USE AND ABUSE OF INJUNCTIONS IN TRADE DISPUTES

III. ADDRESS BY JAMES A. EMERY, ESQ.,
General Counsel, National Council for Industrial Defense, Washington, D. C.

Mr. Chairman, Ladies and Gentlemen:

I thank the chairman for his kind words, and I hope to be brief enough under the circumstances of the hour not to repeat the fault of that great Englishman of whom it was said, "That he went on refining while others thought of dining." The extent of the subject and the limitation of time permits no more than a fragmentary discussion, and I can hope to do no more than respond in outline to the leading criticisms of the gentlemen who have preceded me in the light of a few of the equitable principles which I shall call to your attention.

With all due respect to the distinguished gentleman who has just concluded, his discussion seems to me an excellent illustration of the confusion that is bound to arise through failure clearly to grasp the peculiar powers of equity and the function of the injunctive remedy. The gentleman defended vehemently that which he but half-apprehended, like the ancient Bardolph, whose valor was more certain than his understanding: "Accommodated, it is a Christian word and by my sword I will defend it. Accommodated—that is, when a man is—that which—whereby—he may be thought to be—accommodated. Which is an excellent thing."

The gentleman declares, but undertakes to prove by reiteration rather than demonstration that an injunction issues to protect only property rights, and that the rights usually involved in what are commonly termed labor disputes are not even property rights, and therefore a court of equity, through the injunctive remedy, has usurped a jurisdiction in violation of precedent and right. The injunction is no modern device. It is not the invention of a recent day—an outgrowth of modern ingenuity. The ancient writ has been for centuries the chief instrument of equity. The principles of its use are determined by the decisions and practice of centuries, its application to organizations of labor is but a modern phase of its continuing use through many decades to prohibit attacks by combination upon rights which it is its peculiar office to protect. These

rights, the gentleman to the contrary, are "*civil*" and property rights, rights characterized by the courts as "those of a pecuniary nature." The gentleman rests his appeal and his argument on moral no less than legal grounds, but I cannot find within his narrow definition that vast body of rights which the settled law of many centuries has held within the protection of the injunction. Indeed, I should be interested in knowing upon what theory of morals it could be contended that it was right to issue a restraint to protect a man's house or his business or his horse, and not himself.

The gentleman's theory of a property right is that of mere ownership in a house or lot, of lands and personalty. "The right of property in man," he says, "was destroyed by the emancipation of the slave." Nay, man's property in himself was recognized by the emancipation of the slave, for the first and most elemental of all property rights is that of man in his own labor. The foundation of all property right, it is the one treasury possessed by each individual, and from which he pays in the sweat of his face his way through the world. But he owns the labor of his head no less than that of his hands, of his pen no less than that of his pick, of his learning no less than its product, of his profession no less than his trade. Every exercise of mind or body possessing value is property as much as the coat on his back or the hat on his head, the house in which he lives, or the land whose fruits sustain his life. Nay, more, we dispose of that which we have and acquire the possessions of others only through agreement, and therefore the most commonplace and necessary, indeed, socially, the most indispensable, of property rights is the right of contract. These rights are universally recognized not merely by the technical rulings of generations of judges, but by the common sense of mankind. Every one who sits within sound of my voice has sold or bought labor, and must continue not only to do so, but to maintain the right to do so, "for so the whole world moves around." "No right of property or capital," said Lord Bramwell, "was so sacred or carefully guarded by the law of the land as that of personal liberty." The constitutional guarantee of "liberty and property," interpreted by the Supreme Court of the United States, embraces not merely the right of the citizen to the free use of his powers and faculties in all lawful ways to live and work at any trade, profession or business, but "for that purpose to enter into all contracts that may be proper, necessary and essential in his carrying out the purposes mentioned."

The Anthracite Coal Strike Commission epitomized the civil and moral law by saying:

The right and liberty to pursue a lawful calling and to lead a peaceable life, free from molestation or attack, concerns the comfort and happiness of all men, and the denial of them means the destruction of one of the greatest, if not the greatest, of the benefits which the social organization confers.

Thus we see as a matter of common sense and common law that not merely is the plant of the manufacturer, the store of the merchant, the farm and equipment of the farmer, the tools of the mechanic, the pick of the laborer, the property of each, but it is likewise the property right of each to use them in any lawful manner, and the skill with which they are used is no less the property of him who possesses it than the instrumentalities and properties through which it is exercised. So it must be obvious to you and me, evidenced by our daily experience, apparent in our customs, embedded in our law and confirmed by our courts that the civilization of which we are a part rests upon the fact that not only are our lands and chattels property, but the rights by which we acquire and dispose of them and use them to our own profit and our neighbors' benefit, as well as the peculiar qualities and powers of mind and body that may be turned to our pecuniary advantage, are rights of property and entitled to protection as such, however intangible they may be, as much as those tangible physical objects which the eye sees and the hands feel.

When we exercise these rights in commerce and industry, earning a reputation for skill in manufacture, honesty and enterprise in trading, and custom accrues to us; that reputation which we have in the minds of others because of the quality of our product, the character of our workmanship, the promptness with which we pay our debts, and all those circumstances and incidents that contribute to give us esteem in the judgment of the buying public, constitute a property right as valuable as store and factory and skill themselves, and we term it the goodwill of business. We frame our statutes and enforce our laws in recognition of that fact. The Sherman act was framed upon this very theory, giving triple damages for injury to a business. The Wilson, Dingley and Payne tariff acts each recognized this principle in some of their provisions, and it is a common transaction of the commercial world so widely

recognized as to come within the knowledge of all men that the goodwill of a business is not only a separate and distinct property from the physical instrumentalities used in the transaction of business, but that goodwill is frequently bought and sold without reference to the realty or chattels in the use of which it has come into being.

The rights I define and enumerate are not rare and recondite. The daily press familiarizes each of you with the progress of actions brought to vindicate injuries done to them. You hear of suits for libel, of actions in damages for the misuse of trademarks, business symbols, infringements upon patents, the printing of books or the singing of songs, the use of plays, without permission. It excites no comment, it produces no confusion of mind, if a suit at law is brought to compensate some injured individual for a loss sustained by a trespass upon any of the property rights I mention. How, then, shall you deny the right of a court of equity to interfere under proper circumstances to protect these rights from injuries of such a nature that no proceeding at law will secure compensation. For this is a world of conflicting rights, and our own freedom and privilege of conduct are measured by the equal privilege and freedom of every other citizen with whom we come in contact. You will remember the familiar but happy illustration of the limits of liberty of action suggested by the drunken man who shook his finger in the face of a stranger, and when the other protested, said: "This is a free country; I have a right to shake my finger in your face." The sober one answered: "Your right to shake your finger ends where my nose begins." So it is with a variety of rights which are the subject of daily litigation in our courts and regulation in our legislatures. But every injury which may be worked upon one or many, or which many may work upon one, is not of such a nature that it can be compensated for in damages. The punishment of crime repairs no loss wrought by the criminal. Injury is, as we all realize, sometimes of a character for which there could be no pecuniary relief, either because the wrong done was of a nature that money could not measure, or a successful proceeding would be barren of actual recovery because of the financial irresponsibility of the wrongdoers, or their number being so great as to require an impracticable multiplicity of actions or their identity would be unascertainable.

Under such circumstances, which are not of infrequent occurrence, lawsuits would be of no avail, and if the person injured or threatened with injury must abide the event and await the infliction of damage under circumstances which did not permit of recovery, the person injured or threatened with injury would be without any remedy. He would face the damage or destruction of property and the impairment of rights without legal defense or redress. A legal system so defective would be a disgrace to civilization. The condition fortunately does not exist, for here equity offers the remedy which is essential to complete and perfect our judicial scheme. Where damage threatens what would be of an irreparable nature, equity supplies the absence of an adequate remedy at law by preventing the infliction of the injury.

A few years ago the State of Missouri entered into the Supreme Court of the United States and complained that its sister State, Illinois, was constructing a drainage canal from the city of Chicago which would discharge along the shores of Missouri a vast amount of noxious sewage and drainage, which would not only injure the property of the citizens of Missouri, who could not sue the State of Illinois, but threatened their lives and health and that of their children, and the State of Missouri sought to restrain the proposed action of the State of Illinois, until at least defects in the construction of the drainage canal could be remedied and the conditions anticipated would not come into being.

The late Justice Brewer, in an address delivered in Brooklyn, N. Y., in November last, called attention to this remarkable case, and commented upon the pitiable condition that would have existed had the Supreme Court of the United States been compelled to leave the citizens of Missouri to wait in fear and anxiety the coming of a flood bearing pestilence and death, with no power in the nation to stay its approach.

"Government by injunction," said Justice Brewer, "has been an object of easy denunciation. So far from restricting this power, there never was a time when its restricted and vigorous exercise was worth more to the nation and for the best interests of all. . . . The best scientific thought of the day is along the lines of prevention rather than that of cure. We aim to stay the spread of epidemics rather than permit them to run their course, and attend solely to the work of curing the sick. And shall it be said of the law, which claims to be the perfection of reason and to express the highest thought of the day, that it no longer aims to prevent the wrong, but limits its action to the matter of punishment?"

The critics of the injunction are doubtless quite willing to admit the propriety and necessity of its application to all but cases where their own ox is gored, but here is the rub: in labor disputes, the gentleman argued, strikers are enjoined from doing acts in combination which if done by individuals would be lawful; and, second, they are restrained from doing perfectly innocent acts; and, third, the rights of others they are enjoined from interfering with are not rights of a property nature.

It is a fundamental proposition in this government that there cannot be one set of rights for one class of citizens, and another set for another class under the same circumstances. The right to the protection of a court of equity cannot rest upon the character of the persons from whom the protection is sought. The office of equity is to prevent; that of law to compensate. The right to the preventive remedy is as great as the right to the compensatory remedy. Equitable protection is constitutionally guaranteed as fully as legal protection. The right to that protection is predicated upon the character of the wrong—not of the persons who threaten it. To deny an injunction under circumstances in which it should issue, whether in a labor dispute, a trespass, an infringement of a patent, a restraint of trade, the maintenance of a nuisance, or any other set of circumstances which presents grounds of equitable intervention is to deny to the citizen due process of law. Therefore a citizen is entitled to an injunction in a labor dispute as much as in any other controversy, if in the course of it the combination of laborers threaten his property with irreparable damage, just as under the same circumstances he would be entitled to an injunction against a combination of business men that undertook to injure his patent or his trade, or to maintain a nuisance damaging to his home or place of business.

The argument that a combination of men ought not to be enjoined from doing that which it is not unlawful for one man to do is not peculiar to labor disputes. It was argued by counsel for the defendant in the case of *Montague vs. Lowry*, 193 U. S., 38, and rejected by the Supreme Court, as the principle has likewise been rejected in a variety of criminal and civil proceedings in courts of final appeal, both in England and the United States. For not only does a combination of many possess a power beyond that of any individual, but when it is organized and acts to accomplish a par-

ticular purpose, it is itself a new entity in which the judgment and will of the individual components is subordinated to the purpose and motive of the combination. The power of one man to coerce or intimidate or threaten is obviously a very different matter from similar actions by numbers acting in concert, whose very presence becomes in itself a menace to the peace of mind and the right to the free flow of custom possessed by a person who, for instance, becomes the recipient of the attentions of a labor combination in a labor dispute.

But it is said injunctions are frequently issued in labor disputes which forbid the doing of acts in themselves innocent and lawful. So it is said men have been enjoined from using the streets and roads, from talking to others, from even using "persuasion" or visiting the homes of men who did not join in a strike. "No conduct," said Justice Holmes, in *Aikens vs. Wisconsin*, 195 U. S., "has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law."

Suppose a man is arrested at night, walking up and down the sidewalk before a residence. At least let us suppose this is his explanation to a police judge before whom he is brought by the arresting officer: "Have I not a right," says the defendant, "to the free use of the public streets. Is it a crime to use a sidewalk where my presence does not obstruct its equal use by every other person?" But suppose the officer and other witnesses prove that the defendant used the sidewalk and was in front of the residence in question for the purpose of giving warning to a fellow-thief engaged in the looting of the residence, does the innocent act of using the public sidewalk relieve the accused person of punishment in view of the purpose for which he was there? Yet the distinguished lawyer who opened this discussion intimated that motive was worthy of small consideration in discussing the use of injunctions in labor disputes. Moreover, I need not say to this intelligent audience that a combination, maliciously to persuade or induce men to make a breach of contract was and is unlawful in all forms of human action outside of labor disputes.

The charge of enjoining alleged innocent acts is frequently

based upon a superficial or fragmentary reading of particular injunctions. Thus we find in some injunctions that have been sharply criticised that men were enjoined from marching on a public highway where their purpose was to prevent other workmen equally entitled to the use of the highway from going to or returning from their work, and men have been likewise enjoined from using the public streets for the purpose of threatening or annoying or maliciously persuading others equally entitled to the use of the streets from entering or departing from a boycotted place of business. Then, too, the word "persuasion," which has been and is so frequently made the subject of harsh criticism, has never been used in an injunction except in connection with other phrases forbidding conduct of an unlawful character. No rule of interpretation is better settled than that where a number of phrases are used the concluding word of many terms shall be given construction as of the same general class as the previous phrases. Thus the word "persuasion" is merely used as a general inhibition of "persuasion" of the same general kind as that previously prohibited in the writ.

Finally, I have said that it is frequently objected that the rights protected in labor disputes are not those of a pecuniary nature. If property rights were held to be merely those rights to the possession of realty and chattels to which the gentleman who preceded me endeavored to confine the term, the objection might be well founded, but we have seen that there is a universal recognition in custom and practice, as well as in the adjudicated law of our land, that the right of property includes the right to make contracts for the sale or purchase of labor, and the right to the goodwill of business as distinct from the physical instrumentalities of the business itself.

In the ordinary course of a labor dispute, the strikers organize for the purpose of preventing others from taking their places. To the point where the striker peaceably presents his claims, either to those who seek work or those who have remained at work, he is obviously within his rights, but when individually or in combination with others, he intimidates or threatens by words or actions or annoys and destroys the peace of employer, employee or customer, he has passed the limit of his own rights and intrudes upon the equal right of others to conduct their business in a lawful manner, to give their custom where they will, or to dispose of their labor and work under the conditions that seem to them best. The protection of that

fundamental right is the protection of that principle from which the striker's own freedom springs, and if he deny or combine to destroy it in others, he cannot long hope to keep it for himself.

Perhaps the charge most vehemently pressed by critics of alleged abuse by injunction is that the writ is issued against acts which are crimes, and through proceedings in contempt the persons committing those acts are deprived of trial by jury, although the offense for which they are punished is of a criminal nature. This charge pressed with much plausibility, fades before the simple distinction between the various qualities of any act within the prohibition of the court of equity. The simplest mind can perceive at a glance that any human act may have both moral and mental qualities. It might be good mentally and bad morally. So, too, any act of one human being which endangers another may, like a trespass, be at once the subject of criminal prosecution and subsequent civil action in damages. A man who assaults another may be punished by the state for his crime and sued by the individual for his tort. So, too, an act forbidden by an injunction may, through the spectacles of criminal law, also constitute a crime, but a court of equity in a contempt proceeding punishes only the violation of its order and not the criminal offense which may be committed at the same time. The distinction which I suggest, which must appeal to any intelligent layman, was very clearly put in the decision of Judge Woods in the proceedings in the Circuit Court against Eugene Debs, charged with contempt of an injunctive order :

The jurisdiction of the courts of equity, and by implication their right to punish for contempt, are established by the constitution, equally with the right of trial by jury; and so long as there is no attempt to extend jurisdiction over subjects not properly cognizable in equity, there can be no ground for the assertion that the right of jury trial has been taken away or impaired. The same act may constitute a contempt and a crime. But the contempt is one thing, the crime another; and the punishment for one is not a duplication of the punishment of the other. The contempt can be tried and punished only by the court, while the charge of crime can be tried only by a jury. *U. S. vs. Debs*, 64 Fed. Rep., 746.

The gentleman preceding me has asserted with great earnestness that each man is entitled to bestow his patronage where he pleases, and that he may give or take it, like his labor, from any whom he pleases, for a good reason or none at all, and that is true. Equity

intercepts his action only when he combines with others to injure third parties by preventing other workmen or the public from exercising the same liberty which he demands for himself. The purpose of joining in a boycott may be, by compelling an employer to grant the demands made upon him, to benefit ultimately the cause of labor, or immediately that of the striking employees, but the alleged purpose is remote in comparison with the proximate and immediate effort to injure or destroy the lawful business of another by frightening away workmen and customers in order to compel the person boycotted, by virtue of the injury inflicted, to accede to the demands of the boycotters. This is the mere effort of many to work their will upon one; the coercion of an individual by force of numbers, the individual possessing the same right to pursue his own way and to conduct his own business within lawful limits that each member of the combination has to conduct his.

In these collisions, equity must proceed to employ its time-honored remedies upon the same principle repeatedly invoked throughout the history of our jurisprudence. If that principle does not permit the use of the injunction to restrain damaging assaults upon individual rights and property by strikers seeking to enforce their will by destructive coercion and intimidation, and in ruthless disregard of the equal rights of others, then the striker himself can find no principle of equity which lends its strong arm to his service, or that of the government when it seeks to protect him against vast combinations in restraint of trade, whose powers and activities continually excite the attention of the popular mind. If the principles upon which the issuance of an injunction in a labor dispute is predicated cannot be sustained by the immemorial principles of that branch of jurisprudence and the continuous practice of chancery courts in England and America, then no exercise of that remedy in all the vast field of equity can be excused or defended.