CHAPTER II

GOVERNMENT BY INJUNCTION

HAVING seen the nature and the origin of the recent form of the enjoining power of the equity court, let us observe the manner of its application.

While noting the difficulty of recognizing any controlling principle in the general mass of injunctions used, Judge Seabury divides them into three classes, to wit: —

First. Those cases where the courts hold that force, violence and intimidation constituting a crime have been resorted to.

Second. Those cases which are based upon the Federal act of 1887 regulating inter-State commerce and the so-called anti-trust law of 1890.

Third. Those cases where the application commends itself to the judgment of the judge to whom it is addressed.[1]

Judge Seabury, giving idea of the rapid development of the injunction principle, says that between 1888 and 1891 several injunctions were issued in labor disputes, prohibiting solicitations, threats, parading with banners, putting out circulars and other ways of making a boycott effective. These injunctions were all granted upon the ground that a conspiracy existed, and irreparable damage to property would result unless a court of equity interfered. Then came the next leap forward.

"In 1892," says the judge, "an injunction was issued against a miners' union in Idaho, prohibiting the miners from entering upon mines of the Cœur d'Alene Consoli-

[1] "The Abuses of Injunctions," *The Arena*, June, 1903.

dated and Mining Company, or from using force, threats, or intimidations preventing employees from working.[1] The ground upon which the court claimed to grant this injunction was not to protect private rights, but to preserve the public peace, and thus protect public rights."

In 1893 a further step was taken by Federal Judge Taft who prohibited Grand Chief Arthur of the Brotherhood of Locomotive Engineers, and commanded him to rescind an order which he had already given boycotting a railroad (Toledo *vs.* Pennsylvania, 54 Fed. Rep. 730). The injunction was issued upon the ground that the Inter-State Commerce Act imposed certain public duties upon the railroad company, the omission to perform which constituted a crime; that Arthur had conspired with others, by means of a boycott, to make it impossible for the railroad company to perform its obligations, and, therefore, Arthur and his associates were guilty of a crime which constituted irreparable injury to the public as well as to the railroad company. For this reason he was enjoined.

Then came Federal Judge Ricks with the declaration that while railroad engineers might by a boycott in such circumstances be guilty of a crime, yet that engineers who refuse to haul cars in obedience to a rule of the labor union "and in good faith quit their employment before starting on their run, may not be in contempt" (54 Fed. Rep. 746). That is, if they resign from their employment while in process of a run, they are in contempt; but if they do so before a run has begun, they are not in contempt, notwithstanding the existence of a contract; since such employees are "exercising a personal right in quitting unconditionally and absolutely, which cannot be denied them."

From this Federal Judge Jenkins, when a strike was threatened by the employees of the Northern Pacific Railroad, owing to a reduction in "salaries and wages," not

[1] "Cœur d'Alene Consolidated and Mining Co. *vs.* Miners' Union, 51 Fed. Rep. 260.

only enjoined the men from so quitting the service of the railroad, "with or without notice, as to cripple the property or to prevent or hinder the operation of said railroad," but declared that they can, in effect, be compelled to assent to a new contract where the refusal to do so would result in "crippling the property or preventing or hindering the operation of said railroad" (Farmers' Loan & T. Co. *vs.* Pas. R.R. Co., 60 Fed. Rep. 803).[1]

But in all respects the most celebrated injunction case was that growing out of the Pullman strike in 1894. In consequence of a refusal by the Pullman Company to arbitrate the question of a proposed reduction of wages, the employees struck.[2] The American Railway Union, of which the Pullman employees were members, then declared a boycott on all Pullman cars. On July 10, Eugene V. Debs, president of the union, was arrested on indictments of obstructing the mails and inter-State commerce. He was arraigned, but, despite his demands to be tried, the case was abandoned by the prosecution — for want of proper evidence, it was commonly believed at the time, in absence of adequate explanation. President Cleveland's Strike Commission subsequently declared, "There is no evidence before the Commission that the officers of the American Railway Union at any time participated in or advised intimidation, violence or destruction of property." But if a jury would not punish when it had no evidence, another way might be found. It was found through an injunction without a jury.

An "omnibus" enjoining order was, on July 17, issued by Federal Judges Woods and Grosscup against Debs and the officers of his union, all of whom it specifically named. It also included all persons whomsoever (158

[1] See this and the Taft and Ricks injunctions reviewed in House Report No. 1049, Fifty-third Congress, second session. Besides being published separately, this report is republished in Senate Doc. No. 190, Fifty-seventh Congress, first session, pp. 122–143.

[2] See Report of Commission of Investigation, Senate Ex. Doc. No. 7, Fifty-third Congress, third session.

U. S. 564). It was served on some persons in the accustomed way by presentation in person; but on all the persons not named it was served by publication in newspapers, tacking on telegraph poles and on freight cars and reading aloud to a great crowd of strikers and others.

Presumably on the ground that the American Railway Union was obstructing the United States mails in spite of the restraining order, although the soldiers that President Cleveland insisted on sending into Chicago were sent to the stock-yards district, where there were no mail cars, Debs and others were arrested for contempt of court. They were not sentenced until December. Judge Woods, without trial of the cases before a jury, condemned Debs to six months' imprisonment and his associates to three months'. Appeal was taken to the Supreme Court for release on *habeas corpus*, the ground being that an equity court had no right to issue such an injunction, and thus deprive men of trial by jury. But the higher court sustained the lower one.

A legal writer of high standing, Mr. C. C. Allen, sets forth the progress of the injunction principle up to that time in this way: "The Attorney-General of the United States, acting for the United States in the exercise of its sovereignty as a nation, has sued out injunctions in nearly every large city west of the Alleghany Mountains. Injunction writs have covered the sides of cars; deputy marshals and Federal soldiers have patrolled the yards of railway termini, and chancery process has been executed by bullets and bayonets. Equity jurisdiction has passed from the theory of public rights to the domain of political prerogative. In 1888 the basis of jurisdiction was the protection of the private right of civil property; in 1893 it was the preservation of public rights; in 1904 it has become the enforcement of political powers." [1]

And most of this change came under the Sherman Inter-

[1] "Injunctions and Organized Labor," 17th Report of American Bar Association, p. 315.

State Commerce Act, which organized labor had done so much to have passed against the trusts. Such a possible use of the law had never been dreamed of by workmen, whereas what they deemed the essential feature of it was made a dead letter. President Cleveland during the Pullman strike actually selected as special counsel for the United States Government, at Chicago, Mr. Edwin Walker, who was at that very time general counsel for the General Managers' Association, representing the twenty-four railroads centering or terminating in Chicago, and operating in utter defiance of the Sherman Anti-Trust Law.[1]

But the injunctions have not stopped there. "The courts have not only prohibited persuasion, when accompanied by intimidation and threats," says Judge Seabury, "but they have actually denied the right of workmen peaceably to persuade their fellows to join them on strikes." And he cites the case of the York Manufacturing Company *vs.* Obedick (10 Penn. D. Rep. 463), when the court said: "It is seriously contended by counsel for the respondents that they have a legal right to approach other workmen in the employ of the complainant, and to *persuade and induce* them either to quit or not to accept such employment. . . . *There is no such legal right.*"

In like manner "there is no legal right" for many things in the eyes of some of the Federal judges, who, owing their places not to popular suffrage, act as if above all regard for the body of the people. For instance, in 1899 an injunction was issued out of the United States Circuit Court of West Virginia in the interest of the Wheeling Railway Company against "John Smith and others," without naming the others. It was the now familiar blanket type of injunction. Two men, not parties to the action, nor found to be agents of "John Smith and others," were punished for contempt of court. Wherein were they in contempt? asks a committee of

[1] See Strike Commission's Report, pp. xxviii–xxxi.

the Social Reform Club of New York, appointed to report on the ominous progress of injunctions. The committee answers: The men "were punished for contempt of court for, among other things, 'reviling' and 'cursing' employees of the railroad company. If these men had not actually served out an imprisonment in jail for thirty days as a punishment for *contempt of corporation*, it might be thought that your committee had taken this example from opera bouffe. The legality of this punishment was never passed on by the Supreme Court, for the reason, as your committee understand, that the parties were unable to bear the expense of taking it there, and so served their term in jail."

More recently, during a great coal strike involving most of the mines of West Virginia, United States Judge Keller in the southern judicial district issued a blanket injunction covering some fifty mines along or near the Chesapeake and Ohio Railway. He prohibited even "assembling near" the mines. He went further and restrained national officers of the mine workers' organization from purchasing and distributing food to the West Virginia strikers. At the same time Judge Jackson in the northern district issued injunctions very similar in import, and between the two judges most of the mines of the State were covered by restraining orders. Some of the national organizers of the mine workers' general organization, disregarding Judge Jackson's orders, were arrested and, by summary process and without a jury trial, were by him sentenced to imprisonment for contempt of court, the judge calling them "vampires that live and fatten on the honest labor of the coal miners of the country."

These are but a few typical injunction cases issued in great numbers from the Federal benches all over the

[1] This committee was composed of John Brooks Leavitt, John D. Kernan, Ernest H. Crosby, Mornay Williams and Robert Van Iderstine. The report was printed and sent to all Federal and higher State judges, and circulated generally.

country. The State benches have not been so useful, for one reason that State judges are elected, and thus are not so ready to brave the ill will of the body of the people by doing the bidding of the monopoly corporations; and for another reason, that State courts are backed at last resort by militia only, whereas the Federal courts can call upon United States regulars, who as a general rule manifest less sympathy and act more like machines than the State soldiery. As a consequence, Federal injunctions are preferred to those from State courts.

It was partly for this reason that in the West Virginia cases just cited injunctions were obtained from Federal rather than from State courts. To do this, however, legal tricks had to be resorted to. As to Judge Keller's blanket injunction covering more than two score mines along or near the Chesapeake and Ohio Railway line, the facts were briefly these: Most of these mines were supposed to be under separate and distinct ownership, and to have no concerted action with each other. When the strike came, the mine owners affected small doubt of overcoming the local mine workers' union, which was weak both in number and funds, if the organizers and great funds of the national organization should not be permitted to help the strikers. Some of these organizers were in West Virginia, and some of them were outside. To enjoin all of them at once, it was necessary to have an order issued from a court having jurisdiction at once inside and outside of that State — from a Federal court. But the mining companies in question belonging to West Virginia, and complaining of transactions within that State, could sue only in the courts of that State. To obtain an order from a Federal court application would have to be made by some one outside the State. The Chesapeake and Ohio Coal Agency was selected to play the part. That company was incorporated in New Jersey, did business in New York, and sold the product of the great number of mines in question. But it was evident

that it had nothing to do with the mine workers, and therefore had no right to complain of them. So a fiction was established as a fact, the Chesapeake Agency Company complaining to the court that its contract for the supply of coal was imperiled. It therefore asked the court to enjoin the fifty mining companies and some two hundred miners and union leaders from interfering with the carrying out of the conditions of the contract.

Of course Judge Keller and everybody else knew that this complaint had no foundation whatever, because of the "strike clause" in this contract, as in all such contracts, by which the mining companies are relieved from fulfillment of contract in the event of a strike. But the judge chose not to notice this. He acted as if he had clear jurisdiction and issued the blanket injunction, as a similar one had already been issued by Judge Jackson in the northern Federal district of the State.

The strike in the north involved the mines of the Clarksburg Fuel Company, and the fear of that corporation was not from what the weak local mine workers' union would do, but what President John Mitchell and his fellow-officers and organizers of the United Mine Workers of America would do. Even if a State court could be induced to issue a drastic enough injunction, which seemed more than doubtful, the arm of such a court would not reach far enough. So to a Federal court the mining corporation made appeal. Here came the trick. The Clarksburg Fuel Company, being incorporated in West Virginia, could not proceed in a United States court against its striking employees who were citizens of its own State. But the Guaranty Trust Company of New York had a mortgage for $2,500,000 against the Clarksburg Fuel Company for money loaned to the latter. The Fuel Company complained to the Guaranty Company that if the strike continued, interest payments on the debt would probably have to be suspended. Whereupon the Guaranty Company petitioned United States District

Judge Jackson for a sweeping injunction against the officers and organizers of the miners' national organization, and obtained it.

Some of the organizers ignored this order, or at least, Judge Jackson chose to consider that they did. He had them arrested for contempt of court and sentenced them to imprisonment. Appeal was taken to the United States Circuit Court, Nathan Goff being the judge. The ground of the appeal was that Judge Jackson had no jurisdiction to issue such an enjoining order. Argument was made that in all cases like this, involving mortgagee and mortgagor, the mortgagee cannot act without making the mortgagor a party; that the Clarksburg Fuel Company was therefore an indispensable party to the suit; that it was so shown to be in the spirit and wording of the original prayer for an injunction, the Guaranty Trust Company asking protection for property and privileges not its own, but belonging to the Clarksburg Fuel Company; that since the Fuel Company was properly a party to the suit, it had no standing in a Federal court as against the prisoners, but must seek protection in a court of the State of West Virginia.

This argument was of no avail. Judge Goff ignored the question of jurisdiction. He recognized only the fact that the prisoners had been in contempt of Judge Jackson's restraining order, and he refused to release them.

I attended the argument of this remarkable case at Clarksburg, and talked afterward with a distinguished member of the State bar about it. He summed up the matter in this way: "It is just as if a farmer of Iowa should send word to an Eastern mortgage company from whom he had obtained a loan, that his farm hands had demanded more pay, and, on being refused an increase, had left him, making it impossible for him to meet the interest on his loan, unless the mortgage company should obtain an order from a United States court putting so many restraints upon the movements and utterances of

the farm hands as to force them back into the farmer's employ. And if this form of the injunction principle can be applied by the farmer against his withdrawing field hands, it may also be used by a mill owner against his striking mill hands, and by a factory owner against his striking operatives."

But while this will indicate why Federal courts are preferred for enjoining orders, it is nevertheless a fact that from some of the State courts have issued extraordinary injunctions. A type of these was an order from Superior Court Judge Elmer of Connecticut, in a strike of street railroad men in Waterbury against a great company called the Connecticut Railway and Lighting Company. In an omnibus order, this judge enjoined practically every trade unionist in Waterbury, as well as every sympathizer, against "*any act or language*" intended to prevent persons from taking the strikers' places; "against boycotting the plaintiff or its employees, either by threats, intimidation, unlawful persuasion *or otherwise;* against giving any information, directions, instructions or orders to any committee, association, confederate or other person or persons for the purpose of effecting any of the acts or things hereby enjoined." Judge Elmer attached a $10,000 penalty to the infraction of his order. At the same time that the railroad corporation obtained this enjoining order the railroad men's union and all the other trade unions of the city which had been contributing money toward a strike benefit fund were made parties to a damage suit by the Connecticut Railway and Lighting Company for $25,000.[1]

[1] A sensation has been occasioned in the British industrial world by the decision of the House of Lords that a trade union could be sued "in its registered name," even though not incorporated. This is a well-established principle in American law. Section 1919 of the New York Code of Civil Procedure allows an unincorporated association to sue or be sued. Other sections provide that where the funds of the association are not sufficient to meet the findings in the suit, then an action for the deficiency will lie against the effects of the individual members. Similar laws exist in the other States.

Many more instances of the development of the injunction principle by the Federal courts, and emulated by the State courts, could be given. And it should be remembered that all this has come about within the last seventeen years. The rule of the injunction in labor disputes has been coincident with the era of trust combination. Privilege, seeking to rob and rule in all provinces, has seized the courts for a weapon against rebellious labor unions. And by the irony of fate, it has made the peculiar bludgeon of its injustice and for strike breaking that very department of the legal institution that was created to succor the weak and lowly when they had no remedy in the regular processes of law. The old equity maxims must in the light of much of the present practice be changed: not "Equality is equity," but "Inequality is equity"; not "He who asks equity must do equity," but "He who asks equity may do inequity"; not "He who comes into a court of equity must come with clean hands," but "He who comes into a court of equity may come with soiled hands" — with hands defiled with avariciousness and injustice.

For, says Judge Seabury, in the article already quoted, these enjoining orders issued out of courts of equity violate fundamental rights. "Assuming, for the sake of argument, that in every instance the workmen were engaged in acts in violation of the criminal law, these injunctions were unnecessary and unjustifiable. If the acts were not criminal, then the theory upon which the injunctions were issued is incorrect, and they were admittedly without justification. If the acts were criminal, the criminal law provides the punishment to be imposed and the procedure to be followed. The fact is that the only reason for issuing injunctions in those cases, where the prohibited acts are in violation of the criminal law, is to dispense with a trial by jury.

"Consider the protection with which the law, as a result of centuries of struggle and experience, safeguards

the liberty of the lowest citizen. If he is charged with a crime, there must be a hearing before a magistrate, a grand jury must be satisfied that a crime has been committed, and that reasonable ground for believing the accused guilty exists. Upon the indictment found by the grand jury he is tried by a petit jury, and even their verdict, if improperly arrived at or contrary to the law, may be set aside upon appeal. This protection safeguards the rights of one accused even of murder.

"How different is the new method, introduced by these injunctions. A judge sitting in his chambers, upon the *ex parte* application of a private person or corporation, makes an order commanding not only the defendant in the suit, but all the world, to do or refrain from doing certain things which are specified in the order. Those violating the order are summarily arrested and brought before the judge whose ukases they are accused of violating. He inflicts punishment upon them. He is judge, jury and executioner, and if he had jurisdiction, his acts cannot be reviewed upon appeal, and the accused is not entitled to counsel. The committing magistrate, the grand jury, the petit jury, the right of appeal and the right to have counsel are all dispensed with.

"Under this system a person can be punished twice for the same offense.[1] He may be fined or imprisoned summarily for contempt in disobeying an injunction issued against him, and for the criminal offense charged he may be fined and found guilty and be subjected again to fine or imprisonment, or both.

"The sweeping character of these injunctions may be realized, when it is recalled that they are issued not merely against the parties to the action, but against all mankind.

[1] Article V of the Amendments to the Constitution of the United States reads ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Article VI of the Amendments reads, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

In the Debs case, the injunction was issued against all the persons named in the bill, and against all the members of the American Railway Union who were engaged upon twenty-three railroad systems, and, lest some should be forgotten, against 'all other persons whomsoever.'

"In no legal sense is such an order an injunction at all. It is simply a general police proclamation, putting the community in general under peril of punishment for contempt if the proclamation is disobeyed."

If it be said that many of these injunctions were only temporary, and were never made permanent, the reply is that they would probably have been made permanent on application. But in most labor wars a temporary injunction serves all the purposes of those who obtain it, since the temporary paralysis into which obedience to it casts the trade union is as fatal to the strike as disobedience which brings immediate arrest for contempt, and summary arraignment and punishment.

Governor Sadler of Nevada put the case in essence when in 1897, during a coal miners' strike, he said, "The tendency at present is to have committees make the laws and to have the courts enforce them by injunction." Who are those committees? The privileged corporations. And not only are they potent enough to capture and use the courts in this way, but they have been powerful enough to prevent thus far recapture by the people. The Supreme Court of West Virginia declared unconstitutional a law passed by the Legislature in 1898 to restrict the use of injunctions. The courts were held to be coördinate with the Legislature, which therefore had no right to restrain the powers of the judiciary, or to prevent the judiciary from protecting itself by proceedings in contempt. If a State Supreme Court can take this ground, why may not the Supreme Court of the United States do likewise, if any bill really curtailing the "restraining" power now exercised by the Federal judiciary shall ever get past the committee stage in Congress and be enacted into law?

And furthermore, let it be noted that if this is the way the courts are used and abused by Privilege against unions and for its own power and glory, there would be small hope of such unions obtaining redress of their grievances through compulsory arbitration courts or through incorporation, the institution of which is urged by monopoly speakers and organs, with protestations of disinterestedness. Reading the future by what we have witnessed in the past, labor union incorporation and compulsory arbitration courts would prove to be only additional weapons in the crowded arsenal of Privilege.

Most assuredly remedial measures must be but patchwork and ineffectual so long as Privilege exists, to create, to adapt, to pervert to or for its own continuance and benefit. So long as Privilege exists, it will crowd and oppress unorganized labor. So long as it exists it will, where it cannot make terms satisfactory to itself with organized labor, use and abuse the powers of the courts to club laborers into submission.

Indeed, we have recently witnessed how the combined railroad, mining and smelting monopoly powers in the State of Colorado used the injunction power to strike at the ballot itself. This was done on the theory of protecting the political prerogatives of the sovereign people — the kingly prerogatives which the American people derive from the common law of England.[1] On this plea two of the three judges of the Supreme Court enjoined certain persons from committing election frauds in the gubernatorial election there in the fall of 1904 — election frauds that were crimes under the law. After the election the two judges who had issued the injunction ordered all the ballots of certain voting precincts to be thrown out; not because the vote was tainted by fraud, as was commonly believed, nor yet because the statutes authorize such action, for they do not. The exclusion was made solely on the

[1] See signed letter from Denver by Louis F. Post in the *The Public*, Chicago, Dec. 3, 1904 (p. 547, seventh year).

ground that acts were committed in those precincts in violation of the injunction.

Said a brilliant publicist at that time, Mr. Louis F. Post of Chicago: "The integrity of elections in Colorado is by that decision removed from the protection prescribed by the election statutes; and the function of regulating the voting at elections and determining the results is arbitrarily assumed by the Supreme Court, sitting simply as a court of equity. So sitting, it makes no discrimination between honest and fraudulent voting, but throws out whole precincts upon learning that its injunction has been to any extent violated. In this way a Legislature is packed by the Supreme Court; not in regular statutory proceedings, but in extraordinary injunction proceedings. If fear of popular outbreak does not deter them, even the governorship will probably be determined by these usurping judges through this wholesale throwing out of precincts in proceedings for contempt of a 'prerogative' writ of injunction."

Mr. Post's observation was prophetic. Although on the face of the returns Alvah Adams was elected Governor by a large plurality, the Legislature, packed by the Supreme Court, seated J. H. Peabody in the Executive Chair, as a result of a post-election gubernatorial contest, the understanding being that Peabody would at once resign and give place to J. F. McDonald, who had run for the office of Lieutenant-Governor on the ticket with him. This was done, and the present Governor of the State of Colorado may properly be called an injunction-made Executive.

After such things what is not possible for courts sitting in equity?