LABOR LAW -- LEGAL STATUS OF SIT-DOWN STRIKE -- LEGAL AND EQUITABLE REMEDIES

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The country finds itself infected with a strike rash. Conditions are now like those which previously have resulted in this state of affairs. The midtide of recovery from a depression low has brought rising prices, freer spending, business increase, and speeded up production, but only incomplete relief to labor from depression hours and wages and the later speed-up. Such traditional causes of strikes have been coupled with a new demand for labor recognition. Moreover, a strike now has a much greater chance of
success than it would have had at any time within the past several years—a potent stimulant to labor unrest, as every businessman knows. And the chance of success has been augmented by the development of labor’s as yet most effective weapon, the sit-down strike. This weapon and its legal status are to be the topic of the present comment.

I.

Speaking generally, all of labor’s present weapons were held illegal when first devised, but were continued in use despite legal hindrances.¹ The history of labor’s struggle for increased power presents a picture of a six hundred years’ war against restrictive common-law doctrines and statutes.² The first American labor case, following traditional English doctrines, held that the formation of a trade union was a criminal conspiracy.³ The confederacy involved in the case had struck for the purpose, then considered vicious, of obtaining higher wages—and both confederacy and strike were held illegal. The conspiracy doctrine was apparently a one-edged sword, for employers were allowed to combine to depress wages, on the grounds that the object to be attained was meritorious, and that concerted action to resist real oppression was innocent.⁴ Relaxation of conspiracy doctrines later led to the validation of peaceful combinations.⁵ This seemed to be a Pyrrhic victory, however, for the actions of a peaceful combination or union might themselves be illegal. A threatened strike to force dismissal of non-union men was early held to be conspiracy unjustly to oppress individuals.⁶ Some states still hold the view that a strike to unionize a shop is illegal.⁷ The “oppression of indi-

⁵ The leading decision is Commonwealth v. Hunt, 4 Metc. (45 Mass.) 111 (1842).
⁶ State v. Donaldson, 32 N. J. L. 151 (1867). Such a rule denies to the workers the most effective means of unionization that they have.
⁷ Bausbach v. Reiff, 244 Pa. 559, 91 A. 224 (1914); Plant v. Woods, 176 Mass.
viduals" doctrine has been much used in criminal cases in the English courts; it remains a serious threat to many labor activities if adopted in tort actions for civil conspiracy. Although the right to strike is today well recognized, most states lay down the requirement for this union activity that the purpose of the strike must be lawful, that is, a purpose which the court in the particular case regards as lawful.

But unionization and union activities are not subject to attack from the conspiracy approach alone. Common-law doctrines regarding contracts in restraint of trade can be used by a court at any time it finds that trade unions have stepped out of line. The doctrine was first used by the English courts after the application of conspiracy principles had been banned by an act of Parliament. The unions were preserved only by force of another statute declaring the purpose of any trade union not unlawful so as to open up criminal prosecution, or render voidable any agreement or trust. There is no legislation of this type in the United States. Restraint of trade theories could easily be applied by our courts. It is inconceivable that any court would hold today that a union is itself a combination in restraint of trade, but it is possible that union practices considered unfair and socially undesirable by the courts might be brought within this mesh of the common-law web.

This possibility has become fact by interpretation of the Sherman Anti-Trust Law. This statute has been applied to labor activities, although serious doubt has been raised whether it was intended so


8 See SIDNEY and BEATRICE WEBB, THE HISTORY OF TRADE UNIONISM (1920).

9 A willing court can in most cases find a precedent for holding that there is a criminal conspiracy. The cases are too multitudinous and variant to be here cited. See OAKES, LAW OF ORGANIZED LABOR AND INDUSTRIAL CONFLICTS (1927), index title "Criminal Conspiracy" for an exhaustive treatment. See also Sayre, "Criminal Conspiracy," 35 HARV. L. REV. 393 (1922). American courts have not often used the civil conspiracy doctrines—perhaps because the question is seldom raised.

10 See OAKES, LAW OF ORGANIZED LABOR AND INDUSTRIAL CONFLICTS, §§ 263-291 (1927).


12 "... To make a strike a legal strike the purpose of the strike must be one which the court as a matter of law decides is a legal purpose of a strike. ..." De Minico v. Craig, 207 Mass. 593 at 598, 94 N. E. 317 (1911). In some states a strike is lawful regardless of purpose—taking this union activity as well as unionization out of common-law conspiracy rules. See Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027 (1908).


14 Hornby v. Close, L. R. 2 Q. B. 158 (1867). The decision was a terrific shock to the unions, since it left all their funds at the mercy of those in possession of them at the time.

15 The English Trade Union Act of 1871, 34 & 35 Vict., c. 31, §§ 2, 3.

to be applied. In the Danbury Hatters case, activities which were probably illegal under the state law as a secondary boycott were held to be illegal activities under the Sherman law. A later case extended this law to activities probably legal under state statute and decisions.

The second Coronado Coal Company case, which re-affirmed the principle that unions could be sued as entities, and levy made on union funds, is noteworthy also as a decision that a violent union strike directed against a non-union mine constitutes a restraint of trade entitling the injured party to triple damages. Union regulations forbidding members to work on material furnished by non-unionized concerns have also been held illegal. On the other hand, an agreement by various building contractors and dealers to limit sales of materials to employers having an open shop policy has been held not a violation of the Sherman Law. The Clayton Act purported to give labor an exemption from the anti-trust restrictions. Emasculating court decisions nullified this exemption by construing it as removing the Sherman Law obstructions only from the unions themselves and not from their activities. And, of course, the Clayton Act concerned only federal statutes and bound only federal courts. State courts could still apply their anti-trust laws, and all courts were free to invoke common-law doctrines if they felt so inclined.

The picketing and boycott picture will not be here developed. It is sufficient to say that the courts have produced a mass of sweeping

17 Berman, Labor and the Sherman Act (1930). The courts' view is supported in Mason, Organized Labor and the Law, ch. 7, 8 (1925).
21 The earlier decision was based on the policy that unions were granted special privileges by statutes recognizing them as entities and should be treated as entities for the purposes of legal proceedings. Labor's fear that this was the beginning of compulsory union incorporation has not yet been justified. United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 42 S. Ct. 570 (1922).
23 Industrial Assn. of San Francisco v. United States, 268 U. S. 64, 45 S. Ct. 403 (1925). The Court held that the effect of the particular agreement on interstate commerce was incidental, indirect, and remote, so that Congress had no power to regulate it under the commerce clause. In effect, this decision seemed contra to previous holdings. It was based on a subtle distinction, which eluded the grasp of labor. Labor's belief that it was the victim of invidious discriminations was heightened by the fact that the Court also relied on the maxim, "de minimis non curat lex."
and conflicting decisions which leave this field in confusion. Some courts have announced that peaceful picketing is, like silent noise, an abstraction that can never be attained in reality. Accordingly, peaceful picketing easily becomes, by definition, coercive, and consequently illegal and criminal, because the picketers are conspiring to gain lawful or unlawful ends by unlawful means.

The use of unlawful means can be enjoined. But the act of striking itself cannot usually be enjoined, even where the strike is called for an unlawful purpose; that is, a decree will not be given ordering the strikers to return to work.

Picketing, boycotts, conspiracies, combinations in restraint of trade (the two former usually involved in the two latter) were increasingly the targets of injunctive shafts after the Debs case brought the possibilities of this remedy prominently before the judicial eye. Bitter resentment against this equity jurisdiction found expression in the Norris-La Guardia Act, outlawing most injunctions, and also yellow dog contracts. This act applies only to federal courts. Many states have domestic editions of this federal statute. The effect of the state laws seemed to be much weakened by the opinion in Truax v. Corrigan.

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25 American Steel Foundries Co. v. Tri-City Trades Council, 257 U. S. 184, 42 S. Ct. 72 (1921).
26 This is the rule in Michigan. In re Langell, 178 Mich. 305 at 309, 144 N. W. 841 (1914): "The latter and more reasonable rule, however, holds that all picketing is illegal." Cases cited. The court may allow one or two men to stand at each entrance to a plant and attempt peaceful persuasion—a worthless procedure.
27 The courts adhere rather closely to a theory that only damages may be given for a strike with an unlawful purpose. The usual ground of such decisions is that denial of the right to strike amounts to enforcement of involuntary servitude, forbidden by the Thirteenth Amendment. See Arthur v. Oakes, (C. C. A. 7th, 1894) 63 F. 310. The doctrine is not iron-clad, however. What would be the decision in the case of a general strike in all hospitals, or in all power plants? The public interest must be weighed in certain types of cases.
29 In re Debs, 158 U. S. 564, 15 S. Ct. 900 (1895). Debs was cited for contempt for violating a federal court injunction against union activities in the Pullman strike of 1894. Debs said that the injunction paralyzed and broke the strike depriving it of its leaders. He believed that any strike must fail if deprived of leadership. Could not this principle have been applied in the recent strikes by the arrest of the leaders on any one of several grounds?
30 47 Stat. L. 70, 29 U. S. C., §§ 101-115 (1932). In effect, it was enacted that federal courts could not enjoin most normal, peaceful activities of unions. Query as to the meaning of the delimiting words used, after several years of judicial interpretation. The act has been held constitutional. Cinderella Theater Co. v. Sign Writers’ Local Union No. 591, (D. C. Mich. 1934) 6 F. Supp. 164.
but a recent Supreme Court case gives promise that henceforth such laws will be given full force.\textsuperscript{32}

The Norris-La Guardia Act assumes new importance in light of the validation of the National Labor Relations Act.\textsuperscript{33} Section 8 of the Norris-La Guardia Act provides:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

The violation, by the complainant, of any of the provisions of the National Labor Relations Act "involved in the dispute" should, it would seem, prevent the issuance of an injunction by a federal court. However, it is too soon to formulate any general rule on the interrelation of the two acts, although one case has held that the above-quoted section of the Norris-La Guardia Act does not apply if there has been violence or other unlawful action on the part of the strikers.\textsuperscript{34}

The significant point to be noted in this sketchy review of labor law is that the trend has ever been toward ultimate recognition of stubbornly claimed rights. The course followed by labor has, broadly speaking, been the constant use of illegal methods in the face of all opposition until the courts have declared or the legislatures have made those methods lawful.\textsuperscript{35} New weapons have been devised, new modes of applying pressure discovered. The courts have limited the extent to which some could be used, but the fact of limitation is not as significant as the fact that all of labor's recognized weapons, so readily accepted today, were considered viciously illegal when first tried.

Will the sit-down take its place as another lawful weapon of labor? The sit-down is a new and wonderfully effective weapon. It has been claimed that the sit-down is, or ought to be, legal. The theory urged is that the worker has a property right in his job, and can sit down at it to keep it and improve it.

But it is very doubtful whether the sit-down will at any future date be declared legal. Public opinion is strongly against this weapon,


\textsuperscript{34} United Electric Coal Companies v. Rice, (C. C. A. 7th, 1935) 80 F. (2d) 1, disapproved in 36 Col. L. Rev. 157 (1936).

\textsuperscript{35} If Jhering had been born 50 years later, he might here have found a new illustration for his phrase, "the struggle for law."
though of course public opinion was also opposed to other labor weapons at the outset. Moreover, the courts have definitely declared its illegality, even though it has been freely employed. The sit-down lashes out at fundamental property rights which the law has always been prepared to protect. Even a definite legalization of the sit-down by statute would probably not stand up in the face of the due process clauses of the constitutions. And finally, as a method of vindicating even justifiable claims, the sit-down is open to very grave objections. Its very effectiveness lends itself to serious abuse. The walk-out strike and the boycott are effective only if a substantial majority of the workers are in sympathy with the strike. But by use of the sit-down a small minority of employees in key positions can summarily close a whole plant. Such a potent device for the coercion of majorities conflicts with our usual democratic principles. Even the union leaders are not likely to make any sustained drive to have the sit-down legalized for the simple reason that it is so difficult to restrain. No device can long be used for bargaining purposes if, after a bargain is struck, the device cannot be controlled.


37 The sit-down is the logical end of the unions' search for an instrument to compel complete unionization. At this point a question must be raised. The sit-downers claim a property right in their jobs. Can they consistently do so in face of the fact that they are depriving other men, willing to work, of the opportunity to do so? Or do only union men have such a property right? The U.A.W.A., in the motor strikes, demanded recognition as the sole bargaining agent for all employees. The employers felt that such recognition would be a gross injustice to non-union men, and refused to yield. The issue of sole recognition caused the Chrysler shut-down, and held the General Motors conferences in a stalemate for weeks before the union withdrew its demand. Business Week, March 13, 1937, p. 45. In the final agreement in the Chrysler dispute, the sole bargaining provision was deleted, but the U.A.W.A. accomplished much the same result by gaining preferential status. Business Week, April 10, 1937, p. 16.

38 The agreement in the General Motors strike stipulated that there would be no further strikes within six months, on certain conditions. Yet within two months, there were thirty unauthorized "quickie" strikes by disgruntled workers who felt negotiatory methods did not adjust grievances quickly enough. These wildcat, uncontrolled strikes entailed the loss of 415,865 man-hours of work. Business Week, April 10, 1937, p. 17. That such strikes seriously injure the corporation is evidenced by the fact that during the original strike, General Motors fell behind production schedule at the rate of 10,000 cars per day. Business Week, Feb. 6, 1937, p. 15.

39 An unauthorized strike at the Plymouth plant, in violation of the Union agreement with Chrysler Motors, involved a complete sit-down by 6,000 workers, closed the plant in its entirety, and was settled with difficulty only after six hours, through conferences of union members and leaders. Detroit News, May 21, 1937.

The sit-down has already produced variants. The "slow-down" involves the
2.

If, then, the sit-down is not legal and not apt to be legalized, what is to be done about it? This is a crucial question, especially in Michigan, the scene of the most numerous, most critical, and in many cases, most frivolous of the sit-down strikes.\footnote{The origin and history of the sit-down strike appears in 23 Va. L. Rev. 799 (1937). For a complete story of the sit-down strike, reference is made to all newspapers and periodicals from Jan. 1, 1937, to date.} During one week there were twenty-two sit-downs in operation in Detroit alone.\footnote{These strikes involved packing companies, hotels, cigar factories, bus companies, steel and aluminum plants, drug stores, shoe stores, department stores, and various small industrial factories. They were broken in various fashion—by negotiation, by the police, or by a counter sit-down on the employer’s part. 29 Time, No. 12, p. 17, (March 22, 1937).} The strikes in the motor industry were the most serious and the most far-reaching in effect.\footnote{For seventeen days, 6,000 workers sat down in the Chrysler plants alone. Some 93,000 laborers were affected in the multifold strikes. See 29 Time, No. 14, p. 14 (April 5, 1937), for an account of the mass meeting of 60,000 workers in the heart of Detroit. Feeder industries throughout the nation were throttled, and the loss to the national economy ran into millions.} The General Motors and the Chrysler strikes caused the bitterest feeling and presented the most difficult problems of policy and issues of law. The following discussion will treat these motor strikes alone, in the light of Michigan law. The legal applications made and the arguments suggested will, in many instances, be relevant to other situations, and in other jurisdictions.

Of course, the strikes in the motor industry did not rise spontaneously. The United Automobile Workers of America had long been agitating for a “six hour day, five day week; a decent annual wage; elimination of the killing speed up; no reductions in pay, either directly or indirectly; increase in wages in proportion to the ... increase in profits of the ... corporation; a 100% union shop, with complete recognition and collective bargaining for settling all problems;” and strict application of seniority principles.\footnote{See “The United Automobile Worker,” official publication of the U.A.W.A., for October, 1936.} The prime objective of the union in the General Motors and Chrysler strikes was to secure recognition as the sole bargaining\footnote{See note 37, supra.} agent for all workers in the plants. The slackening of pace by all or key workers. The “skippie” operates by having key men skip jobs as they pass by on the assembly line. Both produce chaos in conveyor belt production processes. They eliminate the objection that the worker has quit his job and is a mere trespasser. The employer might discharge the skippers for inefficiency—but hesitates to give the other men an occasion for striking. Both slow-down and skippie are designed to restrict the speed-up, not to gain sole recognition, higher wages, shorter hours, and seniority agreements—but might be so used.
attainment of such an objective would give the same benefits to the union as a one hundred per cent union shop, and would be, obviously, a great aid in the drive for complete unionization. The corporations refused absolutely to grant the demanded sole recognition, for the reason, among others, that the bargaining rights of those men not desirous of joining the union should be protected. The claims of the employer and of the employees were in conflict. It is not strange that in such a situation the employees applied the most effective pressure of which they knew. That pressure was the sit-down.

Taking the Chrysler strike as a convenient example, one finds that some 6,000 workers remained in the plants, preventing the entry of other workers, and effectively stopping production in every department. The occupancy was quiet, orderly, and complete. Thousands of fellow strikers stood ready at all times to relieve those inside, to distribute necessary supplies to them, and to come to their support in a crisis. There was a firm determination not to leave the plants before a satisfactory settlement, except under pressure of overwhelming force. There were threats, also, to destroy vital machinery, should force be applied. The Company refused to negotiate until possession of the plants was surrendered, and had, presumably, one prime purpose in the legal actions it contemplated. That purpose was to have the premises cleared, the buildings evacuated.

It is not entirely clear, nor provable, how the two motor strikes were called. As to the Chrysler strike, the best evidence which the author has been able to obtain indicates that the executive council of the Chrysler local of the U.A.W.A. had been authorized by a vote taken at the time of the Flint General Motors strike to call a sit-down in the Chrysler plant. When a decision was made to close the plant, a code signal was telephoned to agents in the plant, with the desired results. It is a question whether such facts could be proved in court. Aside from questions of proof, it would seem that the union officials would be liable for the torts of the members, and that union funds would be subject to levy were a damage judgment recovered. This assumes that the acts of the sit-downers were tortious. Once the strikers had neatly welded themselves within the plant, some claim was made that the new institution was lawful. Attorneys for the U.A.W.A. urged strenuously that the clear mandate of the people, in 1936, had so

45 The decision was hotly contested in council. Personal motives and desire to assert leadership powers undoubtedly had much to do with calling the Chrysler strike, since the corporation had treated the U.A.W.A. very fairly. For an account of the Chrysler conference, see BUSINESS WEEK, March 6, 1937, p. 14.
46 29 TIME, No. 12, p. 17 (March 22, 1937).
changed the law that labor’s fundamental human claim to have and hold a job, to work decent hours, at a fair pace under fair conditions, with a just annual wage, had become a property right co-equal with the property right of the employer in his plant.\textsuperscript{48} It is doubtful whether any striker actually believed himself to be acting within the law. There was no intention of evacuating the held property, should the possession be declared illegal, but there was a desire to present a plausible argument to gain a measure of public sympathy. This result followed to a certain extent, the idea becoming quite popular. However, the popularity does not denote the validity of the doctrine. Under Michigan law, the sit-down strikes were illegal on a number of counts.

3.

The civil liability of the strikers is clear. Cases, alike in all but magnitude, have held that it is a trespass to retain the employer’s property after the employment, of which the right to possession and use is an incident, has voluntarily or involuntarily ceased.\textsuperscript{49} And it may be that the strikers, by depriving innocent third parties of a right to work, also committed the tort of civil conspiracy against both those parties and the employer.\textsuperscript{50} Multiple damage actions against the

\textsuperscript{48} These claims were dismissed without question by the court. “This court has previously stated that he must take the law as he finds the law . . .” “The question involved here as to the right of possession seems to have been clearly settled . . .” Gadola, J., in General Motors v. International Union, U.A.W.A., (Mich. Circ. Ct. 7th Dist.) reported in part in 4 U. S. Law Week 678 (1937).

49 Lane v. Au Sable Electric Co., 181 Mich. 286, 25 A. 597 (1893). Even where one party has no legal rights, injunction may be refused where the hardship to the trespasser will greatly outweigh the benefits to the complainant. See Crescent Mining Co. v. Silver King Mining Co., 17 Ut. 444, 54 P. 244 (1898). In the sit-down case, a balance of convenience would tilt in favor of the company, where the strikers had no legal right in the premises. The doctrine has received scant consideration in labor cases, though it should be applied in restraining orders and ex parte decrees when the rights of the parties and relative merits of their claims are not clear. See Frankfurter and Greene, \textit{The Labor Injunction} 65 (1930), and 31 Ill. L. Rev. 942 at 955 (1937).

\textsuperscript{50} J. C. McFarland Co. v. O’Brien, (D. C. Ohio, 1925) 6 F. (2d) 1016. The employer could sue in damages for the injury to him; and injured employees seem-
individual strikers would be a remedy of little practical worth, however. The vexing problem of proof of damages, and the difficulties of collecting a recovered judgment, need here only be mentioned. Ejectment was available. Cases interpreting the statute\(^{51}\) on that remedy hold that it lies to recover the mere possession\(^{52}\) when title questions are not involved.\(^{53}\) An ejectment action would be of more value to the corporation than damage judgments, but time was of the essence, and court proceedings are slow. The summary action of forcible entry and detainer would remove this objection. The wording of this statute\(^{54}\) seemingly should draw a sit-down strike within its operation; but it should be noted that the statute has been interpreted to apply only where the entry is unlawful, and subsequent unlawful retention will not relate back to the entry.\(^{55}\)

The desired result of clearing the plants could have been reached by the arrest of all the sit-downers as well as by an ejectment or forcible entry judgment. Consideration of that possibility leads to a study of the applicable criminal laws, which are more varied than the civil, but less clear.

Very like the common-law rules of conspiracy as applied to labor activities is the Michigan Mechanics' Statute, which provides that any person unlawfully interfering with any laborer in the peaceable pursuit of his occupation is guilty of a misdemeanor.\(^{56}\) The statute badly needs construction, for although sit-down strikes are certainly included within its broad letter, so are countless other acts usually considered

\(^{51}\) Mich. Comp. Laws (1929), § 14905: "No person can recover in ejectment, unless he has at the time of commencing the action a valid, subsisting interest in the premises claimed, and a right to recover the possession thereof . . . ." Same, § 14909: "Sufficient for plaintiff to aver . . . that . . . he was possessed . . . and . . . that the defendant afterwards . . . entered . . . and that he unlawfully withholds . . . the possession . . . ."


\(^{54}\) Mich. Comp. Laws (1929), § 14965: "When any forcible entry shall be made, or when an entry shall be made in a peaceable manner, and the possession shall be unlawfully held by force, the person entitled to the premises may be restored to the possession thereof, in the manner hereinafter provided." The manner provided is complaint, issuance of warrant, and arrest: §§ 14966-14968.


\(^{56}\) Mich. Laws (1931), c. 328, § 352: "Any person or persons who shall by threats, intimidations, or otherwise, and without authority of law, interfere with, or in any way molest, or attempt to interfere with, or in any way molest or disturb, without such authority, any mechanic or other laborer, in the quiet and peaceable pursuit of his lawful avocation, shall be guilty of a misdemeanor." [Re-enactment of Mich. Comp. Laws (1929), § 8612.]
legal. In so far as the statute codified earlier decisions reaching the same result on common-law doctrines of civil and criminal conspiracy to oppress individuals, the courts would be justified in applying it to the sit-down situation. However, the court in its opinion in the Flint General Motors strike case did not mention the statute, although it was urged by the complainant's attorneys as a ground for relief. A rather similar statute in Illinois, obviously designed for use in industrial conflicts, has been relied on to authorize warrants against sit-down strikers in Chicago.

The anti-syndicalist movement left its traces in the Michigan statutes: "Criminal syndicalism is hereby defined as the doctrine which advocates crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reform. The advocacy of such doctrine . . . is a felony. . . ." This statute has been applied against the central executive committee of the Communist party. It is arguable that it is applicable to sit-down strikers who advocate "unlawful methods of terrorism" to accomplish "industrial reform."

Moreover, the strikers threatened injury to the property of another to compel him to do an act against his will. Such conduct finds its interdict in the words of the extortion statute: "any person who shall . . . threaten any injury to the person or property . . . of another with intent thereby to extort . . . any pecuniary advantage whatever, or with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony. . . ."
The above laws were framed, apparently, with an eye to including all possible situations and actions of the types sought to be banned. They are broad brooms, but the courts have not yet said whether they will reach into the sit-down strike corner. On the other hand, decisions have applied the rules of common-law criminal conspiracy to certain practices in industrial disputes. In an early Michigan case, the court declared that a conspiracy by two or more persons "wrongfully to injure or to prejudice any third person or any body of men in any other manner," or "to commit an offense punishable by law" was a criminal act. But it was added, obiter, that the rule did not apply to mere civil trespass. A combination, then, merely to seize industrial property, would not be criminal. A later case took the position that illegal picketing, intimidating, boycotting and pamphleteering by a union did amount to a criminal conspiracy "to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual." The act of barring laborers, unsympathetic to the strike, from their work would be an oppression of individuals falling within this principle. Of course, if the strikers were guilty of violating any of the above statutes, as a group, they would also be criminal conspirators for their concerted violative action.

But it is not the punishment provided which is of interest to an employer harassed by a sit-down; the important fact is that a warrant can be issued against those who, by a sit-down strike, commit a crime. Arrest of the strikers is a speedy and inexpensive means of evacuating the plants—if the arrest can be made.

4.

Injunction is the remedy which is most apt to be sought. In his decision giving an injunction in the General Motors strike, Judge Gadola said, "The question involved is solely as to the right of the defendants to occupy the premises involved in this litigation." Such
a statement seems to assume that injunction will be granted once the right to possession is determined. Injunction, of recent years decreed freely in labor disputes, was unhesitatingly used as a solution to the new problems raised by the sit-down strike.

This relief, enjoining the strikers’ torts and crimes, was proper if the remedy at law were inadequate, if the plaintiff company came into court with fairly clean hands, if the order would not be wholly inequitable, and if the decree would not be unenforceable. Were these conditions fulfilled?

There were other remedies possible, as outlined above. Trespass lay against the individual strikers, and against the U.A.W.A. (It will be an interesting sidelight if the insurance companies, who bore the strike loss to a large extent, sue the U.A.W.A. to recover.) Equity does not invariably refuse jurisdiction where there is a trespass remedy, of course—especially where litigation will be multiple and will not secure full recompense for the injury. Ejectment lay, but, where forcible dispossession will continue and irreparable injury will be inflicted pending litigation, equity can intervene. Forcible entry, which would move as speedily as injunction, was of doubtful applicability. Certainly there was an ironclad case of inadequacy of civil remedies, from equity’s viewpoint.

68 Frankfurter and Greene, The Labor Injunction (1930).

70 See 18 Va. L. Rev. 681 (1932), citing cases which hold that equity will enjoin a criminal offense when it affects property rights or civil rights, or when it constitutes a public nuisance. See also 29 Ill. L. Rev. 942 (1935); and Caldwell, “Injunctions against Crime,” 26 Ill. L. Rev. 259 (1931).
71 For a discussion of hardship and balance of convenience, see 31 Ill. L. Rev. 942 at 955 (1937).
73 Multiplicity of suits alone should be sufficient to make the legal remedy inadequate. Some states add the requirement of irreparable injury. See Walsh, Equity, § 25 (1930); and 43 W. Va. L. Q. 70 (1937), noting Henline v. Miller, (W. Va. 1936), 185 S. E. 852. This is the rule in Michigan. Edwards v. Allouez Mining Co., 38 Mich. 46 (1878).
74 Injunction lies to prevent forcible dispossession of, and irreparable injury to, one who has a prima facie right of possession, until he may be heard and given an opportunity to establish his rights. Deane v. Allen, 172 Mich. 686, 138 N. W. 228 (1912).
Theoretically, self-help could have been used by the Chrysler Corporation, but this can hardly be regarded as an adequate remedy so as to bar equitable relief. In fact, one court in giving an injunction against the sit-down relied heavily on a Michigan case in which the employer had used self-help and had faced a damage suit in consequence. The possibility that private rights may lawfully be vindicated by a minor private war has never been regarded as a reason for refusing judicial intervention.

But the privilege of self-help leads naturally to a consideration of the criminal remedies available and the existence of criminal remedies does have a bearing on the granting or withholding of equitable relief. The usual city ordinances against disorderly conduct have been relied on to justify many activities of local constabularies. Serious doubt exists whether a peaceful sit-down falls within the definition of "disorderly." But the property owner, in exercising his right of self-help, may call upon the police as his agents to render needed assistance. Any resistance would soon breed disorderly conduct, giving the police additional powers of their own. Criminal conviction would not compensate the companies for the damages suffered, it is true, and would be a lengthy and speculative business at best; but the property owners were seeking, not recompense, but evacuation of the plants. Arrest would accomplish this result. It is sometimes said that the discretion allowed the prosecutor in issuing warrants makes the criminal remedy so indeterminate as to render it inadequate. But when a case becomes so clear that any refusal to extend the law's aid is an abuse of discretion, it must be presumed that public officers will perform their duties. It is submitted that arrest would more swiftly and efficiently serve the purpose of the injunction against retention of possession—especially in view of the known fact that the injunction would not be self-executing against the strikers, and would be enforceable only by arrest for contempt.

Somewhat allied to the principle of lack of jurisdiction because of adequacy of other remedies is the rule, well-recognized in the Michigan decisions, that it is improper to dispossess a defendant from land by an interlocutory order, either through mandatory injunction or receivership. It has even been said that a dispossession order of

75 Gadola, Circuit Judge, in the General Motors case, 4 U. S. Law Week 678 (1937).
76 A well-rounded discussion of this phase of the problem appears in Caldwell, "Injunctions against Crime," 26 Ill. L. Rev. 259 at 271-272 (1931).
77 Cf. Vegelahn v. Gunther, 167 Mass. 92 at 99, 44 N. E. 1077 (1896): "Nor does the fact that defendants' acts might subject them to an indictment prevent a court of equity from issuing an injunction." The criminal remedy in that case, however, was not adequate, since it could not prevent a continuing injury to property unless all the strikers were arrested, held, convicted, and jailed.
78 Arnold v. Bright, 41 Mich. 207, 2 N. W. 16 (1879); People v. Simonson,
this type is void, and may be disregarded without fear of punishment for contempt. It may be, however, that this rule is limited to situations where the defendant has a prima facie right of possession.

The "clean hands" maxim has been applied infrequently in labor disputes. It was dismissed by the circuit judge in the General Motors case with the observation that two wrongs do not make a right. This view, however, would wipe out entirely a traditional equity doctrine, which proceeds on the theory that two wrongs do not give a right. It is settled that equity will not attempt to balance the wrongs of two adverse parties. This principle has been tacitly recognized in a leading Michigan case, centering on a labor dispute. There the court took pains to point out the rights of employers and employees, after stating that complainants "had done nothing to the defendants, or any of them, either illegal, immoral, or unjust." The recent sit-down cases might have been approached from this point of view: some notice might have been given to the charges against General Motors of intimidation, coercion, espionage and blacklisting. Such forms of conduct, if present, would satisfy the general requisite that complainants' misconduct must be closely related to the subject matter before equity will deny relief. It must be noted here, however, that courts have at various times failed to disapprove blacklisting, refusals to negotiate,


79 The decision of Gadola, J., in General Motors Corp. v. International Union, United Automobile Workers, reported in part in 4 U. S. LAW WEEK 678 at 679 (1937): "The court yesterday asked the defense counsel if they were of the opinion that one wrong could be righted by another wrong. The falsity of the position is apparent by merely stating the position. The courts are open to the defendants, if they are wronged, and they may have redress therein if they seek the assistance of the courts."

80 See cases cited in 1 POMEROY, EQUITY JURISPRUDENCE, 4th ed., §§ 397-404 (1918); Roszell v. Redding, 59 Mich. 331, 26 N. W. 498 (1886).


82 See affidavit of Homer Martin, in the General Motors case, at 3.


84 Forstmann & Huffman Co. v. United Front Committee of Textile Workers, 99 N. J. Eq. 330, 133 A. 202 (1926). The reverse situation is presented by Cornellier v. Haverhill Shoe Mfrs.' Assn., 221 Mass. 554, 109 N. E. 643 (1915). An injunction against blacklisting was refused to complainant labor leader because of his drive to intimidate "scabs."

85 Thomson Machine Co. v. Brown, 89 N. J. Eq. 326, 104 A. 129 (1918); and of course, the General Motors case. General Motors had refused to recognize any unions, or hold any elections under the Wagner Act—though it professed itself willing
and the forming of associations to destroy unions. The contention has been made that the National Labor Relations Act sets up a new legislative definition of cleanliness. This argument would seem to have much weight, especially where an employer has refused bargaining rights to majority representatives and indulged in forbidden practices. The Michigan court evaded this issue by stating "If the National Labor Relations Act] is valid, it can hardly be contended that failure to abide by its terms gives the defendants the right to seize and appropriate $50,000,000 worth of property of the plaintiff, and to prevent by threats of violence any use of the property by the plaintiff or its agents." But refusal of injunctive relief would not mean that defendants had a right of seizure. It would mean only that, on other grounds, complainant had deprived itself of equitable relief.

Another strong objection to the issuance of a mandatory injunction in an industrial dispute is one never considered by the courts in this type of case. Following the maxim that "equity will not decree a vain thing," courts have long denied decrees for injunction, as well as for specific performance of contracts, which could not be enforced. The doctrine has had its clearest application in cases where a strong personal element, or special skill, was involved, or where the decree would require long continued supervision. But the practicability arguments to meet with group representatives to talk things over. See Lorwin and Wubnic, Labor Relations Boards 354-355 (1935).


87 This should or could prevent the issuance of an injunction in a state having a junior Norris-LaGuardia Act. The forbidden practices set up by the Wagner Act are: interference with the right of labor to organize and bargain collectively; any domination of or contribution to any sort of labor union; discrimination against workers for union activities; retaliation on a worker for bringing a charge or testifying under the Wagner Act; refusal to bargain collectively with the majority group. Employers have relied on the unconstitutionality of the Act, and refused to obey the above rules. The unions could bring complaints, and have the above rules enforced, through the National Labor Relations Boards. This possibility does not prevent labor from urging the unclean hands defense in an injunction suit brought by the employer. Labor's administrative remedies do not have to be exhausted before striking, or before urging the defense, where time is of the essence as it is in the strike cases.


89 See Lawrence, Equity Jurisprudence, § 44 (1929).

90 Clark v. Truitt, 183 Ill. 239, 55 N. E. 683 (1899) (contract to form a partnership).

91 De Rivafinoli v. Corsetti, 4 Paige Ch. 264 (N. Y. 1833) (contract for personal performance by concert artists.)

made in that type of case could appropriately be applied to labor disputes. Completely effective enforcement of either a prohibitory or mandatory injunction in the larger labor disputes is rare. This is especially true where the decree includes, as is common, the sweeping clause restraining interference "in any way." In the General Motors and Chrysler strikes, enforcement was impossible, it has been claimed, except at the price of civil war. Intense hostility was raised by the very appearance of the sheriff instructed to read the decree in the Flint dispute, and the local police admitted that they were powerless. Troops to aid in effecting the order were denied by the governor, and no attempt at ouster was made. The decree took on the shape of a mere declaratory judgment. This may have been all that was desired. If so, the Declaratory Judgment Statute might provide an equally swift and more proper proceeding to reach the same result.

However, the refusal of relief on the ground that equity will not grant a vain decree involves a question of fact, whether the injunction, if granted, can be enforced by the ordinary processes of the courts. In the smaller strikes such enforcement can be made. In the larger strikes, leading commentators have lined up on both sides of the issue, leaving the answer in doubt. It must be remembered that the strikers in the plants were but representatives of a larger group, which might well have joined in any affray. There was undeniably serious danger of civil uprising inherent in the situation. If attempted enforcement of the injunction had led to a pitched battle, the strikers could have been driven out. The cost would have been loss of human life on both sides.

93 See FRANKFURTER and GREENE, THE LABOR INJUNCTION 99, 275 (1930) and cases cited by McCracken, STRIKE INJUNCTIONS IN THE NEW SOUTH 94 et seq. (1931). The omnibus restraining clauses have been common: Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 S. Ct. 492 (1911). Such orders are oppressive when issued by lower courts, only to be reversed years later when the emergency is over and the strike defeated. See Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324 (1909); Michaels v. Hillman, 111 Misc. 284, 181 N. Y. S. 165 (1920).

94 N. Y. TIMES 1:1 (Feb. 6, 1937).

95 A report of the strike, sent to General Motors stockholders by Alfred P. Sloan, intimated that enforcement of the injunction, by the military if necessary, was desired by the corporation. Such enforcement would seem to have been poor business policy, in view of the attendant circumstances. And it may be that the corporation wished only to refute the popular notion that the strike was legal, in that the workers had a property right in their jobs.


97 See the account of the routing of the 60 strikers from the Fansteel Metallurgical plant in North Chicago. CHICAGO DAILY TRIBUNE, Feb. 18, 1937; March 4, 1937; 29 TIME, No. 9, p. 13 (March 1, 1937).

If the 6,000 strikers in the Chrysler plants could have been jailed, could they have been held? See BUSINESS WEEK, April 10, 1937, p. 72, for a report of the disturbances in Albert Lea, Minn. The sheriff arrested fifty-three sit-downers. A mob prepared to break the jail. Governor Benson order the strikers' release.
of the plant walls, and the destruction of the very property sought to be protected. Wreckage of plant equipment alone would have made an avoidable use of force unwise.\textsuperscript{98} On the other hand, there is a question whether in the face of tear gas and firearms the strikers would have persevered in their announced intention to give their lives if necessary to attain their objectives. One cannot disprove the contentions of those who insist that a clear condemnation of the first General Motors strike at Flint, supported by a strong show of force, would have resulted in quiet and costless enforcement of the granted injunction of the strike menace. If these claims are true, then the issuance of an injunction against sit-down strikes becomes a routine procedure, no distinction will have to be drawn between the small strike and the large in determining equity’s jurisdiction, and the theory of uniform treatment will not have to be compromised.

5.

What we have said so far seems to suggest that the whole question whether an injunction should be given turns on the question of enforcement. But we cannot really be satisfied with a solution of the sit-down strike problem in terms of the grant or refusal of injunctions. And the question of enforcement cuts across the whole list of legal doctrines and legal remedies which we have heretofore catalogued. We may talk of rights and wrongs and remedies in various terms, but we are conscious all the time that our talk is somewhat arid, because at the end of our thinking stand these questions: What can we do? How shall rights be enforced and wrongs prevented? An injunction may be given, but at the time it is granted we must be aware that it means no more than the enforcing machinery of the court can make it mean. When equitable interference can be only ineffectual, when it will cost the court its dignity and prestige, equity may rightly say that it cannot give a vain decree, but will leave further action up to the other governmental branches.\textsuperscript{99}

It has been said that the denial of an injunction because of the lack of physical power to enforce it is a recognition of the “uncivilized

\textsuperscript{98} It has been urged that strikers be starved out: objection, violence and plant destruction would occur before starvation. It has been urged that machine guns be used: objection, plant destruction, overmuch bloodshed, and needless loss of life among the troops and possibly innocent parties would follow. Poison gas has not been suggested. It is a possible solution, begging the questions whether the strikers are in fact outlaws, whether such extremes of force will, in the long run, protect capital against aroused and better equipped labor in future disputes, whether arbitration will not accomplish as much before, as it will have to after, violence.

\textsuperscript{99} The militia may be used, under orders from the executive. See 45 YALE L. J. 879 (1936).
principle” that “might makes right.”100 It is only a partial answer to say that sanity may make some demands, even in a civilized society. No good citizen can accept the idea that right, in the ethical sense of “right,” is created by the pressure of might. No lawyer would like to concede that right, in the legal sense of “right,” is made by might. But might is a fact in this world which it is not wise to ignore. And we cannot talk of might as a necessarily wicked thing existent only within itself. Ethical rightness, or legal rightness, may be joined with might, and may find its proper expression through that means. We may label our pigments might, and paint a picture of extortion, of racketeering, and of crime in all its forms. We may turn again to a fresh canvas, and paint a picture of whole populations in rebellion against corrupt tyrants; or a picture of mobs rioting to protect fugitive slaves, secretly and illegally carried out of their bondage through the underground railway; or, perhaps, a picture of embattled farmers resisting mortgage foreclosure. The scenes differ not at all in the fact that might was used. They differ in the fact that might was used in greater or lesser conjunction with ethical rightness.

The use of the sit-down is somewhat like revolution. There is no doubt that both contradict existing legal arrangements, nor that both represent extra-legal means of achieving ends. Nor is there any doubt about the undesirability of recognizing either as a standard way of achieving ends. But behind the use of the sit-down or the resort to revolution may stand justifiable human claims which need to be recognized or which there is no adequate legal machinery to vindicate. We have seen troubled times before, when the processes of our courts could not satisfy pressing needs. Fresh in our memory are the reports of crowds of mortgagors, united by a common cause, armed with clubs and shot-guns, standing behind barricades of wagons and barbed wire to prevent foreclosure sales of property rendered temporarily valueless by economic forces. Traditional equity concepts and ordinary foreclosure processes could not give to the justifiable claims of those debtors the protection which the extra-legal means of riot did. In that situation, courts and legislatures designed machinery which would give substantial justice, and the riots stopped.

It may or may not be true that the sit-down strikers have as high ethical claims as the farm mortgagors did. At least, some consideration should be given to the idea, often expressed, that labor has not received a wholly fair deal. No one individual can pass judgment on labor’s claims. That judgment must be made by the people generally, as other judgments affecting the entire population have been made in the past. The problem is essentially a legislative one. The crying need

100 85 UNIV. PA. L. REV. 643 at 644 (1937).
is for new, or modified, legal machinery that can cope with practical issues which lie behind the sit-down strikes.\textsuperscript{101} It is apparent that the present conflict of human claims and property rights cannot satisfactorily be resolved by courts of law and equity applying present common-law concepts.\textsuperscript{102} This is not the place to consider what form the needed statutory machinery should take. It may be that the determination of the merits of each case will be delegated to an administrative body, employing court orders to make its decisions binding. It may be that the courts themselves will interpret new laws, redefining the rights of labor and capital. At any rate, some adequate labor tribunals must be created before order will be drawn from the present unfortunate turmoil. It would be desirable to give, in effect, declaratory judgments on the validity of a strike before it is called, and to attempt settlement of grievances before they lead to strikes. To accomplish this, well-considered statutes will be needed, statutes drafted with an understanding of our much changed times, and passed with foresight of future industrial developments. If sound devices are adopted, there is every reason to expect that the conference table can adjust the differences of the disputants before as well as after riot occurs, and that labor tribunals will be able to reconcile justifiable human claims with established notions of law and order:

\begin{center}
\textit{Charles C. Spangenberg}
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\textsuperscript{101} See the thought-provoking article by Arnold, "Law Enforcement," 9 Ency. Soc. Sci. 267 (1933).

\textsuperscript{102} Qualification, that the common-law concepts may be revised. Equity has power to balance convenience in other types of cases; to refuse an injunction where its operation would be too harsh for the chancellor's conscience; to refuse a decree which would have a substantial adverse effect on the general welfare; and to require one seeking equity to do equity. It is perhaps too much to be hoped that the courts will voluntarily extend these doctrines to the point where the chancellor will himself serve as the arbitrator in the major disputes, weighing the merits of adverse claims, the prior conduct of the parties, and the interest of the public before decreeing relief to either party. Such a course would call for rare statesmanship on the part of the court in formulating decisions that could in justice be enforced. Or the courts might draw on the analogy of those political questions where the courts abdicate decision to the body politic. See Post, THE SUPREME COURT AND POLITICAL QUESTIONS (1936).