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NOTES

MAJORITY RULE AND THE RIGHT TO STRIKE

He [the worker] has a legal right under the federal constitution—and a natural right as a mortal—to work, not to do so, to quit, to be lazy, to go fishing.[1]

As part of their efforts to establish rules to govern the conduct of labor disputes, seven states have enacted legislation making it an unfair labor practice

[1] State ex rel. Dairyland Power Cooperative v. Wisconsin Employment Relations Board, 14 C.C.H. Lab. Cas. ¶ 64385 (Wis. C.C. Dane County, 1948), rev'd on other grounds 15 C.C.H. Lab. Cas. ¶ 64638 (Wis. S. Ct., 1948).

for employees to instigate or participate in a strike without first obtaining the approval of a majority of the workers in the plant or collective bargaining unit to which they are attached.[2] Five other states have passed similar legislation designed to regulate the "overt concomitants" of a strike.[3] Three of these statutes have been held unconstitutional;[4] one has been sustained;[5] while one other, the Colorado restriction, has been invalidated because of its inseverability from an otherwise unconstitutional provision.[6] These "strike restriction" provisions, as well as the sections of the Taft-Hartley Act which define illegal purpose strikes, will make it difficult for the Supreme Court to avoid some future consideration of the relation of the federal constitution to the so-called "right to strike."[7]

In a suit to enjoin the attorney general from bringing a criminal prosecution pursuant to the majority strike-vote provisions of the Michigan Labor Relations Act, the Circuit Court of Wayne County held unconstitutional those sections of the Act which outlaw any strike not approved by a majority of the employees of an appropriate collective bargaining unit.[8] Relying upon the rationale of Alabama, Kansas, and Oregon decisions dealing with similar legislation,[9] the Michigan court concluded that the right to strike was constitutionally protected. In consequence it held that a law subjecting an employee's right to strike to the approval of the majority vote of the collective bargaining unit was an unreasonable regulation in violation of the Fourteenth Amendment. An alternative argu-

[2] Ala. Gen. Acts (1943) 257, § 13; Fla. Gen. L. (1943) c. 21968, § 9 (3); Kan. L. (1943) c. 191, § 8 (3); Mich. Pub. Acts (1947) § 17. 454 (10); Minn. Stat. (Henderson, 1945) § 179.11 (8); Mo. Rev. Stat. (1947) § 10178.203; N.D.L. (1947) c. 242, § 11.

[3] Colo. Stat. Ann. (Michie, Supp., 1947) c. 97, § 94 (6) (2) (e); Del. L. (1947) c. 196, § 2 (e); Ore. Comp. Laws Ann. (1940) § 102-906; Utah L. (1947) c. 66, § 49-1-16 (2) (c); Wis. Stat. (Brossard, 1943) § 111.06 (2) (e).

[4] Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810 (1944), cert. dismissed 325 U.S. 450 (1945); Stapleton v. Mitchell, 60 F. Supp. 51 (Kan., 1945), dismissed per stipulation sub nom. McElroy v. Mitchell, 326 U.S. 690 (1945); AFL v. Bain, 165 Ore. 183, 106 P. 2d 544 (1940).

[5] Hotel and Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board, 236 Wis. 329, 295 N.W. 634 (1941), aff'd 315 U.S. 437 (1942).

[6] AFL v. Reilly, 113 Colo. 90, 155 P. 2d 145 (1944).

[7] Watt, The New Deal Court, Organized Labor and the Taft-Hartley Act, 7 Lawyers Guild Rev. 193, 237 (1947). The Court might, however, avoid the necessity of such a consideration by turning its attention to the question of state conflict with federal legislation. For a general discussion of the permissibility of state labor legislation supplementing or conflicting with federal legislation see Killingsworth, State Labor Relations Acts (1948); C. Lamkin, Jr., The Madison Act and Recent Developments, 4 Mo. Bar J. 117 (1948); R. Smith, The Taft-Hartley and State Jurisdiction over Labor Relations, 46 Mich. L. Rev. 593 (1948). The Supreme Court has invalidated state legislation which frustrates the policy or limits the rights expressed in the National Labor Relations Act. Bethlehem Steel Company v. New York State Labor Relations Board, 330 U.S. 767 (1947); Hill. v. Florida, 325 U.S. 538 (1945); see Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942).

[8] UAW v. McNally, 15 C.C.H. Lab. Cas. ¶64684 (Mich. C.C. Wayne County, 1948).

[9] Note 4 supra.

ment by the plaintiff union alleged conflict between the Michigan strike-vote provision and the federal strike policy expressed in the Taft-Hartley Act.[10] The Michigan court approved this contention, pointing out that the states cannot impair or modify federal control over the exercise of collective bargaining rights and that "under existing conditions, it is impossible to dissociate the strike from the process of collective bargaining."[11]

Having withstood the hostile treatment of unsympathetic courts and legislatures, the primary strike (as distinguished from the sympathetic strike, jurisdictional strike, and secondary boycott) has, in the United States, come to be recognized both by courts and by legislatures as a legitimate economic weapon in support of labor's demands for improvement in wages, hours, and conditions of employment.[12] The present legal status of the primary strike to a very great extent reflects historical changes in the American attitude toward the position of organized labor in the structure of competitive capitalist enterprise.[13] These changes have precipitated unresolved problems of far-reaching importance. Perhaps foremost among such problems is whether the primary strike is to be considered as simply one element in a legislative labor policy designed to promote the achievement of more effective collective bargaining or whether it is to be put into that special class of civil liberties ultimately defined and protected by the judicial department of government. Should the Supreme Court adopt it into the family of constitutionally protected rights, results may follow that are not presently contemplated by the chief advocates of its incorporation into the safety of constitutional immunities. If, like picketing, the primary strike finds its way into the Constitution, it is not unlikely that the result will have a measurable effect upon the principles of collective bargaining.

The term "strike" generally denotes a movement growing out of problems arising between an employer and his employees relating to wages, hours, or conditions of work, in the course of which there is a concerted suspension of employment by the employees for the purpose of obtaining or resisting a change in the terms of employment.[14] Most American jurisdictions accept the view that employees who are not bound by a contract for a definite period or who have not voluntarily given up the right to strike may, singly or collectively, without

[10] Labor-Management Relations Act, 61 Stat. 136–61 (1947), 29 U.S.C.A. § 151 et seq. (1947), hereafter called the Taft-Hartley Act. Section 13 of the Act provides: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

[11] UAW v. McNally, 15 C.C.H. Lab. Cas. ¶64684 (Mich. C.C. Wayne County, 1948); see note 7 supra.

[12] As late as 1921 the participation in a strike was viewed as prima facie actionable if not justified by some standard of public policy; see Strikes and Boycotts, 34 Harv. L. Rev. 880, 881 (1921).

[13] Watts, The Right To Strike, 9 U. of Pitt. L. Rev. 243 (1948); Mason, The Right To Strike, 77 U. of Pa. L. Rev. 52 (1928); Storey, The Right To Strike, 32 Yale L. J. 99 (1922).

[14] See Webster's International Dictionary (1947); 31 Am. Jur. Labor § 191 (1940).

liability abandon their employment at any time for the purpose of compelling or attempting to compel their employers to accede to their demands for better terms or conditions of employment.[15] In at least seven jurisdictions this right to strike arises by implication from the worker's right to do in concert that which he might do individually—quit work.[16] Without directly referring to the Constitution, these courts seem to reach the result on the basis of the involuntary servitude prohibition of the Thirteenth Amendment. It is undisputed that strikes for unlawful purposes or strikes conducted in an unlawful manner may be prohibited.[17] But a constitutionally protected right to strike questions the propriety of a legislative definition of "lawfulness" in terms of the number of employees who approve of taking strike action. Might not the courts strike down such legislative efforts to define lawfulness by holding that "the denial of such a right to the members of a minority is no less an unconstitutional abridgement of the right simply because it is saved to the majority"?[18]

To avoid the danger that restrictions on the right to strike might be invalidated because of a possible conflict with the Thirteenth Amendment, the Michigan Labor Relations Act, like the Taft-Hartley Act, contains a clause to the effect that nothing in the Act should be construed to make the quitting of labor by an individual employee an illegal act.[19] That the Thirteenth Amendment secures the right of individuals to quit work need not be questioned.[20] That it may, as a derivative of this protection, secure the right to strike is open to controversy. There is a legal and conceptual distinction between the right to quit employment and the right to suspend employment in concert to produce some desired result.[21] Both organized labor and the Taft-Hartley Act regard the

[15] Beck v. Teamsters' Protective Union, 118 Mich. 497, 77 N.W. 13 (1898); Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753 (1906); Bossert v. Dhuy, 221 N.Y. 342, 117 N.E. 582 (1917); authorities cited 31 Am. Jur. Labor § 192 n. 17 (1940). Properly phrased the right of employees in these cases should be stated not as the right to strike, but as the right not to be punished for striking. In Hohfeldian terms the right sustained by the above courts is more accurately a privilege. "Developing Ethics" and the "Right To Strike," 32 Yale L.J. 157 (1922).

[16] Hardie-Tynes Manufacturing Co. v. Cruse, 189 Ala. 66, 66 So. 657 (1914); Truax v. Bisbee, 19 Ariz. 379, 171 Pac. 121 (1918); The Illinois Malleable Iron Co. v. Michalek, 279 Ill. 221, 116 N.E. 714 (1917); Saulsberry v. Coopers International Union, 147 Ky. 170, 143 S.W. 1018 (1912); Bohn Manufacturing Co. v. Hollis, 54 Minn. 223, 55 N.W. 1119 (1893); Roddy v. UMW, 41 Okla. 621, 139 Pac. 126 (1914); Jensen v. Cooks and Waiters' Union, 39 Wash. 531, 81 Pac. 1069 (1905).

[17] Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941); Dorchy v. Kansas, 272 U.S. 306 (1926); Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, 2 F. 2d 993 (D.C. Ill., 1924); UAW v. Wisconsin Employment Relations Board, 250 Wis. 550, 27 N.W. 2d 875 (1947).

[18] AFL v. Bain, 165 Ore. 183, 106 P. 2d 544 (1940).

[19] Taft-Hartley Act § 502; Mich. Stat. Ann. (Henderson, Supp. 1947) § 17.454 (14.1).

[20] Pollock v. Williams, 322 U.S. 4 (1944); The Reach of the Thirteenth Amendment, 47 Col. L. Rev. 299 (1947).

[21] Exchange Bakery and Restaurant, Inc., v. Rifkin, 245 N.Y. 260, 157 N.E. 130 (1927); Gerhart, Strikes and Eminent Domain, 30 J. Am. Jud. Soc. 116 (1946).

striker as an employee whose work has been suspended rather than terminated.[22] Strike-vote statutes do not so much impair the right to quit work as restrict the concerted suspension of employment in its use as a labor weapon.[23]

Grounds for bringing the primary strike within the protection of the Constitution may perhaps be more easily found by a process of analogy to the Supreme Court's identification of picketing and free speech. One court has said as much: "It would be but a hollow principle to say a union is free to advertise a labor dispute by picketing but may not strike to enforce its demands."[24] The first indication that picketing might be construed as a form of free speech appeared in 1936 in the *Senn* case.[25] Three years later, in the famous *Thornhill* case, the identification was stated in unmistakable terms.[26] Subsequent decisions set out the scope of the new doctrine. Picketing may not be prohibited merely because of the fact that the disputants do not stand in the proximate position of employer and employee[27] nor because the picketed establishment is operated without employees.[28] In addition if it is "practically impossible" for a union to make known its grievances by another means, picketing the premises of a retailer who purchases from the wholesaler with whom the union has a grievance must be permitted.[29] Although the Supreme Court has not ruled on the precise point, it is also apparent that picketing may not be forbidden on the sole ground that no employee majority has authorized such action by a strike vote.[30]

It is clear that striking involves more than the right to quit and equally clear that picketing involves more than the right to speak. Relating the primary strike, therefore, to the Thirteenth Amendment would require an extension no more strenuous than that which brings picketing within the content of the First and Fourteenth Amendments. Aside from its possible relation to the Thirteenth Amendment, the strike may be viewed in conjunction with the free speech doctrine. If the Supreme Court may hold that the Constitution protects the right to use concerted coercion for advertising labor disputes in the form of picket lines, might it not with equal justification hold that strikes are "so enmeshed with the right of free speech as construed in recent federal decisions that the right to strike and the right to picket are but facets of the [same] general prin-

[22] Taft-Hartley Act § 2 (3).

[23] 2 Teller, The Law Governing Labor Disputes and Collective Bargaining § 398.8 (Supp., 1948).

[24] Hotel and Restaurant Employees International Alliance v. Greenwood, 249 Ala. 265, 273, 30 So. 2d 696, 701 (1947); see In re Porterfield, 28 Cal. 2d 91, 168 P. 2d 706 (1946).

[25] Senn v. Tile Layers Union, 301 U.S. 468 (1937).

[26] Thornhill v. Alabama, 310 U.S. 88 (1940).

[27] AFL v. Swing, 312 U.S. 321 (1941).

[28] Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943).

[29] Bakery and Pastry Drivers and Helpers v. Wohl, 315 U.S. 769 (1942).

[30] AFL v. Bain, 165 Ore. 183, 106 P. 2d 544 (1940).

ciple"?[31] This indeed seems to be the reasoning employed by one federal court, the Supreme Court of Alabama, and the Michigan court in the instant case in nullifying statutes which require a majority vote for the authorization of a strike.[32] Statutes requiring a majority strike vote for taking part in the "concomitants" of a strike fall even more clearly within the scope of the picketing-free-speech doctrine, since picketing is itself the principal strike concomitant. This latter group of statutes might be saved, however, if as in Wisconsin the courts interpret the restriction to apply only to such picketing as lies outside the area of constitutional protection.[33]

The contemporary effort to derive a constitutional basis for the right to strike by an extension of the identification of picketing and free speech is not likely to find favor in the United States Supreme Court.[34] The association of picketing with the First and Fourteenth Amendments has met with serious criticism,[35] and the Court itself has permitted restrictions on picketing not altogether consistent with its earlier opinions. Without specifying the circumstances, the Court has let it be known that the free speech doctrine would not preclude the enjoining of an "unlawful strike."[36] It has upheld injunctions prohibiting picketing carried on outside the industry in which the dispute arose[37] or away from the situs of the dispute.[38]

In view of the industrial character of the national economy, it has been suggested that the primary strike might be encompassed within the term "liberty" of the Fifth and Fourteenth Amendments.[39] Even if it is conceded that the right to strike is not itself constitutionally protected, legislation which discriminates against a class composed of a minority group of workingmen might arguably

[31] Hotel and Restaurant Employees International Alliance v. Greenwood, 249 Ala. 265, 273, 30 So. 2d 696, 701 (1947).

[32] Stapleton v. Mitchell, 60 F. Supp. 51 (Kan., 1945); Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810 (1944); UAW v. McNally, 15 C.C.H. Lab. Cas. ¶64684 (Mich. C.C. Wayne County, 1948).

[33] Hotel & Restaurant Employees International Alliance v. Wisconsin Employment Relations Board, 236 Wis. 329, 295 N.W. 634 (1941), aff'd 315 U.S. 437 (1942).

[34] As between picketing and striking, labor usually regards the latter as the more basic economic weapon, and yet because the former is more easily identified with the constitutional guarantee of free speech it has had prior recognition by the Supreme Court. It is curious to note how the advocates of a constitutional right to strike have sought to safeguard this prior right by relying upon an analogy to a secondary or derivative right already secured.

[35] Teller, Picketing and Free Speech, 56 Harv. L. Rev. 180 (1942); Gregory, Labor and the Law, c. 12 (1946).

[36] Bakery and Pastry Drivers and Helpers v. Wohl, 315 U.S. 769 (1942).

[37] Carpenters & Joiners Union, Local 213 v. Ritter's Cafe, 315 U.S. 722 (1942).

[38] Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942).

[39] 58 Albany L. J. 435 (1898).

impair the guarantee of equal protection of the laws. Although neither of these contentions has received any serious consideration by the courts, the right to strike is a symbol too closely associated with the emancipation of American labor for the courts tacitly to permit its arbitrary infringement. Should the Supreme Court view a state statute as seriously jeopardizing the use of the strike weapon, it is more likely to invalidate the legislation by finding conflict with an existing uniform federal labor act, such as the Taft-Hartley Act, than by passing squarely on the constitutional basis of the right to strike.[40]

But whether a right to strike can or cannot be discovered within the flexible safeguards of the Constitution, it is important to discern the effects that such a discovery would have upon our present policy of collective bargaining. The collective bargaining principles of both the old and amended Labor Relations Acts are predicated on the theory of majority rule. While the individual employee retains his rights to take up personal grievances with his employer, Section 8 (a) (5) of the Taft-Hartley Act requires the employer to recognize the majority representative of the collective bargaining unit as the "exclusive" bargaining agent for all employees within the unit. The employer's duty to bargain with the properly designated bargaining agent imposes a correlative duty to refrain from circumventing such agent by negotiating directly with individuals or with a minority group.[41] The majority rule principle has been advanced by labor leaders as a platform for improving the position of organized labor.[42] Since a minority has no right to enter into separate bargaining arrangements, it should have no right to take independent action to interfere with the course of bargaining carried on by the majority.[43]

The extension of constitutional protection to the primary strike would materially affect these policies by creating in the individual a new right which might not be abridged by majority control.[44] This is, in fact, the very sort of control which the Michigan court has said must not be exercised. The right of the minority to strike would offer more shadow than substance to a group of workingmen whose employer has by law been forbidden from bargaining with them. The wildcat strike would wear the sanctity of constitutional protection while both the employer and a majority of his employees would be forced to suffer interruption of their collective agreements. The union might, of course, discipline its own dissident elements, and the employer might replace or discharge the nonunion strikers for participating in an unauthorized strike,[45] but what con-

[40] See note 7 supra.

[41] J. I. Case Co v. NLRB, 321 U.S. 332 (1944); Virginia Railroad Co. v. System Federation, 300 U.S. 515 (1937); NLRB v. Hyland Shoe, Inc., 119 F. 2d 218 (C.C.A. 1st, 1941); NLRB v. Brashear, 119 F. 2d 379 (C.C.A. 8th, 1941).

[42] Pressman, Improvements of the Processes of Collective Bargaining, 12 Mo. L. Rev. 10 (1947).

[43] NLRB v. Draper Corp., 145 F. 2d 199 (C.C.A. 4th, 1944).

[44] Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So. 2d 810 (1944).

[45] NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

tent would then remain to the individual's constitutionally protected right to strike? A judicial policy designed to protect an individual or minority right to press for separate labor agreements and a legislative policy designed to promote collective security would produce inconsistency and tension.

On its face the strike-vote provision aims at insuring democratic procedures in industrial controversies. Such legislation is said to be designed both to assure the employer and the majority of his employees that their collective agreements will not suffer at the hands of a dissonant minority and to guard against irresponsible labor leaders who call strikes without first consulting their membership.[46] However, the strike-vote provision has some features which, from the point of view of organized labor, are undesirable. It may seriously delay the calling of a strike, and it might indirectly outlaw "stranger picketing."[47] In addition, under such a provision a union which becomes exclusive bargaining agent by virtue of securing a small majority in the collective bargaining unit may receive the approval of a majority of its own members and still be prohibited from going on strike because it has failed to procure an absolute majority of all employees in the unit. However, the decision as to the wisdom or necessity for promoting these measures should be within the legitimate province of the legislature. Extending constitutional protection to the primary strike would seriously affect the legislature's power to formulate a comprehensive labor policy.[48]

The pressure to create constitutional safeguards for particular economic policies is, in effect, an expression of uneasiness over the possible fate of these policies in the hands of the legislature. But the attempt to transfer power from the legislatures to the courts can succeed only in placing control in the hands of officials further removed from the influences of popular sentiment and public control. Democratic theory necessarily presupposes legislative rather than judicial government.[49] Moreover, the failure to secure constitutional guarantees for valued social or economic policies does not mean that such policies are left unprotected. Public opinion, legislative responsibility, and political feasibility

[46] Millis and Katz, A Decade of State Labor Legislation: 1937–47, 15 Univ. Chi. L. Rev. 282, 301 (1948).

[47] Killingsworth, State Labor Relations Acts 65 (1948). But a Florida court has held that the strike-vote clause does not affect the rights of persons not employed by the picketed establishment. Whitehead v. Miami Laundry Co., 36 So. 2d 382 (Fla., 1948).

[48] "All rights are derived from the purposes of society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." Justice Brandeis, dissenting in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 448 (1921).

[49] See, for example, Corwin, Liberty Against Government (1948); Carr, The Supreme Court and Judicial Review (1942).

are equally effective checks against arbitrary or impetuous governmental action. A political democracy knows other than constitutional securities.

CONFLICT BETWEEN LOCAL AND NATIONAL INTERESTS IN ALIEN LANDHOLDING RESTRICTIONS

Early in 1948 the Supreme Court of the United States handed down its opinion in *Oyama v. California*,[1] the latest in a line of cases in which that court has considered state restrictions on alien landholding. Two concurring[2] and two dissenting[3] opinions make articulate a wide divergence in view as to the wisdom of condemning the California statute in whole or in part. By the terms of this alien land law a presumption is created that any conveyance to an eligible landholder is made with intent to avoid the statute if an ineligible alien pays the consideration for the conveyance. Oyama's minor citizen son was here the eligible landholder. Intent to avoid the statute by such a conveyance results in escheat to the state. Though the decision was specifically limited to declaring the statutory presumption unconstitutional, a dictum in a succeeding case[4] indicates that a wider effect may be given to the holding than was at first apparent. If this is true, aliens may in the future again invoke the equal protection and due process guarantees of the Constitution, an approach unsuccessfully attempted in 1923.[5]

In any event, the issue is at a critical stage which justifies a study of the historical origin of a theory sanctioning the exercise of an obviously discriminatory power by the states. For the decisions in these cases make clear a strong presumption of statutory validity, founded squarely on history and tradition. It has been contended that "the public policy of prohibiting the alien ownership of real property, except in very limited cases, has been an outstanding principle of the common law almost since its inception."[6] But the same principle of the common law is one completely at variance with the exercise by the states of

[1] 332 U.S. 633 (1948).

[2] Justices Black and Murphy wrote concurring opinions. Justice Douglas joined Justice Black and Justice Rutledge joined Justice Murphy. The Black-Douglas opinion suggested that the California statute was inconsistent with federal powers over immigration and foreign affairs and denied to the alien the equal protection secured by the Fourteenth Amendment. Justices Murphy and Rutledge agreed that the law was based on racial prejudice and ought to be struck down under the Fourteenth Amendment.

[3] The dissents by Justices Reed and Jackson, with Justice Burton joining the former, denied that the California presumption was unreasonable if, as the majority opinion pointed out, the policy of the California legislature was not to be questioned.

[4] Note Justice Black's reference in Takahashi v. Game Commission, 334 U.S. 410, 421 (1948) to the cases cited in note 5 infra upholding the validity of the California and Washington alien land laws: "assuming the continued validity of such cases. . . ."

[5] Terrace v. Thompson, 263 U.S. 197 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Frick v. Webb, 263 U.S. 326 (1923).

[6] This was the argument of the state in Terrace v. Thompson, 263 U.S. 197, 206 (1923).