Virginia coal go by, trainload after trainload passing their doors, when they were on strike. This coal supplied the markets that they should have had. There is no disguising the fact, something must be done to remedy this condition. Year after year Ohio has had to go home and strike in some portion of the district to enforce the interstate agreement that was signed up here. * * * I confess here and now that the overwhelming sentiment in Ohio was that a settlement by sections would not correct the conditions, we complained of. Now, something must be done; it is absolutely necessary to protect us against the competition that comes from the unorganized fields east of us.' Mr. Mitchell opposed the view of defendant Lewis, reiterating an opinion, repeatedly expressed before, that West Virginia and the other unorganized fields, 'would not be thor-

oughly organized except as the result of a successful strike'; but declaring that 'they will not be organized at all, strike or no strike, unless we are able to support the men in those fields from the first day they lay down their tools. * * * Now, I believe, it is possible, indeed I believe it is probable, that in the not distant future we will be able to inaugurate a movement in West Virginia and the other unorganized fields that will involve them in a strike, and then we will expect you to furnish the sinews of war, as you have done in the past, to keep these men in idleness.'

The discussion continued during three days, and at the end of it, the report of a committee which expressed disagreement with the Vice President Lewis' opposition to sectional settlements and recomended 'a continuation in the future of the same wise, conservative businesslike policies' that had been pursued by President Mitchell, was adopted by a *viva voce* vote.

The plain effect of this action was to approve a policy which, as applied to the concrete case, meant that in order to relieve the union miners of Ohio, Indiana and Illinois from the competition of the cheaper product of the nonunion mines of West Virginia, the West Virginia mines should be 'organized' by means of strikes local to West Virginia, the strike benefits to be paid by assessments upon the union miners in the other states mentioned, while they remained at work.''

The above recited facts, found by the Supreme Court of the United States to exist, undoubtedly make this United Mine Workers of America *a conspiracy* in restraint of interstate trade and commerce, and we contend that it is no longer an open question as to whether or not *it is such a conspiracy,* because it has been judicially determined *that it is,* not only in the Hitchman case, but in the Coronada case hereinbefore cited. The existence of the conspiracy having been so found and so adjudicated, his Honor, Judge Anderson, of the District Court, could do nothing other than to follow these

decisions, especially that of the Supreme Court of the United States, and we further say, that, in the very nature of things, this court is likewise bound by this decision, and being bound, there is not, in our view of the case, anything this Honorable Court can do, in this phase of the case, except reaffirm or follow the decision in the Hitchman case. When this is done, the jurisdiction of the District Court—the right of that court to award the temporary injunction complained of,—cannot be denied or questioned; but even if this were not true and had the District Court considered this question as an original proposition, it could not, under the pleadings and evidence, have reached any other or different conclusion.

The original and amended bills of complaint allege that the so-called check-off contracts, as above described, were first entered into at the time of or immediately following the formation of said conspiracy in 1898, and have continued down to the present time, and the terms thereof are clearly proven by a copy of said check-off contract filed in the record as a part of the evidence. This check-off contract shows that it was the intention of the parties thereto to establish and maintain the closed union shop, and further, to compel all employees of the contracting companies who were members of the United Mine Workers of America, or eligible to membership therein, to pay to that organization whatever fees, dues or assessments might be required, and this payment was made certain by the obligation on the part of the contracting companies to collect said dues and assessments through and over their pay rolls by deducting the same from the wages due their employees. There is no denial of the existence of said check-off contracts, of their alleged and proven purport, or of the effect thereof. We contend that the said check-off provisions of the contracts en-

tered into between the operators of said Central Competitive Field and the United Mine Workers of America is unlawful in and of itself, and that it is violative of the rights of all persons desiring, and who have the right, to work or pursue their calling in the mining industry without, as a condition precedent, contributing to or becoming a member of said organization; and further, because it has for its object the establishment of a monopoly of mine labor.

The case of *Curran* v. *Galen,* which was a decision of the New York Court of Appeals, affirming a decision of the general term of the Supreme Court, and decided in 1897, was the earliest case on the question in a court of last resort, and was an action against members of a union for damages for conspiring together to injure plaintiff by taking away his means of earning a livelihood and preventing him from obtaining employment. The facts alleged were in substance as follows: Defendants, who were officers and members of a local branch of the Knights of Labor in Rochester, threatened plaintiff that if he refused to become a member, they and their union would obtain his discharge from the employment in which he was then, and would make it impossible for him to obtain any employment in Rochester or elsewhere. On plaintiff's refusal to join, defendants made complaint to his employers and forced them to discharge him from their employ and to prevent him from prosecuting his trade and earning a livelihood. The answer denied generally and specifically all the allegations of the complainant except those in respect of the organization and rules of the union, and as a second and separate answer set up the existence in Rochester of a brewers' association and an agreement between that association and the local branch of the Knights of Labor *that all employees of the brewery companies belonging to the Ale*

Brewers' Association "should be members of said local branch and that no employee should work for a longer period than four weeks without becoming a member." It was further alleged that plaintiff was retained in the employ of one of the associated brewery companies "for more than four weeks after he was notified of the provisions of said agreement requiring him to become a member of the local assembly"; that on plaintiff's refusal of defendant's request that he join, defendants notified plaintiff's employers that plaintiff, after repeated requests, "had refused for more than four weeks to become a member of the local assembly" and that "defendants did so solely in pursuance of said agreement and in accordance with the terms thereof and without intent or purpose to injure in any way." Plaintiff demurred to the separate answer on the ground that it was insufficient in law on the face thereof. The special and general term of the Supreme Court sustained the demurrer. On appeal to the Court of Appeals the judgment of the general term was affirmed. *It was said that the contract if valid would have presented a defense, but the view was unanimously held that the contract was against public policy and void.* The reasoning of the court in support of its holding was as follows:

> "Public policy and the interest of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workmen be to hamper or restrict that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their position and of deprivation of employment, then that purpose seems clearly unlawful, and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to

> deprive the public of the service of men in useful employment and capacities. It would, to use the language of Mr. Jusice Barrett, in *People* v. *Smith,* 5 N. Y. Cr. R., at page 513, 'impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages or the maintenance of the rate.' It was also said that 'while such contract was entered into for the purpose of avoiding disputes between the union and the association of employers that feature and such an intention could not legalize a plan of compelling workmen not in affiliation with the union to join it at the peril of being deprived of their employment and of the means of making a livelihood.' "
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> 152 N. Y. 33, 46 N. E. 297; 37 L. R. A. 802.

Berry v. *Donovan,* 188 Mass. 352, decided by the Supreme Court of Massachusetts, June 20, 1905, is the second case in point of time decided by a court of last resort, involving the validity of contracts of the character under consideration. The contract in this case was between a shoemakers' union and a manufacturer of shoes, and among other things provided that the manufacturer should not retain in his employ any shoemaker *who was objectionable to the union from any cause,* after receiving notice thereof from the union. Plaintiff having repeatedly refused to join the union, its representative under the provisions of the contract demanded and procured his discharge for this sole reason, and plaintiff brought suit to recover the resulting damages. The court said:

> "The case of *Curran* v. *Galen,* 152 N. Y. 33, in the decision of which the judges of the Court of Appeals were unanimous, fully covers the present case. The principle involved in each of the two cases is the same and the language of the opinion of that case in its application to this, is decisive."

In addition to the reasoning of *Curran* v. *Galen,* which the court adopted, it was said:

> "* * * that if such an object were treated as

legitimate and allowed to be pursued to its complete accomplishment, every employee would be forced into membership in a union and the unions by a combination of those in different trades and occupations would have complete and absolute control of all the industries of the country. Employers would be forced to yield to their demand or give up business. The attainment of such an object in the struggle with employers would not be competition but monopoly. A monopoly controlling anything which the world must have is fatal to prosperity and progress. In matters of this kind the law does not tolerate monopolies. Nor could interference to compel a workman to join a union be justified as legitimate competition between workmen. Inducing a workman to join a union has no tendency to aid in such competition. On the contrary, the object of organization of this kind is not to make competition of employees with one another more easy or successful. It is rather, by association, to prevent such competition, to bring all to equality, and to make them act together in a common interest."

It was also said that:

"* * * interference with one to compel him to join a union is not justifiable as competition between employer and employee in the attempt of each class to obtain as large a share as possible of the income from their combined efforts in the industrial field. It is no legal objection to action whose direct effect is helpful to one of the parties in the struggle that it is also directly detrimental to the other. But when action is directed against the other primarily for the purpose of doing him harm and thus compel him to yield to the demand of the actor, and this action does not directly affect the property, or business status of the actor, the case is different, even if the actor expects to derive a remote or indirect benefit from the act. The gain which a union may expect to derive from inducing others to join it, is not an improvement to be obtained directly in the conditions under which the men are working, but only added strength for such contest with employers as may arise in the future."

Again, said check-off provision is unlawful by reason of the object sought to be obtained by that means when it was first agreed to as a part of said conspiracy of 1898, because by that conspiracy it was made the means by which the operators of said Central Competitive Field contributed directly the money, "the sinews of war," to be used by the United Mine Workers of America, to carry out the objects of said conspiracy, namely, to restrain, hamper or destroy the interstate trade and commerce of the operators of the nonunion fields. Without the check-off, that is, without the money contributed, or at least collected, by the operators by that means, that conspiracy could never have accomplished its purpose, because experience had shown, and it was then admitted, that said United Mine Workers of America had not been able, nor has it since been able, to establish a closed union shop in any coal field without the aid of the check-off, because it is known that its members will not voluntarily pay dues or assessments. The check-off system has utterly destroyed a free-labor market in all organized districts where it is made a part of the contract between the coal operators and the said miners' organization, and it is the means by which the cost of labor in the mining industry of the United States has been artificially, arbitrarily and unreasonably increased, and, as above stated, it furnishes the money, and is the direct means, by which to enable said United Mine Workers of America to destroy the business, property and the interstate trade and commerce of the nonunion operators of the United States, as well as to destroy, or attempt to destroy, the right of nonunion men to follow their trade and calling in the mining industry.

There can be no doubt about the purposes of the check-off being understood and agreed to, not only by the officials of the United Mine Workers of America, but by the

operators who enter into contracts with that organization containing that provision. In the joint conference of 1902, between the United Mine Workers of America and the operators of said Central Competitive Field, referred to in the bill of complaint and in the affidavit of D. C. Kennedy, that purpose was fully discussed, and the operators were there told explicitly why the mine workers' representatives insisted that the check-off provision be made a part of all contracts. Reference is here made to the quotations from the proceedings of said meeting contained in the bill and in said affidavit of D. C. Kennedy to support this statement. It clearly appears that it was the intention to use this money to organize and unionize the mines of West Virginia for the express purpose of increasing the cost of production of coal in that state, which would lessen or destroy competition between that coal and the coal produced in said Central Competitive Field, so that the operators of said Central Competitive Field would be able to sell their coal, and thereby be further able to pay the increased demands made upon them by the United Mine Workers of America.

We here quote from the statements of mine officials as appears in the affidavit of D. C. Kennedy, in evidence in the case:

> "In an interstate convention of coal miners and operators held in Indianapolis from January 30 to February 8, 1902, Mr. Reese, who was an official of the United Mine Workers' organization and attending said interstate convention, said: 'The check-off system, in my opinion, ought not to require an argument. When the operators enter into a contract with the United Mine Workers of America, they do so believing that the officials of that organization will enforce the terms of that contract, not only on their own members, *but on every man employed in their mines;* not only on their own employees, *but on every one of our competitors in the market.* If that be true, and it surely is, haven't we the right to de-

mand that every employee at least be in our organization, *obligated to obey our mandates* in order that we may deliver the goods?'

Mr. T. L. Lewis, the vice president of the organization, and later its president, stated: 'In regard to the question of the check-off—why is it that the miners should put so much importance on this particular clause of our contract? I don't agree that it is absolutely necessary to have a check-off to have this joint movement, because our friends on the other side realize that a joint movement is to their advantage just as well as to ours. There is a double responsibility placed on the mine workers. We have to come in here, meet our employers and make a contract. We are in honor bound to compel our members to live up to the terms of that contract, and whenever an operator seeks to violate it, according to the construction put on it by the operators, we are also bound to make the operator live up to it. We not only have to discipline our own men, but we must discipline some operators sometimes. If this be true—and it cannot be successfully contradicted—then, as a part of this joint movement—I call it *joint business—they should concede the right to us to compel all of the men working in these mines covered by this joint agreement to contribute to this organization.* Why? Every man who is employed in the mines represented by the operators here is a party to this agreement; and if he is a party to this agreement, and we are expected to discipline, *they should indirectly help us. They should help us to discipline the men who do not want to be a part of this joint agreement only to be able to get any advance that we may be able to get.* There is another reason: If we are expected to move on and on, and perfect this movement and place every operator in this competitive field on a fair basis with every other operator, then we have got to have the sinews of war to do it. We have got to have the means to go into the unorganized field in order *to make the operators in those fields be placed on a relative competing basis with the operators of this joint movement.* If we want to get the entire country, so far as the mine industry is concerned, on that basis where we can meet one another and do business as two joint

partners, *then the inequalities that exist in the different places must be removed.* We don't ask our employers to furnish us money to go into those poorly organized districts and organize them. All we ask is their co-operation in getting the money from our own people, because we don't want to invade their business and take away from them any of the profits they get to organize those disorganized men. That would not be fair."

The effect of such a monopoly as that contemplated and demanded by the United Mine Workers of America to increase the cost of coal to the public and to control all the industries of the country using coal as a fuel, is apparent at a glance. It is these baleful effects of monopolies generally that have made them abhorrent to the law ever since our country has existed. On this subject we quote the following authorities:

"A practical monopoly may exist without the aid of a legislative grant, as it may result from the *control of trade or industry brought about by means of contracts and combinations between competitors.* Like the ancient monopolies, the practical monopoly is under the ban of the law because it tends to prevent competition and enhance the price or deteriorate the quality of the commodity or service to which it relates. Accordingly, it is a principal of universal application that every agreement, combination or association, the purpose of which is to create a virtual monopoly *in the production,* manufacture or sale *of a useful commodity, either generally or in a given locality, making it possible to control the output or prices, or to suppress competition,* is contrary to public policy and hence unlawful, both at common law and under the anti-trust statutes, and regardless of its form, methods or incidents."

Standard Oil Co. v. *United States,* 221 U. S. 1.

"If the contract or combination actually results in the effective creation of a mutual monopoly, whether local or general, *its illegality is beyond question,* particularly if it *in fact fixes and increases prices,* or if one of its results is to reduce the *avail-*

able supply of the commodity below the needs of the locality affected, thus operating not only to enable the combination *arbitrarily to maintain prices, but directly and necessarily to create a partial famine by which it can profit at will.* If the object or tendency of the agreement or combination is to produce a monopoly and enable the parties to control prices of a useful commodity, it is none the less illegal because the prices actually fixed at the time may be entirely reasonable in themselves, or that it has not attempted to control the output of the few independent concerns left, or the prices at which they sell their product." (Same case.)

"It is a criminal offense for a person to obtain a monopoly of a prime necessity life. *It is no answer to say that the article may have been monopolized* for a benevolent purpose."

Continental Wall Paper Co. v. *Voight,* 48 Fed. 939; 182 Ill. 551; 77 Mich. 632; 187 Mo. 244; 115 Ga. 429; see Sec. 18, Ruling Case Law, Vol. 19, pp. 31 and 32, and numerous cases cited to support the text.

Also, see,

Addyston Pipe, etc. Co. v. *United States,* 175 U. S. 211.

Dr. Miles Med. Co. v. *John D. Parke Co.* 220 U. S. 373.

U. S. v. *Tobacco Co.* 221 U. S. 106.

If there is monopoly, *there is restraint of trade,* because

"* * * Whatever restrains trade prevents competition and *whatever prevents competition in trade necessarily restrains trade;* and the word 'monopoly' conveys the same idea of excluding competition."

138 Ky. 530; 107 Minn. 506.

"Every contract, combination or arrangement whose direct purpose, probable effect or necessary tend-

ency is to stifle or unduly to restrict competition is unlawful, at common law and by statute."

Addyston Pipe, etc. Co. v. *United States,* 175 U. S. 211.

"The common law rules against restraint of trade are based on the theory that competition is the life of trade, and advances the public welfare, and while of course the public cannot compel competition, the law in the interests of public policy, can and will remove unreasonable restraints on competition."

Pocahontas Coal Co. v. *Powhatan Coal Co.* 60 W. Va. 508

"The purpose in all the prohibitions against monopolies and restraint of trade was to preserve the freedom of trade by means of free competition between the traders themselves, in order that the public should not be required to pay exorbitant prices for articles of common use and necessity. *It was to prevent any man or set of men from possessing the power arbitrarily to determine the price at which an article of common use shall be sold.* The courts are practically unanimous in holding unlawful all agreements and combinations in whatever form or name, by and between independent and unconnected manufacturers and dealers for the purpose of directly controlling the prices of their commodities, either by restricting or monopolizing their supply, or by elimination of production, or by restrictions on sales or distribution, or by express agreements to maintain specified prices."

U. S. v. *Trans-Missouri Freight Asso.* 166 U. S. 290.

The combination and conspiracy herein referred to was intended to accomplish several things:

First, to destroy the competition of mine labor in the Central Competitive Field;

Second, to destroy the competition of operators in the Central Competitive Field among themselves;

Third, to increase the cost of production of coal in West Virginia and other unorganized fields by unionizing their mines, and demanding concessions which would have that effect, and thereby,

Fourth, destroy the competition of their coal with coal produced in said Central Competitive Field in the markets common to both, and thus restraining interstate trade and commerce.

Fifth, to create a monopoly of mine labor in and about all the bituminous coal mines in the United States.

It would be hard to conceive a clearer, more direct and more effective conspiracy in restraint of interstate trade and commerce.

As additional authorities pertinent to such contracts, we cite:

Christensen v. *People,* 114 Ill. App. 40.
O'Brien v. *People,* 206 Ill. 354.
Christensen v. *Kellogg Switchboard Co.* 110 Ill. App. 61.

The right of the individual citizen to work without, as a condition precedent, becoming a member of a labor union, has received the attention of the courts in numberless cases, and so far as we are advised, has always been sustained. It has always been held that no man could be forced to join a union, and one reason given has been that the law does not tolerate monopolies.

The original and amended bills of complaint allege that it is the intention and object of the United Mine Workers of America to procure as members all men working in and about the bituminous coal mines of the United States, and to make it impossible for anyone else to engage in the business of mining coal. This allegation is proven by the constitution of said United Mine Workers of America, filed as a part of the record in this

case, and there is no denial of this object of said organization.

The original and amended bills of complaint allege that the money collected by the United Mine Workers of America under the said check-off system was intended to be used and has since that time been used, and is now being used, for the purpose of unionizing and organizing the nonunion bituminous coal mines in West Virginia and Pike County, Kentucky, by the means above stated. The evidence in support of this allegation is contained in the many affidavits filed by the plaintiff and which cover the very broad field of activities of that organization in the West Virginia and Kentucky coal fields, and they establish the fact that this money has been used, and is being used, not only to unionize and organize these mines against the will of both the owners and the miners at said mines, but also to unionize and organize said mines by the fomenting and inciting of lawlessness in the form of threats, intimidation, abuse, destruction of property, murder and insurrection, and particularly in this connection, during the present year, by the purchase of arms and supplies for armies of men engaged in these lawless acts, and to maintain them while carrying this lawlessness into execution. That said lawlessness and lawless acts exist is not denied, and the alleged denials that any money was furnished by the United Mine Workers of America for the purposes aforesaid, are mere *ex parte* statements on the part of certain general officials of said United Mine Workers of America, which from the very nature of the case, as well as from the language used, cannot be claimed to mean anything more than a statement by said officials that they personally had not authorized any such expenditure of said money and knew nothing about any such expenditure, while the affidavits in support of these

charges and filed by the plaintiff are specific as to many instances of this kind of expenditure of money, including the purchase of arms and the maintenance of armed tent colonies, by men who had personal knowledge of the things stated in their affidavits. The District Court on this comparison of evidence had no difficulty in reaching the conclusion that the affidavits offered by the defense had failed to overcome or even seriously affect the direct testimony offered by the plaintiff.

What became of the $2,567,000 admitted by C. F. Keeney to have been expended in these fields, from the beginning of these troubles down to July 14, 1921?

The explanation is found in the affidavit of A. E. Hester, filed in this case, who was only one of the many active and authorized agents of this organization, from which we quote:

> "Charles H. Workman who was a member of the executive board of District 17 and his brother John L. Workman came to me and told me that some arrangement had to be made to arm the miners and that a way would have to be found to get the money necessary to purchase the guns and ammunition, that it would not do to buy guns and ammunition direct with checks drawn on the funds of the United Mine Workers Organization because all expenditures had to be itemized and the purchase of guns and ammunition in this way would afford evidence of such purchases and after thinking about the matter for some time they advised the issuance of 'script' for 'relief' to persons who were not to receive the same and that affiant should endorse on the back of such 'script' the name of the payee or the supposed payee and to write on the face of such 'script' the name of the merchant who cashed the same; that affiant did so and all such 'script' so issued by the 'President and Secretary-Treasurer of Lick Creek tent colonies was endorsed as above stated by affiant and countersigned by J. L. Workman and by this means approximately thirty-five

hundred dollars in cash was received for the purpose of purchasing guns and ammunition; that at the time the Lick Creek local was securing money for the purpose of buying guns and ammunition affiant is advised that others were, at the request of Charles Workman and John L. Workman, doing the same thing and getting money in the same way for the purpose of buying guns and ammunition; that after affiant began to secure money in the way above mentioned and during or about the time he was having the script cashed by local merchants, J. L. Workman advised affiant that he would send miners to him for the purpose of securing money with which to buy guns and ammunition; that the said Workman sent a great number of miners to affiant for money for this purpose and he gave each and every one so sent to him by the said Workman sufficient money to purchase a high-power gun and ammunition for it. At the request of Charles H. Workman and John L. Workman affiant went to the Roach Hardware Company at Williamson and had this company order as many as a dozen high-power rifles a week for the miners; that in this way a great number of high-power rifles were purchased through the Roach Hardware Company. On several occasions affiant went and inspected the guns so purchased by the Roach Hardware Company at his request and all of the guns so purchased were 30-30 high-power Winchesters and another make of high-power gun, the name of which affiant does not now recall.

Affiant personally knows of as many as seven hundred high-power rifles being furnished to the union miners in Mingo County; that at the request of John L. Workman affiant went to Ashland and Louisa, Kentucky, and bought high-power rifles and ammunition buying all I could find in Ashland and Louisa and took them to Mingo County and turned them over to a negro by the name of Paige who was an organizer for the United Mine Workers' organization. John L. Workman told affiant that he sent Paige to Fairmont, West Virginia, during the time David Robb, who was a representative of the United Mine Workers Organization, was in charge of the

affairs of the United Mine Workers in Mingo County to get guns and ammunition and that Paige had brought such guns and ammunition into Mingo County. He further advised affiant to inform the miners in Williamson Hollow after these guns had been secured that they would not be delivered to them until after the term of court then in session had adjourned.

Affiant further states that in addition to the purchase of guns and ammunition in Kentucky at the request of the officials of the United Mine Workers Organization, he, at various other times, purchased ammunition from local merchants in Mingo County; that after these guns had been purchased and turned over to the striking miners in Mingo County affiant says that every official of the United Mine Workers Organization in Mingo County, that he came in contact with, and believes he met them all, advised the miners to shoot up the mining camps or towns where nonunion men were working in order to stop the operation of such mines and in several instances where mines were about to resume operations the shooting up of such mines occurred; that in addition to the advising of the shooting up of these mines, affiant has heard the officials of the Mine Organization repeatedly advise and request the striking miners to talk to the transportation men who were brought in to work for the coal companies and if they would not allow them to talk to them to 'knock hell out of them.'

Affiant further states that while he was in Mingo County a number of the mines were shot up such as Mohawk, McCarr, Lynn and other places and that after these shootings which were from the hillsides and done by the striking miners, affiant has heard Charles Workman, J. L. Workman and David Robb commend and congratulate the miners for their good work in shooting up the mines and has heard them say that they were only sorry that the miners had not made a better job of it. After these shootings affiant has repeatedly seen David Robb, Representative of the International Organization, jump in the air with joy, and when these shootings were going on and when being told about it has

heard the same David Robb exclaim, 'By God that is the way to do it!' Affiant has further heard him say that if the men had any nerve they would stop the nonunion men from working as they knew how to do it, by the use of their guns.

Affiant further says he has heard these officials say that the Members of the State Police Forces were nothing but thugs and that they all ought to be killed; that after these statements had been made to the striking miners by the officials of the organization in Mingo County a number of the State Police Force were killed and for the killing of such members of the Police Force the striking Miners were commended by the Mine Workers Officials."

UNITED MINE WORKERS ABANDON THE TRADE-UNION MOVEMENT IN THE YEAR 1912.

The original and amended bills of complaint allege that it is the object of the United Mine Workers of America to take over all bituminous coal mines in the United States without compensation to the owners. This allegation is proven by the change made in its constitution in 1912, wherein the declaration in its original constitution stating that the miners were entitled to "an equitable share of the fruits of their labor" was stricken out, and for the words quoted, there were inserted the words, "the full social value of their product"; and by the discussion and action at the time of said change in said preamble, taken from the official records of that meeting, and proven by the affidavit of D. C. Kennedy, it appears that this change was intended to mean, as stated in the language of Delegate Finney, "the full value of our toil would mean to my mind that the man who employs us will receive no compensation for the money he has invested"; or, in the language of Delegate Williams, who offered the amendment, "I would say, as one of the working class, that I would not be

willing to concede that any parasite has any right to any share of it. The working class is entitled to the full social value of its product." (Vol. 1, Record of Miners' Convention, 1912, page 432.)

This marks the definite and complete abandonment by this organization of the trade-union movement, the positive denial by it of all vested property rights and the adoption of a definite policy and purpose to deprive property holders of their property without due process of law. In pursuance of that policy, at every convention since then, the miners have made and obtained increasing demands, so that to-day, in the organized fields of West Virginia, the cost of production of coal is greater than the selling price, and two-thirds of the one hundred and nineteen mines in the New River district, and about fifty per cent of the one hundred and seventy-five mines in the Kanawha district, are now shut down, and the remainder are running on short time.

MAINTENANCE OF ARMED TENT COLONIES AS HEADQUARTERS OF UNITED MINE WORKERS IN MINGO COUNTY NOTWITHSTANDING THERE IS NO STRIKE.

The original and amended bills allege that there are now being maintained in the Williamson coal field, where its mines are located, certain tent colonies wherein are located a number of alleged "strikers" and the families of some of them, one of which tent colonies is located close to the mine of the plaintiff; that these tent colonies are armed camps maintained and supported by money furnished by the United Mine Workers of America, and that they constitute a constant menace to the safety and welfare of the plaintiff's property and employees, and of the property and employees of the other companies in said coal field belonging to its class, and on behalf of

whom this suit is brought, notwithstanding there is now no strike. The evidence on this subject is found in the affidavits of L. E. Armentrout, M. S. Lambert, C. A. Jones, Harry Olmsted, and others. There is no denial whatever of the existence of these tent colonies, and the only alleged denial in this connection is contained in the *ex parte* statements of certain national officers of this organization to the effect that said organization, so far as they know and believe, has furnished no money to maintain armed camps, but they admit furnishing money to maintain the men in the camps admitted to exist, and the dependents of such men. The District Court had no difficulty in reaching the conclusion that this attempted explanation of the facts admitted to exist was unsatisfactory.

The Right to Operate Nonunion Mines.

The original and amended bills allege that the plaintiff and all of the other coal operating companies in said Williamson coal field, on whose behalf this suit is brought, have always individually operated their mines as nonunion, and desire to continue to do so, and that they have a right, under the law, as determined by the Supreme Court of the United States, to so operate their mines. This allegation is supported by the evidence of L. E. Armentrout, and others, and there is no denial whatever.

The original and amended bills also allege that the plaintiff's mine and all the other mines in said Williamson district belonging to its class, and on behalf of whom this suit is brought, have now in their employ all the miners they need or can use in the conduct of their business; that these miners are satisfied with wages, housing, working conditions, etc., and have no complaint against

their employers on any account, but that on the contrary, the relations existing between said companies and their employees are entirely satisfactory and agreeable to both parties. This allegation is also established by the affidavits of Harry Olmsted, and others, and there is no denial of its truth.

Plaintiffs Engaged In Interstate Trade and Commerce.

The original and amended bills allege that the plaintiff and the other coal operating companies in said Williamson coal field belonging to its class, and on behalf of whom this suit is brought, are actually engaged in interstate trade and commerce; that is, that their coal is mined to be shipped and is shipped in interstate commerce, and the coal of the plaintiff company is taken from the mines on the Kentucky side of Tug River, taken across said Tug River to the West Virginia side thereof, where are located its tipple, miners' houses, office and other buildings, and there loaded into cars of the Norfolk & Western Railway Company, and from thence transported out of the State of West Virginia, and principally into the territory where it comes in competition with the coal produced in said Central Competitive Field. This allegation is proven by affidavits which are in no way disputed; and it further appears from the record, as shown by the statements and admissions of officials of the said United Mine Workers of America, that by far the larger part, probably ninety per cent, of the coal produced in West Virginia, is transported out of that state in interstate commerce.

RESTRAINT OF INTERSTATE TRADE AND COMMERCE.

It is the contention of the plaintiff, as set out in the original and amended bills, that the said conspiracy of 1898, and the acts and things done in carrying it out since then, the check-off contract in itself, the object and aim of the United Mine Workers of America to monopolize mine labor at all the bituminous mines in the United States, and to prevent anyone not a member from engaging in the work of mining coal, each and all were intended to operate, and do operate, in restraint of interstate commerce and trade, and that they were specifically intended to operate and have operated to restrain the interstate trade and commerce of the plaintiff and the other coal operators in said Williamson field, and to prevent them from shipping their coal in interstate trade and commerce. Under the facts above stated and shown by the record in this case, certain questions of law arise, and whether or not these facts actually constitute restraint upon interstate trade and commerce, and particularly restraint upon the interstate trade and commerce of the plaintiff and those belonging to its class, must be determined in the light of the law laid down in the statutes of the United States, particularly the Sherman Anti-trust Law, and the Clayton Act, as construed by the courts, and it is respectfully submitted that the following authorities, being only a few of the many that might be pertinently cited, clearly establish the claim of the plaintiff in this connection.

Dealing first with the conspiracy of 1898, we give the definition of conspiracy found in the case of *Duplex Printing Press Company* v. *Deering,* decided by the Supreme Court of the United States, January 3, 1921:

> "A conspiracy is a combination of two or more persons by concerted action to accomplish a crime

> or unlawful purpose, or to accomplish some purpose not itself criminal or unlawful, by criminal or unlawful means. If the purpose be unlawful, it may not be carried out, even by means that otherwise would be legal; and although the purpose be lawful, it may not be carried out by criminal or unlawful means."
>
> U. S. Supreme Court Reporter, February 1, 1921, page 179, 254 U. S. 443.

The object of that conspiracy specifically stated by the parties, as before stated, was to destroy the competition of West Virginia coal shipped in interstate commerce in the markets theretofore supplied by the operator parties to that conspiracy, and to destroy competition is, under all the authorities so far as we know, unlawful. That being true, said conspiracy comes strictly within the definition quoted. It follows, that if that conspiracy is unlawful, then according to said definition, no act however lawful in itself, done in pursuance of said conspiracy, is lawful. The same case also defines what are shipments in interstate commerce, and lays down the proposition that any interference with such shipments is unlawful. It would seem to follow that as, under the admitted facts, the coal from plaintiff's mine, and from the mines of the other operators in the Williamson field, is shipped from West Virginia into other states where it comes in competition with the coal from the Central Competitive Field, there can be no doubt that any interference with said shipments, or with said competition, is unlawful; therefore, the conspiracy to do so entered into in 1898, and since persisted in, was and is unlawful, and all efforts and means, as shown by the evidence to have been made to carry out that conspiracy, no matter what their character standing alone may be, are unlawful.

Assuming that the foregoing statement of law is cor-

rect, and it is believed it cannot be questioned, the next questions arising are as to the rights of the plaintiff in the premises, and its legal methods of enforcing said rights, whether they are rights violated in pursuance of said conspiracy establishing the check-off contract, or by the unlawful objects, aims and activities of the United Mine Workers of America.

It is the contention of the plaintiff that it has the right to maintain this suit, and is entitled to the relief prayed for, under the facts alleged and proven and under the law.

In the case of *Duplex Printing Press Company* v. *Deering, supra,* the court said:

> "* * * Private parties are given, by the Clayton Act of October 15, 1914, Sec. 16, a right to relief by injunction in any court of the United States against threatened loss or damage by a violation of the Federal Anti-trust Laws, under the conditions and principles regulating the granting of such relief by courts of equity."

Again, in the same case, the court said:

> "The Clayton Act, in Sec. 1. includes the Sherman Act in a definition of 'anti-trust laws,' and in Sec. 16 (38 Stat. at L. 737, Chap. 323, Comp. Stat. Sec. 8835c, 9 Fed. Stat. Anno. 2d ed. p. 745), gives to private parties a right to relief by injunction in any court of the United States against threatened loss or damage by a violation of the Anti-trust Laws, under the conditions and principles regulating the granting of such relief by courts of equity. Evidently this provision was intended to supplement the Sherman Act, under which some of the Federal Courts had held, as this court afterwards held in *Paine Lumber Co.* v. *Neal,* 244 U. S. 459, 471, 61 L. ed. 1256, 1264, 37 Sup. Ct. Rep. 718, that a private party could not maintain a suit for injunction.
>
> That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference; that unrestrained

> access to the channels of interstate commerce is necessary for the successful conduct of the business; that a widespread combination exists to which defendants and the associations represented by them are parties, to hinder and obstruct complainant's interstate trade and commerce by the means that have been indicated, and that, as a result of it, complainant has sustained substantial damage to its interstate trade, and is threatened with further and irreparable loss and damage in the future—is proved by clear and undisputed evidence. Hence, the right to an injunction is clear if the threatened loss is due to a violation of the Sherman Act, as amended by the Clayton Act. * * *"

Further on in the same opinion, the court said:

> "It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute."

And again in the same case, the court said:

> "But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects, and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade, as defined by the Anti-Trust Laws."

As to what combinations, agreements, conspiracies and acts constitute restraint upon interstate commerce, and are therefore unlawful and may be enjoined, see

Lowe v. *Lawler,* 208 U. S. 274 (52 Law Ed. 488),

also,

Standard Oil Co. of N. J. v. *U. S.* 221 U. S. p. 1 (55 Law Ed. p. 619).

This court, in a criminal case, has said:

> "An agreement between employees and their unionized employees, in order to avoid the competition of nonunion shops situate in other states, was a violation of the Sherman Anti-trust Act—being an agreement in restraint of interstate trade by eliminating the competition of the foreign manufacturers."
>
> *Boyle* v. *U. S.* 170 C. C. A. 603.

It is not believed necessary or proper to cumber this brief with further citations of authorities to establish the fact that restraint of interstate trade and commerce is prohibited by the Anti-trust Laws, and any combination, agreement, conspiracy, act or acts done for that purpose or having that effect, may be enjoined.

That labor unions are included in this inhibition, and that they may be enjoined under the same conditions and circumstances and to the same effect that anyone else may be enjoined, is clearly shown by the cases of *Lowe* v. *Lawler,* 208 U. S. 274 (52 Law. Ed. 503); *Duplex Co.* v. *Deering,* 254 U. S. 443, above cited, and no other authorities is deemed necessary.

The Right to Operate Nonunion Mines.

In the exercise of his constitutional rights, anyone may employ whom he pleases, when and where he pleases, and upon such terms as may be agreed upon, and likewise (in the absence of a contract) he may discharge an employee for any reason whatsoever, or without any reason other than mere caprice, and especially can he discharge an employee for no other reason than that he belongs to a labor organization. The employee may refuse to work or take employment for any reason, or with-

out reason, and especially may he stop work or strike because a nonunion man is employed about the plant.

Adair v. *U. S.* 208 U. S. 161.
Coppage v. *Kansas,* 236 U. S. 1.
Hitchman Coal Co. v. *Mitchell,* 245 U. S. 251.

In the Hitchman Coal Company case, the court said:

> "That the plaintiff was acting within its lawful right in employing its men only upon terms of continuing nonmembership in the United Mine Workers is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to 'run union' were a sufficient explanation of its resolve to run 'nonunion,' if any were needed. But neither explanation or justification is needed. Whatever may be the advantages of 'collective bargaining,' it is not bargaining at all, in any just sense, *unless it is voluntary on both sides.* The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union, and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make nonmembership in a union a condition of employment, as the workingman is free to join the union, and that *this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power.*"

Again, in the same case, the court said:

> "An employer who has made nonmembership in a labor union a condition of obtaining or continuing employment, is entitled to be protected in the enjoyment of the resulting status, although the employment is terminable by either party at any time."

(Italics here and in other quotations are ours.)

The courts have also dealt with the efforts frequently made by third parties to interfere with this right. An instance is found in the case of *Duplex Printing Press Company* v. *Deering, supra.* There, the court, at page 177, said:

> "The International Association (workers) also is a party, having the object of *compelling complainant* to *unionize its factories and enforce the 'closed shop,'* the eight-hour day, and the union scale of wages, by *means* of *interfering with and restraining its interstate trade in the products of its factory.*"

And, again, on page 178, said:

> "Defendants conduct consisted essentially of *efforts to render it impossible for complainant to carry on any commerce* in printing presses between Michigan and New York; and that defendants had agreed to do and were endeavoring to accomplish the very thing pronounced unlawful by this court in *Lowe* v. *Lawler,* 208 U. S. 274; 235 U. S. 522."

As hereinbefore stated, the mines of the plaintiff are now running with all the men needed, as are the mines of all the other producing companies in the Williamson field. In this connection we cite the case of *Quinlivan et al.* v. *Dial-Overland Co.,* decided July 19, 1921, reported in advance sheets of Federal Reporter, September 29, 1921, where, at page 56, the court said:

> "The allegations of the original bill (as well as cross bills) as to the irresponsibility of appellants sufficiently answer the objection of adequate remedy at law. The allegations respecting the damage which plaintiff would suffer by continuance of the strike indicate *prima facie* that the jurisdictional amount is involved. The objection that peaceful persuasion and peaceful picketing were improperly forbidden by the final order is, to our minds, sufficiently answered by the considerations announced by the trial judge, viz., that there was no longer a controversy between the Overland Company and its employees respecting terms and conditions of em-

ployment; that the plant was then running at full capacity and full production; that the strike had then long since ceased to exist, except for certain annoying manifestations on the part of a comparatively few people; and that none of those so engaged could longer be regarded as employees. We cannot say that the order complained of violates section 6 of the Clayton Act."

In *Montgomery* v. *Pacific Electric Ry. Co.* 169 C. C. A. 398, the Circuit Court of Appeals for the Ninth Circuit has approved the finding of Judge Killits in the case of *Stephens* v. *Ohio State Telephone Co.* 240 Fed. 759, 773, 774, wherein that learned judge says:

"Again, every man has the right to the pursuit of his lawful business or employment undisturbed, and any act performed with intent to disturb the full and unrestrained exercise of his faculties and wishes in such employment is plainly unlawful.

Again, he has the right of privacy and freedom from molestation of private persons, hostile or otherwise, at his home, at his lodging, at his place of work; he has the right to walk the streets without annoyance from the unwelcome attentions of others, so long as he is conducting himself in a lawful manner. * * *

Again, the right of one man to work is as much entitled to respect as the right of another to cease work or to strike.

Again, the right of an employer to engage whomsoever he chooses is as strong as the right of an employee to refuse to work. * * *

It is a safe and proper generalization that any action having in it the element of intimidation, or coercion, or abuse, physical or verbal, or of invasion of rights of privacy, when not performed under sanctions of law by those lawfully empowered to enforce the law, is unlawful; every act or speech, of gesture, or of conduct, which 'any fair-minded man' may reasonably judge to be intended to convey insult, threat or annoyance to another, or to work assault or abuse upon him, is unlawful. Not a syllable of the Clayton Act, or of any other law, whether

of legislation of congress or of the common law, sanctions any of the incidents we have referred to. They are to be condemned as legally inexcusable; such must be the verdict of 'any fair-minded man'; nothing can be said in justification.

These propositions are so elemental, that but for the confusion which exists in many minds that a labor controversy affects the commonest rules of life, it would seem a waste of time to state them. The existence of a strike does not make that lawful which would otherwise be unlawful. These personal rights to which we have alluded are, in each instance, precisely those which the striker himself would insist upon were conditions reversed. They are also so plain, and the answers to the questions involving them so certain, that one called upon to enforce the law, if he have but ordinary intelligence, will plainly fail to do his duty when in his presence a fellow citizen suffers an invasion of his rights of this character.''

THE DECISION OF THE COURT OF THE DISTRICT OF INDIANA.

The decision of the District Court seems to us to be not only consonant with the evidence in this case, but unavoidable. The evidence, all in accord with the allegations of the original and amended bills, seems to establish clearly the existence of the conspiracy having for its object the establishment of a monopoly of mine labor, the increase in the cost of production of West Virginia coal, to the end and for the purpose of destroying competition of West Virginia coal with the coals produced in the Central Competitive Field, and thereby restraining the interstate trade and commerce of the plaintiff and the other coal companies belonging to its class and doing business in the Williamson coal field; that the check-off provisions in the contracts between the United Mine Workers of America and the operators of the Central Competitive Field are unlawful, not only because

they are a part of the said conspiracy to restrain interstate commerce and trade, but also because they in and of themselves are intended to establish a monopoly of mine labor, by excluding from the industry of mining coal, all men who do not belong to the United Mine Workers of America or contribute to it as its members contribute, and that the United Mine Workers of America is in itself *per se* an unlawful organization, because it seeks to monopolize all mine labor, and further seeks to deprive all mine owners of their property without consideration or due process of law.

There is one other matter that we desire to refer to, while the same has not been presented in the assignment of errors by counsel representing the appellants; yet, judging from the matter contained in the telegrams of Jno. L. Lewis, president U. M. W. of A. to the various districts of that organization, we are inclined to believe that it will be contended that the last contract entered into between the operators of the Central Competitive Field and the officials of the United Mine Workers of America was, in fact, made by the Government through the Bituminous Coal Commission, Mr. Lewis says:

> "It is, therefore, obvious that said joint agreement honorably entered into and executed in due from under the direction of the Government of the United States, cannot be modified or changed in any part of its provisions until the date of its expiration, March 31, 1922. Any abrogation or setting aside of any part or section of this agreement, including the section providing for the checking off of dues and assessments, cannot be regarded as other than a violation of the agreement and should be treated accordingly by the district officers and local unions within your jurisdiction."

We reply to this by saying that the Government, through the Bituminous Coal Commission, had nothing to do with, nor was it responsible for, the check-off pro-

vision being written into the contracts made between the operators and the miners' officials. While the operators requested the Bituminous Coal Commission to abolish the check-off, the Commission did not act upon this request, except to advise that a Commission "be selected by the Scale Committee of miners and operators in the Central Competitive Field, respectively, which shall study the differentials," etc. "As well as the check-off system of collecting dues for the United Mine Workers of America, the award of said Commission to become part of the wage agreements in the districts affected." "The Commission shall consider: '(e) The discontinuance of the check-off system of collecting dues for the United Mine Workers of America.' "

This Commission was not selected and of course, no action whatever was taken in reference to the check-off as suggested by the Bituminous Coal Commission. The officials of the miners at that time took the position that the check-off proposition was not involved in the wage dispute and that the Commission had no authority to deal with it. From an editorial appearing in the official organ of the United Mine Workers, the United Mine Workers Jornal, under date of April 1, 1920, we quote the following:

> "The miners understood that the Bituminous Coal Commission was to determine the issues *raised by the demands of the miners as they were formulated at the Cleveland Convention and presented to the operators at Buffalo, together with the reply of the operators to these demands. There was nothing in either the demands or the reply that mentioned the check-off or the creation of boards or commissions. Therefore, these subjects were not involved in the case nor were they before the Commission until the Commission itself took them up.* These two features of the majority report, therefore, were a source of disappointment to the miners."

It will thus be seen that the Bituminous Coal Commission took no action on the check-off. Its award concerning "wages and hours of employment" was written into the interstate and local contracts in full, but the check-off provisions in those contracts were entirely separate and distinct therefrom and were inserted by agreement between the operators and the officials of the United Mine Workers of America in the Central Competitive Field just as they had been doing since 1898.

We recognize the importance of this case and the far-reaching effects of the granting of the relief prayed for in the bill of complaint. Immediately upon the granting of the temporary injunction by the District Court, John L. Lewis, president of the United Mine Workers of America, according to the press reports, took issue with the judgment of the court and sent out telegrams to the district organizations to the effect that an observance of the injunction would result in the violation of valid contracts. The maintenance of the supremacy of the courts is of far more importance than the personal interests of any litigant. United States soldiers are still on guard in West Virginia, martial law still remains in force, and armed tent colonies are still maintained in Mingo County. The threat and danger of violence constantly menace this plaintiff and the other coal companies of its class, and yet the injunction of the United States Court stopping the payment, through the check-off, by the operators to the officials of the United Mine Workers of America of the money, "the sinews of war," by which the lawlessness complained of is maintained, is belittled and practically disregarded. Strikes occur as a "protest"—a protest against what? A protest against "the law of the land," nothing more nor less! It would seem that no remedy for such a situation could be too quick or too severe.

For these reasons, it is respectfully submitted that the temporary injunction should be reinstated, in full force and effect as awarded, and that this case should be remanded to the District Court of Indiana to be further proceeded with according to law.

Respectfully submitted,

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