

icized as an unreasonable classification and if re-enacted will probably raise a constitutional question. See 31 Ill. L. Rev. 267,268 (1936). A classification excluding only couples with dependent children from the operation of the divorce provisions would be more reasonable since the remarriage made possible by the Act might impair the ability of a parent to support the children of his former marriage. Moreover the scheme envisaged by the old act is unnecessarily dilatory and cumbersome because a two year delay and two distinct judicial proceedings are necessary for absolute divorce. The policy against separate maintenance would receive a more logical expression by a complete abolition of separate maintenance and a provision making existing grounds for separate maintenance grounds for divorce. Although it might be suggested that the two year delay would promote reconciliation, experience with interlocutory decrees does not support this suggestion. See 2 Vernier, American Family Laws 152 (1932). The delay, however, may be justified as a prophylactic against hasty divorces by couples who may be able to adjust their marital difficulties.

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Labor Law—Strikes—Ineffectiveness of a Strike as Grounds for an Injunction—[Massachusetts].—The Park Corporation, an operator of a theater in Boston, made an agreement with its employees providing for minimum wages and a closed shop. Upon the employer's violation of the agreement by reducing wages, the employees struck. The union maintained pickets who verbally informed passers-by that the corporation did not employ union labor. The corporation hired non-union men and resumed normal operations. The picketing was suspended for a time, but upon its resumption the plaintiff, subsidiary of and successor to the Park Corporation, sought an injunction against further picketing. From a decree enjoining the strike the defendants, officers of the union, appeal. *Held*, affirmed. Picketing, although lawful *ab initio*, will be enjoined when the employer has resumed normal operations and the strikers no longer have a genuine hope of success. *Hertzig v. Gibbs*, 3 N.E. (2d) 831 (Mass. 1936).

The decision is in harmony with results reached by the application of the flexible Massachusetts rule that union aggression will be enjoined unless it has a direct relationship to the welfare of the complaining workers. See Holmes, J., dissenting in *Vegeahn v. Guntner*, 167 Mass. 92, 105, 44 N.E. 1077, 1080 (1896); *Plant v. Woods*, 176 Mass. 492, 499, 57 N.E. 1011, 1014 (1900). This rule is merely a particular application of the doctrine that intentional interference with lawful activity must have an affirmative justification. In applying this rule, the Massachusetts court has sanctioned strikes for higher wages, shorter hours, and better shop conditions for here the workers' self-interest is patently direct. See Frankfurter and Greene, *The Labor Injunction* 28 (1930). However, on the ground that the benefits from the aggression were too remote, the court has proscribed strikes for a closed shop as well as "peaceful picketing" when there is no strike, *i.e.*, when the enterpriser's own employees have not quit work. See Frankfurter and Greene, *The Labor Injunction* 28, n. 131 (1930). It is noteworthy, however, that in *Densten Hair Co. v. United Leather Workers* (237 Mass. 199, 203, 129 N.E. 450, 451 (1921)), cited as authority by the instant court, the precise question raised by the instant case was left open. But language in a few federal and state cases affords some support to the decision. See *Dail Overland Co. v. Willys Over-*

land, 263 Fed. 171, 190, 192 (D.C. Ohio 1919), approved by *Quinlivan v. Dail Overland*, 274 Fed. 56, 65 (C.C.A. 6th 1921), *Waitresses' Union v. Benish Restaurant Co.*, 6 F. (2d) 568 (C.C.A. 8th 1925); *West Allis Foundry Co. v. State*, 186 Wis. 24, 202 N.W. 302 (1925).

The Massachusetts decisions are a result either of an inadequate analysis of the needs of organized labor or of a desire to restrict its power. Successful labor activity requires organization throughout an entire industry. This view is the basis of recent New York decisions extending the scope of permissible union aggression. See *Exchange Bakery, Inc. v. Rifkin*, 245 N.Y. 260, 157 N.E. 130 (1927); *Goldfinger v. Feintuch*, 159 Misc. 806, 288 N.Y.S. 855 (1936) (peaceful picketing designed to inform the public that an enterpriser handled non-union product is lawful even in the absence of a strike). 143 Nation 753 (Dec. 1936). But the Massachusetts court, disregarding the effect of a union aggression upon organized labor throughout the industry involved, has inquired whether the direct benefits of union aggression to the workers of a single enterprise outweighed the detriment sustained by the enterpriser. Pursuing this inquiry the court in the instant case argued that employee success was so improbable that the injury inflicted upon the employer was not justifiable. This argument ignores the fact that continued agitation against an employer who has broken an agreement, even though ineffectual as against him, will encourage compliance by other employers. Since such compliance will increase the power and prestige of organized labor, the agitation which induces such compliance has a clear relationship to the welfare of employees who must rely on organization as an equalizer of bargaining power. On the other hand, the court's position is, in effect, a promise to the employer that he may break his contract without fear of union retaliation if he can assemble a permanent personnel and re-establish normal operations.

The injunction might have been refused on another ground. The whole controversy in the instant case arose out of the plaintiff's breach of contract. Consequently, the "clean hands" doctrine should have barred him from relief even though the defendant's conduct would otherwise have been enjoinable. But see *Niles-Bement-Pond Co. v. Iron Molders' Union*, 246 Fed. 851 (D.C. Ohio 1917) (employer granted an injunction although he had broken the agreement under which strikers had temporarily returned to work).

The result of this case bears out the severe criticism levelled against the use of labor injunctions in industrial disputes. Frey, *The Labor Injunction* (1922); De Silver, *The Injunction—A Weapon of Industrial Power*, 114 Nation 89-91 (1922); Fitch, *Causes of Industrial Unrest* 280 ff. (1924). See also the policy declared in § 2 and § 4e of the Norris-La Guardia Act, 47 Stat. 70 (1932); 29 U.S.C.A. §§ 101-15 (1934); Norris, *Injunctions in Labor Disputes*, 16 Marquette L. Rev. 157 (1932). If used with discretion the injunction might be a desirable means of social control. Quigg, *Function of the Law in Disputes between Employers and Employees*, 9 A.B.A.J. 795-801 (1923). But its extension, as in the instant case, to situations in which it can have no other effect than to retard the growing strength of the labor union movement, may well lead to "a growing distrust of the courts" on the part of labor. Witte, *The Government in Labor Disputes* 131 (1932). The courts, without departing from their basic policy of preserving the present economic system, might consider the possibility that the continued provocation of this distrust may cause a disillusioned working class to

adopt extra-legal means for the protection of its interests. Foster, *The Great Steel Strike and Its Lessons* 50 ff. (1920).

Parties—Judicial Control over Executive—Postmaster General as Indispensable Party in Suit against Local Postmaster—[Federal].—The Postmaster General, after conducting a hearing, held the plaintiff's business unlawful and issued a "fraud order," directing the defendant, a local postmaster, to stop the plaintiff's mail. The plaintiff sued, without joining the Postmaster General, to restrain enforcement of the fraud order. *Held*, the Postmaster General is an indispensable party. Decree dismissing complaint affirmed. *National Conference on Legalizing Lotteries v. Goldman*, 85 F. (2d) 66 (C.C.A. 2d 1936). On similar facts the Postmaster General was not considered an indispensable party, although dismissal was affirmed for other reasons. *Rood v. Goodman*, 83 F. (2d) 28 (C.C.A. 5th 1936).

The opposing results in these cases arose out of the conflict between the policy of giving easily accessible judicial protection from administrative rulings and the established rule that a suit in equity must join all those whose interests will be directly affected by the decree. As Judge Hand remarked in the *National Conference* case, in what must be considered a gem of judicial understatement, ". . . it must be owned that the law is not as clear as one might wish." 85 F. (2d) 66, 67. A series of Supreme Court decisions have held that in a suit against a subordinate federal officer the superior must be joined. *Warner Valley Stock Co. v. Smith*, 165 U.S. 28 (1897) (suit against commissioner of land office for issuance of land patents; Secretary of Interior held indispensable); *Gnerich v. Rutter*, 265 U.S. 388 (1924) (suit against prohibition director to compel issuance of liquor permits in addition to those granted by Commissioner of Internal Revenue; latter held indispensable); *Webster v. Fall*, 266 U.S. 507 (1925) (suit against disbursing agent in charge of payments to Indians to compel payments against terms of statute alleged to be unconstitutional; Secretary of Interior held indispensable). In a subsequent case it was summarily held, through Mr. Justice Holmes, that "there is no question" that the superior officer is not indispensable. *Colorado v. Toll*, 268 U.S. 228, 230 (1925) (suit by a state against a national park superintendent to enjoin enforcement of federal regulations allegedly inconsistent with the state's rights; Director of National Parks not joined). In the meantime numbers of cases were decided, although the superior officers were not joined, without any discussion of the problem. See, e.g., *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902) (suit against local postmaster to enjoin enforcement of fraud order without joining Postmaster General; decree dismissing bill reversed); *Leach v. Carlile*, 258 U.S. 138 (1922) (suit to enjoin enforcement of fraud order; dismissed on the merits).

If an injunction had been granted in the *National Conference* case extending to the local postmaster, his subordinates, and "all those with notice," the Postmaster General would have been effectually prevented from interfering with the plaintiff's mail. Since he found the plaintiff's business unlawful and it is his duty to protect the mails from unlawful correspondence, he would be under a duty to intervene in the trial or to provide the local postmaster with adequate defense. Hence the principal cases are not within the policy of Equity Rule 39 which permits proceedings without joinder of "proper parties" who are not within the jurisdiction, but envisages only decrees which