

to arise again, the sole inquiry of at least four members of the present Court would be: How did the union exert its exclusionary pressure? If it was by picketing, by strike or by boycott or by any conduct which might fairly be said to have been described in either of the sections just referred to, then according to Mr. Justice Frankfurter there would be no violation of the Sherman Act no matter how drastically the union sanction would have imposed a control on a commodity market. For would not the union have been acting in self-interest in keeping out "non-union" goods, even if they were union-made but fabricated by a competing union?

Are not the *Lake Valley* and the new "kitchen cabinet" cases very much like the *Brimms* case in this and in other respects, including the feature of combination with non-labor groups? It looks as if the only escape, lacking a clear pronouncement from Congress to the contrary, is for those interested in the unrestricted movement of goods in national markets to "play ball" with the unions—and with the *right* unions, at that. Whether or not this pessimistic forecast is to be the last word, without further legislation, may be revealed in the near future, for the Anti-trust Division of the Department of Justice is said to have been allowed to appeal directly to the Supreme Court in the "plywood" and the "concrete mixer" cases. But even this *locus poenitentiae* will not afford an opportunity to instruct the profession concerning the Court's attitude toward violations of the Sherman Act as flagrant as that in the old *Brimms* case.

AND WHAT OF THE APEX CASE NOW?

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IN the February number of the *Review* Mr. Gregory and I set forth in separate articles our respective views concerning the applicability of the Sherman Act to labor restraints, in the light of the *Apex* case.¹ Mr. Gregory, in the preceding comment, now returns to the problem with his analysis of the majority's position in the recent *Hutcheson* case. My present comment, discussing chiefly the relation of that case to its predecessor, the *Apex* case, is not self-sufficient; for its full understanding, a reading of my previous article and Mr. Gregory's comment on the *Hutche-*

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¹ Gregory, *The Sherman Act v. Labor*, 8 Univ. Chi. L. Rev. 222 (1941); Cavers, *Labor v. The Sherman Act*, 8 Univ. Chi. L. Rev. 246 (1941).

son case is called for. In view of this fact and in the interest of brevity, citations to the statutes and cases noted herein have not been supplied.

Mr. Gregory has not spared the rod in castigating Mr. Justice Frankfurter's opinion in the *Hutcheson* case. If Part I of Mr. Gregory's article could be made required reading for the American bar and a Gallup poll taken of their reactions, I think an overwhelming majority would register their approval of the author's strictures and, if the yardstick could measure attitudes qualitatively, I should expect a high degree of vehemence.

For a court to have produced such a reaction is, I think, unfortunate. Of course the judiciary should not strive always to win the bar's plaudits or even to avoid its condemnation; but to justify an opinion which arouses a hostile professional response, the need for that course should be clear. Indulgence in tactics calculated to *épater le bourgeois* is denied to courts. In the discharge of their function as interpreters of legislation, it is important that they act, wherever possible, in such fashion as to minimize the friction engendered when new legislation is introduced into the body of accepted law. Only when this would require the sacrifice of the policy basic to the legislation should professional attitudes be disregarded. Peculiarly is this true in a field where, as here, pre-existing social and economic conflict had produced a situation surcharged with emotion.

Seldom has there been so little occasion for challenging professional convictions—or prejudices, if you will. Two courses were plainly open to the majority, neither of which would have evoked a response at all comparable to that which I am sure Mr. Justice Frankfurter's opinion will produce. The majority came to the very brink of taking one of the alternatives; Mr. Justice Stone in his special concurrence took the other. Let us consider these alternatives briefly.

1. The Clayton Act, Section 20, would have sufficed to legalize the activities of the defendant but for the rulings in the *Duplex* and *Bedford* cases to the effect that only persons *proximately* in the relation of employer and employee come within that section's scope.² Those cases had been decided by divided courts; for years they had been subjected to criticism by economists and legal scholars, as well as to attack by labor leaders. If the court which in a few years had overruled *Swift v. Tyson* and perhaps a dozen other landmark decisions, had overruled the *Duplex* case and had reconstrued the Clayton Act to eliminate the requirement of proximate relationship, no one would have been surprised and only die-hards ag-

² This assumes, of course, the dismissal of the Government's scarcely plausible contention that the defendants' acts did not fall within the categories listed in the second paragraph of §20.

grieved. The Norris-LaGuardia Act need have been invoked, if at all, only to rebut the inference of Congressional acquiescence in the earlier decisions construing the Clayton Act.

This may seem but another way of beating the devil around the stump. Why should the bar accept this tactic, yet object vigorously to the course taken? One reason is that an assumption by the Court of direct responsibility for the change instead of attributing it to the Congress would have prevented *ad hominem* charges of inconsistency which Mr. Gregory has discussed. A second reason, which to me seems more important, is that the overruling of the *Duplex* case would not have required the employment of a novel process of statutory construction, the consequences of which are difficult to measure. Will this process be commonly resorted to? If so, what will be the impact of new legislation—that now on the books and that to be enacted—on existing law? These questions, for which ready answers cannot be expected,³ will heighten the sense of insecurity already created by the demolition of constitutional landmarks. And insecurity, in a social group as in an individual, is a prolific breeder of conflict.

2. An alternative to the course chosen, still simpler than overruling the *Duplex* case, was that chosen by Mr. Justice Stone who found no need to rely upon the Clayton and Norris-LaGuardia acts since the indictment, in his opinion, charged no offense under the Sherman Act. Unless the majority entertained serious doubt as to his conclusion, why should it have resorted to what was essentially matter in defense to sustain the demurrer, especially in view of the price that course exacted? If the majority did question the applicability of the *Apex* case, or wished to abandon this decision which all four justices had accepted but eight months before, then disclosure of the new position was imperatively called for. On the other hand, if the *Apex* case is to be adhered to, no opportunity should be lost to clarify its rationale. The interpretation of the Clayton Act could well have been foreshadowed by dictum or left to a case where recourse to that statute alone would have provided a defense to prosecution under the Sherman Act.

Presumably now we must await, for a further elucidation of the application of the Sherman Act to labor restraints, the coming of cases where the Clayton-Norris-LaGuardia Act will provide no defenses. These cases will doubtless fall into one of two categories: (a) cases where the labor

³ My own view is that Mr. Justice Roberts in his dissent has exaggerated the novelty of the technique of statutory construction employed and Mr. Justice Frankfurter, by his opinion in *FTC v. Bunte Bros.*, 61 S. Ct. 580 (1941), indicates that the technique will be used with circumspection. But fear, once aroused, is seldom quieted by assurances of this sort.

restraint is imposed by a strike or boycott conducted with violence and (b) cases where the labor union combines with a non-labor group to pursue their respective ends, a category recognized in a dictum by Mr. Justice Frankfurter, citing the *Brims* case.⁴

The first of these categories promises alone to give rise to a sufficient number of cases to justify an examination of Mr. Justice Stone's separate opinion in the *Hutcheson* case for further evidence as to the meaning of the *Apex* decision. Such an examination reveals no deviation from the line of decision, but in formulating his position Mr. Justice Stone has surprisingly failed to utilize a conception of the function of the Sherman Act which seemed central to his thesis in the *Apex* case.

In the latter opinion, Mr. Justice Stone delimited the scope of restraints actionable under the Sherman Act to "the prevention of restraints to free competition in [interstate] *business and commercial transactions*." It was to be the character of the transactions restrained rather than the directness of the restraint's effect on interstate commerce which was to determine the applicability of the act. In the *Hutcheson* case, however, this test is relegated to a secondary position; in its stead the primary test is whether the restraint is "incidental to the conduct of a local labor dispute." There is a reversion to language reminiscent of the earlier cases, the *Levering* and *Leather Workers'* cases in particular.

This is not wholly to be wondered at. In my previous article I pointed out that the test of "business and commercial restraints" was generally consonant with the test, couched in terms of direct and indirect effects on interstate commerce, which had been employed in the preceding cases.⁵ In ironic corroboration of that comment, I fell unwittingly into the language of the earlier test in endeavoring to reformulate the test which seemed to me indicated by Mr. Justice Stone's thesis.⁶

⁴ The limits of these categories are far from clear. Is the process of infusion which brings §§ 2 and 13 of the Norris-LaGuardia Act into the first paragraph of § 20 of the Clayton Act equally effective to bring § 4 of the former act into the second paragraph of § 20? Even so, labor practices involving fraud or violence would still be denied immunity. The exception carved for the *Brims* case leaves in doubt the status of restraints discriminating against products embodying technological improvements, such as that presented by the "kitchen cabinet" case. Some contractors may find such restrictions profitable, however costly to the consumer, and acquiesce readily in their imposition, though the fact, or evidence, of combination may be lacking. And do all such restraints relate to "working conditions" so as to obtain the immunity which § 20 affords?

⁵ *Cavers*, op. cit. supra note 1, at 251.

⁶ I stated, *ibid.*, "The question the court should have raised was: would the agreement which the union was seeking to impose by its strike have restrained interstate commerce?" A more satisfactory statement would have substituted "business and commercial transactions" for "commerce" in that sentence and, incidentally, in the second sentence following it.

My effort at reformulation was inspired by a desire to escape a difficulty which I found in the "business and commercial transactions" test, as developed in the *Apex* opinion. To formulate that test so that it would not bring all strikes in plants producing for interstate commerce within the compass of the Sherman Act, Mr. Justice Stone felt obliged to qualify it by the requirement that only such labor restraints as had a substantial effect on the market (e.g., on price or supply) were restraints on "business and commercial transactions." But this qualification meant that in certain critical situations unions would be debarred from protecting their gains while in others they would be free to restrain interstate business and commercial transactions simply because their action was on a small scale.⁷

My own reading of the cases led me to conclude that, except for the *Second Coronado* case, all prior decisions could be reconciled to the "business and commercial transactions" test if the determination of that test were made to rest, not on the temporary interruption to interstate commerce incidental to a union's attempt by coercion to impose its will on an employer, but on the agreement which such coercion or its threat was designed to exact from the employer. Where such an agreement would result in restraining interstate "business and commercial transactions," then an apt case for the invocation of the Sherman Act seemed to me to be presented, whether the restraint had been agreed to or a boycott or strike had been called to enforce it. Whether the Clayton Act would afford a defense in such a situation was a question into which I did not inquire.

Mr. Justice Stone's opinion in the *Hutcheson* case is not open to the criticisms which I directed to his employment of the "substantial effect" qualification. However, along with the qualification, the test to which it was attached seems to have been forgotten in the *Hutcheson* opinion. This is to be regretted. The *Apex* opinion gave promise of establishing a conception of the function of the Sherman Act which, when refined and matured, would have set to rest a problem that has plagued the Court for half a century. It is to be hoped that, with the judicial enactment of the Clayton-Norris-LaGuardia Act, the Court can return to the interrupted task of delimiting the scope of the Sherman Act.

⁷ Space limitations preclude the development here of these criticisms, which are presented in *Cavers*, op. cit. supra note 1, at 249-50, 253-54.