

## CHAPTER I

### USE OF THE COURTS BY PRIVILEGE

TOWARD the end of his life, Thomas Jefferson spoke of the judiciary of the United States as a "subtle corps of sappers and miners constantly working under ground to undermine the foundations of our federated fabric."<sup>1</sup> And certain it is that the Federal courts have had a great share in the movement toward centralization of political institutions in this country. They have also been "a subtle corps of sappers and miners" in ways of which Jefferson had not the remotest surmise. They have been a most potent weapon in the hands of Privilege to crush strikes and break the back of trade unions. "No weapon," says John Mitchell in his book, "has been used with such disastrous effect against trade unions as the injunction in labor disputes. It is difficult to speak in measured tones or moderate language of the savagery and venom with which unions have been assailed by the injunction."<sup>2</sup>

Now as Jefferson has said, if the question arose as to whether the people had better be omitted from the legislative or from the judiciary department of the Government, it would be better to leave them out of the legislative, since the execution of the laws is more important than the making them.<sup>3</sup> Yet the body of the people are as a general

<sup>1</sup> Letter to Thomas Ritchie, Dec. 25, 1820. Jefferson's Writings, Ford Edition, Vol. X, p. 169.

<sup>2</sup> "Organized Labor," p. 324.

<sup>3</sup> Letter to L'Abbé Arnond, Paris, July 19, 1789. Jefferson's Writings, Ford Edition, Vol. V, p. 102.

practice most effectually left out of the judiciary, the Federal judges being appointed almost wholly from the ranks of attorneys representing the great monopoly corporations. This may to some degree be due to the fact that other fields do not yield equal opportunities for the display of experience, ability and learning. Certain it is that other fields do not afford like opportunities for money-making, either in respect to fees or "business openings" in partnership with Privilege. This has become particularly manifest during the last decade. Mr. Bryce noticed it during his recent trip to this country, saying subsequently:—

Lawyers are now to a greater extent than formerly business men, a part of the great organized system of industrial and financial enterprise. They are less than formerly the students of a particular kind of learning, the practitioners of a particular art. And they do not seem to be quite so much of a distinct professional class. Some one seventy years ago called them the aristocracy of the United States, meaning that they led public opinion in the same way as the aristocracy of England led opinion there. They still comprise a large part of the finest intellect of the nation. But one is told that they do not take so keen an interest in purely legal and constitutional questions as they did in the days of Story and Webster, or even in those of William M. Evarts and Charles O'Connor. Business is king.<sup>1</sup>

Of course what Mr. Bryce means by "business" is business with a monopoly element in it; business conducted around some government-made or fostered privilege. For mere competitive, unprivileged industrial or commercial business offers no enormous money-making. But as the attorneys for public franchise corporations, as the spokesmen for tariff-nurtured trusts, as the counselors for bond syndicates, as the legal guides, philosophers and friends of individuals or companies holding rich privileges in coal, oil, timber, urban and suburban lands, these lawyers grow rich. The late James C. Carter, toward the

<sup>1</sup> "America Revisited: the Changes of a Quarter Century," *The Outlook*, March 25, 1905.

end of his life the undisputed leader of the American bar, left an estate worth a million and a half. He acquired it through "corporation practice" and the taking advantage of "business openings." Yet he was not regarded as a money-making man, and it is probable that many of our practicing lawyers, starting with only sufficient to pay their office rent, have acquired fortunes far larger than the Carter estate. Since the monopoly corporations endeavor to retain for their service all lawyers revealing the highest capabilities, and since the pay and honors in such service are generally large and frequently are very great, as against small and uncertain pay and indifferent honors in the service against them, most first-rate lawyers will persuade themselves that their proper course as attorneys lies on the former side, even though their private judgments, if taken abstractly, might be found opposing.

It is from the ranks of such men that the Federal court benches are almost altogether filled — men who have come more or less directly out of the employ of Privilege. It is needless to cast a breath of suspicion against their integrity to perceive that a bench made up of judges drawn from such sources will lean in the direction of Privilege. Judges are no less human than they were before they put on the judicial gown. They may have the most scrupulous intention to deliver even-handed justice, but they will construe justice *from their own point of view*; and their point of view must have been affected more or less in favor of Privilege by formerly being in its service. We can easily appreciate how the reverse would be true were the judges drawn from those serving as attorneys for trade unions, and how the cry would be raised, and not improperly, that the trade unions had captured the judiciary. So may it be said that the monopoly corporations have captured the judiciary; that Privilege, which has first tested attorneys in its service, has afterwards obtained their appointment to the bench.

And as with the United States courts, so to large extent,

if not quite so fully, is it with the higher State courts. The reason why it does not obtain so fully is that there the judiciary is nearer to the body of the people which elects its incumbents. Yet in nominating conventions and in the canvass for votes the open support or secret influence of the public franchise or other privilege-owning corporations is employed for their favorites. Even in cases where this is not so, it is frequently seen that the monopolies pay assiduous homage after election. The most subtle means of doing this is supplied by the railroad pass favor, touching which the following from a practicing lawyer, who for obvious reasons withheld his name, appeared in one of the Chicago newspapers (*Chronicle*, March 6, 1904): —

It is common knowledge among Chicago lawyers that as soon as a judge is elected to the bench his mail is full of passes from all directions sent him by both State and inter-State companies. It is difficult to see why the railroads should do this, except that they expect some advantage from these free gifts. I believe that, if the commissions make a full investigation on this subject and an exposure is publicly made of it, the facts will show that every county judge in the one hundred and two counties and every Supreme Court judge, including the Federal judges, is tendered yearly passes. The extent to which they are accepted can only be surmised. This point should be established and made a matter of record. Some judges spurn the passes, others use them. The people should know who they are. It is not the claim of any lawyer who is in favor of breaking up this practice that a railroad pass will affect the decision of a judge in an important case, yet the question remains whether any one for a moment supposes that railroad companies grant these favors without an expectation of getting something in return.

If trade unions were to procure the appointment or election or favor of judges they would be expected to use those judges in their own behalf. Privileged companies who *do* procure such appointment, election or favor appear to use it to issue enjoining orders.

An injunction has been defined in law as an order or process by a court possessing equitable powers operating upon the person, requiring the party or parties to whom

it is directed to do or to refrain from doing some designated thing. Originally it was used in restraint of action, but recently it has come to be used to compel action, and it is now being used to restrain where there is full legal right to act, or where the law, forbidding, provides a punishment; the penalty of disobedience to the restraining order being a summary sentence by the court disobeyed, or without trial by jury or respect to whether or not the person or persons so punished for disregarding the court order were only doing what they had a right under the law to do.

The court of equity began its operations in England (whence we get our legal practice) at a time when the ordinary judicial trials and processes being used by the nobles in their own behalf, the humbler subjects made petition for redress to their sovereign, or rather to the "keeper of the King's conscience," the Chancellor, who usually was a priest. Upon this hearing the petitioners were dismissed, or else a decree was issued by the King, or by the Chancellor in the King's name, granting the petition and ordering it to stand as if by legal proceedings. From this the Chancellor developed into a judge, who, acting without a jury, issued mandates in cases where there was no adequate remedy at law.

At outset the equity jurisdiction was of wide latitude and its decisions were reproachfully described as varying with the size of the Chancellor's foot. It was susceptible of being turned, like captured guns, against the very class of people it was devised to help. No better illustration of its early tyranny can be found than in the workings of the infamous English Star Chamber. This body, with the Chancellor at its head, and working without a jury and by summary process, under plea of reaching cases not determinable by common law, delivered arbitrary decisions and administered cruel punishments in furthering exercise of the right of absolute power asserted by the Stuarts. But while the Star Chamber fell with the head

of Charles I, the practice of equity was continued under rules that calculated to keep the Chancellor within proper bounds. The Chancellor's court and the law courts were, however, kept distinct, the latter to give judgments after a trial by jury, the former to issue decrees after hearing before the Chancellor.

But in the adaptation in this country of English legal and equity usages, our Federal courts and most of the courts of our States have come to embrace both functions. Our judges are both law judges and equity judges. They conduct trials before juries; they also issue decrees without juries. With what result? That, armed with the power to command, judges, who before ascension to the bench were formerly the representatives in litigation of monopoly corporations, issue, while sitting in "chambers," mandates against bodies of workmen with whom such corporations may be in conflict, and refrain from bringing the case into court for trial before juries. This is not to question the integrity of such judges. It is only to say that they follow the rules of human nature and continue to think and act on the bench as they were accustomed to think and act before they went there.

Let any who will gainsay this answer how often these judges in their equity practice follow the precepts of that branch of jurisprudence: "Equality is equity;" "He who asks equity must do equity;" "He who comes into a court of equity must come with clean hands." How often do our judges sitting in equity inquire into the preceding conduct of, say, great coal companies or of railroad companies when they petition for restraining orders? Is it not the common usage not to make any inquiry at all, but to issue the decree at once, and on a mere *ex parte* statement?

Then, too, it is a fixed principle of the equity court that an injunction should not be issued merely to prevent the commission of crime, because a court of equity has no criminal jurisdiction. An injunction should not be issued

when there is a remedy at law, or when the facts or the law are in doubt. Do our courts observe these limitations? Not at all. "Courts of equity," says a courageous jurist in New York City — Justice Samuel Seabury of the City Court — "have traveled over the whole field of human action to restrict whenever it has seemed to the individual judge that restraint should be imposed. . . . The ridiculous extreme to which their power has been stretched is nowhere better illustrated than in the opinion of the Texas Court of Appeals, sustaining an order punishing a defendant for contempt of court for violating an injunction which prohibited him from attempting to alienate the affections of his neighbor's wife."<sup>1</sup>

That is to say, mixing what men have a right to do, such as peaceably to persuade, with what they have not a right to do, but for the doing of which they are punishable under the law, a restraining order may forbid all alike. To ignore this order is not to bring the case for jury trial as to the law and the facts. Men's rights under the law have nothing to do with it. The question to be determined is: Was the restraining order ignored? If it was, then those who ignored it were in contempt of court. For such contempt they are punishable by the judge who issued the order, no matter how fully they might, if they could but get a jury trial, prove they were within their legal rights when they disobeyed the restraining order.

It is true that the injunction when first issued is only temporary. The theory upon which the court is supposed to proceed is that it will grant a petition for a restraining order pending an examination of the matter to decide if such restraint should be made permanent or be dissolved. But in most injunction cases the date for argument for a permanent injunction is far removed, and the enjoined persons are in the meanwhile so tied up by the temporary order and confronted with summary punishment for contempt of court if they ignore it, that the tem-

<sup>1</sup> "The Abuses of Injunctions," *The Arena*, June, 1903.

porary injunction is just as effective as a permanent one in killing hand-to-mouth strikes.

Our practice of applying injunctions to labor disputes originated with a case in England in 1868. Upon that foundation all our wonderful edifice of industrial court orders has been built up. And yet mark how unsubstantial this foundation! The English case is known as *Springhead Spinning Co. vs. Riley* (6 L. R. Eq. Cas. 551). In that case members of a labor union were restrained from issuing placards which requested "all well-wishers" of the union "not to trouble or cause any annoyance to the Springhead Spinning Company Lees by knocking at the door of their offices, until the dispute between them and the self-actor reminders is finally terminated." Vice-Chancellor Malins, who sat in the case, held that the defendant workmen were in this issuing of placards guilty of "threats and intimidation, rendering it impossible for the plaintiffs to obtain workmen, without whose assistance the property became utterly valueless for the purposes of their trade." The court therefore held that it should interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of property.

But this injunction order was only temporary, and the Vice-Chancellor had some doubts as to whether it would stand on subsequent hearing, should argument be made for making the order permanent, for no precedent for such action existed. He said:—

In the present case, the acts complained of are illegal and criminal by the Act of George IV. . . . Upon the general question whether this court can interfere to prevent these unlawful proceedings by workmen issuing placards amounting to intimidation, and whether acts of intimidation generally would go to the destruction of property, that will probably have ultimately to be decided at the hearing in the case.

In the meantime I would only make this observation, that by the Act of Parliament, it is recited that all such proceedings are injurious to trade and commerce, and dangerous to the security and personal freedom of individual workmen, as well as to the security of the prop-



erty and persons of the public at large; and if it should turn out that this court has jurisdiction to prevent these misguided and misled workmen from committing these acts of intimidation, which go to the destruction of that property which is the source of their own support and comfort in life, I can only say that it will be one of the most beneficial jurisdictions that this court ever exercised.

That is to say, Vice-Chancellor Malins thought that if, when on motion to make the injunction permanent, the court should be found to have authority so to act, such enjoining order would be found beneficial to the workingmen against whom it operated! Similarly, it was argued in the Southern States that chattel slavery was beneficial to the slaves.

The motion to make this injunction permanent apparently never was argued, and the case ended there, probably for the reason that the temporary injunction broke up the strike, and the court order lapsed into desuetude.

A year later, 1869, Vice-Chancellor Malins, in the case of *Dixon vs. Holden*, issued another temporary injunction of the same kind. This order, like that in the case of *Springhead Spinning Co. vs. Riley*, was not appealed to a higher court.

But in 1875 both these cases were cited as furnishing precedents for an injunction case carried to the Chancery Court of Appeals, and known as the *Prudential Assurance Company vs. Knott* (10 L. R. Chancery Appeals, p. 142, 1875). Then that highest equity tribunal deliberately and unanimously repudiated Vice-Chancellor Malins's action. Ground was taken that the court had no jurisdiction to restrain publication of a libel as such, even if it is injurious to property. In reference to the Vice-Chancellor's restraining orders of six and seven years before, Lord Chancellor Cairns of the Appellate Court said:—

I am unable to accede to these general propositions. They appear to me to be at variance with the settled practice and principles of this court, and I cannot accept them as an authority for the present application. I think that this appeal must be refused with costs.

Lord Justice James said:

I think that Vice-Chancellor Malins, in the case of *Dixon vs. Holden*, was, by his desire to do what was right, led to exaggerate the jurisdiction of this court in a manner for which there was no authority in any reported case, and no foundation in principle. I think it right to say that I hold without doubt that the statement of the law in that case is not correct.

Lord Justice Mellish said: "I am also entirely of the same opinion."

Could anything be stronger and clearer than this? The Chancery Court of Appeals unanimously negatived Vice-Chancellor Malins's action on the ground that it was "at variance with the settled practice and principle" of the Chancery Court; that it had "no authority in any reported case"; that it had "no foundation in principle."

Yet clearly and emphatically as all this appears in the law reports, in 1888 — twenty years after the Springhead Spinning injunction, and thirteen years subsequent to that injunction's repudiation by the English Chancery Court of Appeals — a Massachusetts court, in the case of *Sherry vs. Perkins* (147 Mass. 212), took Vice-Chancellor Malins's action as a precedent for the issuance of a similar restraining order. It was held that the displaying of a banner constituted intimidation, deterring others from working for the employer. The only visible sign of a conspiracy which the court found to exist was the following inscription upon a banner: "Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U."

This enjoining order of 1888 in the *Sherry vs. Perkins* case began the long procession of American injunctions in labor disputes. And then when this plant, which had been uprooted from English soil, took root in American soil and grew to size and strength, behold what happened, all ye who put your faith in the consistency of courts! The English Chancery courts began to cite the American equity courts for injunction precedents, en-

tirely ignoring the former declaration of its own Chancery Court of Appeals that all such action was "at variance with the settled [Chancery] practice and principle."

To pile wonder on wonder, the Canadian courts have now begun to cite those recent English Chancery cases for the issuance of restraining orders, and doubtless ere long our courts will quote the Canadian judges as additional injunction authorities.

Thus, while an attorney for a great monopoly corporation will now quote a perfect cloud of American and English labor injunction authorities, the facts are that they all sprang up in America since 1888, and that in England and America they came from a single temporary injunction issued by an English Vice-Chancellor in 1868, who had some doubt of his jurisdiction; which jurisdiction was subsequently declared by the highest equity court in England not to exist.

Upon such a foundation rests the recent great construction of labor injunctions.