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the head of their character comes their reasonable relation to any fiscal purpose. Without doubt the Child Labor Tax Case opens the door to many captious criticisms of sundry provisions in the tax laws of the present and the future. Equally without doubt is the confidence that the court will not say that a tax is not a tax except in a very clear case. The decision under consideration was essential to safeguarding the federal system from being warped beyond recognition. No valid criticism against it can be premised on the difficulties it engenders in passing on more difficult issues in the future.

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## THE SUABILITY OF LABOR UNIONS

KATHERINE B. AND ROSWELL F. MAGILL

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NO CASE which has recently come down from the United States Supreme Court, with the possible exception of the child labor cases, has been the subject of more general comment, both lay and professional, than the so-called *Coronado* case.<sup>1</sup> The decision cost the plaintiff coal companies their judgment for \$625,000, secured to them by the verdict of a jury and two lower courts.<sup>2</sup> For the defendant unions, it was a Pyrrhic victory, however, for, in reversing the judgment below on the ground that the acts of the unions involved no restraint upon interstate commerce, Chief Justice Taft further concluded that under the Sherman Act the United Mine Workers of America, an unincorporated association, could be sued at law as such, without naming or serving its members as party defendants. To understand the exact significance of the case, it is necessary to examine the holding in the light of the facts established below.

The plaintiff companies owned adjacent mines in Sebastian County, Arkansas, in a district which was practically completely unionized. The mines were being operated under a common management and had a contract with District No. 21 of the United Mine Workers of America, which was not to expire until July 1, 1914. About three months before the expiration of this contract, Bache, the receiver for the companies, in breach thereof, shut down the mines and reopened shortly afterward on an open shop basis. A strike was called at once and both sides embarked upon a period of industrial warfare marked by a degree of bitterness and violence not unlike the recent occurrences at Herrin, Illinois. Matters culminated on July 17, 1914, in an armed attack upon the plaintiffs' mines, during the course of which two employees were deliberately murdered and the mines either blown up or fired.

For the resulting damages the receiver of the plaintiff companies, nine in

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<sup>1</sup> *United Mine Workers of America v. Coronado Coal Co., et al.*, 257 U. S. —, 42 Sup. Ct. 570, 66 L. Ed. —, (1922).

<sup>2</sup> *Dowd v. United Mine Workers of America*, 235 Fed. 1 (1916); *United Mine Workers of America v. Coronado Coal Co.*, 258 Fed. 829, 119 C. C. A. 469 (1919).

number, brought suit under the Sherman Act,<sup>3</sup> alleging a conspiracy in restraint of interstate commerce and asking treble damages under section 7. He joined as party defendants the United Mine Workers of America,<sup>4</sup> District No. 21 of the international union, and twenty-seven local unions, as well as the officers of the several organizations, together with sixty-five individuals. The unions are unincorporated voluntary associations.

Since so much emphasis has been put upon the collateral features of the opinion, it may be clarifying to point out just what the actual decision was.<sup>5</sup> In order to sustain the complaint it was necessary to show that the unlawful acts alleged were a restraint upon interstate commerce, and in view of the conclusion arrived at this was the decisive element in the case.

In a helpful review of many of the leading cases dealing with a definition of interstate commerce under the Sherman Act, the court distinguishes the various situations involved and restates a few simple principles as to what constitutes interstate commerce.

In the first place production as such is not interstate commerce, even though the resulting products are destined for shipment between states, and hence acts which obstruct production are not of themselves restraints upon interstate commerce. But acts which obstruct a process which is not interstate commerce may nevertheless constitute a restraint upon such commerce: (1) if an *intent* to restrain interstate commerce can be shown, or, (2) if the acts are such that their direct and substantial effect is to restrain such commerce, then the *intent* to restrain will be *inferred*.

Having held that the mining of coal, in the instant case, as a matter of law, was not interstate commerce, the court took up a consideration of the evidence as tending to establish an intent to restrain such commerce. It concluded that there was no evidence to indicate such an intent but, on the contrary, that the facts amply supplied an entirely local motive for the outrages complained of, *viz.*, a desire to raise the standard of living for these particular miners by maintaining the mines involved on a union basis. The desire to lessen the effect of non-union competition upon the operators by unionizing the mines was ancillary to the main purpose. On this interpretation of the evidence it is significant that the court reversed the conclusions reached by the jury and the two courts below.

In addition, the court held that the effect of the acts in question offered no basis upon which an intent to restrain interstate commerce could be inferred, because the amount of coal involved relative to the national output was so small that a cessation of its production could have no appreciable effect upon prices.

The court found that no restraint of interstate commerce within the principles stated had been shown and consequently reversed the judgment, but not without an expression of regret at its inability to afford a remedy, in view of the circumstances of extreme lawlessness under which the injuries had been inflicted.

<sup>3</sup> Comp. St. sec. 8820, 8821, 8829.

<sup>4</sup> Although it does not appear in the opinion, counsel for the plaintiff states that process was served within the District of Arkansas upon the vice president, the secretary and treasurer of the international organization, the international board member for District 21, and the District officers.

Responsibility on the part of the International union for these acts of lawlessness was denied by the court on the ground that the International, though cognizant of the strike, had neither authorized nor ratified it. It was called and directed by District No. 21. In view of the provision in the constitution of the union specifying the conditions under which the International may assume control of a strike, together with the fact that none of these conditions had been complied with, the court found it clear that District No. 21 in the conduct of the strike was in no way acting as the agent of the International. That is, the fact that the International could have taken over the strike and had power to discipline members of district unions, does not compel it to exercise this power at peril of being held liable for lawless acts which may ensue. This conclusion is a distinct safeguard to the international organization in protecting it from innumerable suits for injuries committed by irresponsible members of local groups.

As to the district organization, however, the following language is matter for reflection: "Thus the authority is put by all the members of District No. 21 in their officers to order a strike, and, if in the conduct of that strike unlawful injuries are inflicted, the district organization is responsible." Does the scope of injuries "in the conduct of the strike" include injuries resulting from all acts whether specifically or impliedly authorized or not? This is a possible interpretation and, if true, would subject the unions to a degree of liability not recognized in the normal relations of principal and agent and one which would work a peculiar hardship. However, though the language used is unqualified, it is more reasonable to suppose that the court really had in mind that the liability in each instance should be tested by the ordinary rules of agency, which is sound enough, granting that the union is suable at all.

If Chief Justice Taft had been content to rest his decision upon his conclusion that there was no interference with interstate commerce involved in the case, he would simply have added another to the group of cases defining that rather difficult concept. The paramount importance of the decision, however, lies in the court's conclusion that this suit under the Sherman Act was properly brought against the defendant unions by name. In examining the foundation for this conclusion, it is necessary to consider the exact legal status of the various unincorporated associations. At the one extreme of business organization is the ordinary partnership, at common law possessing no individuality apart from that of its members.<sup>5</sup> Therefore, to reach partnership assets, the creditor must at common law sue and serve the partners individually, since the assets belong to the partners.<sup>6</sup> Only by statute can the partnership be sued as a firm, and partnership assets reached by service on a single partner.<sup>7</sup> At the other extreme is

<sup>5</sup> Uniform Partnership Act, sec. 6; Terry, *Anglo-American Law*, sec. 31; Mechem, *Partnership*, sec. 6. Cf. Crane, *The Uniform Partnership Act—A Criticism*, 28 H. L. R. 762; Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism*, 29 H. L. R. 158, 291; Crane, *The Uniform Partnership Act and Legal Persons*, 29 H. L. R. 838.

<sup>6</sup> Uniform Partnership Act, sec. 25; Burdick, *Partnership* (3d ed.), 251. For a collection of cases, see 20 R. C. L. sec. 155, 156; 20 Ann. Cas. 1238; *sembie*, *Heaton v. Wilson*, 123 N. C. 398, 31 S. E. 671 (1898).

<sup>7</sup> For examples of such statutes, see Cal. Code Civ. Proc., sec. 388, which provides for a suit in the firm name; Mich. Comp. Laws, sec. 12363; N. Y. Code Civ. Proc., sec. 1919; Page and Adams Ohio Code, sec. 11260, 11664; Gen. Laws Vermont, sec. 1743. The statutes of North Carolina provide merely (Consol. St. sec. 459): "In all cases of joint contracts of partners in trade or others, suit may be brought and

the corporation, legally an entity distinct from its stockholders, capable of suing and being sued in its own name.

Various intermediate types of organization possess some qualities of a partnership, some of a corporation, without belonging precisely to either group. One of these is the unincorporated association or club not for pecuniary profit, and ordinarily not statutory. A voluntary association or club not organized for gain is not a partnership, and its members are not partners.<sup>8</sup> Hence, the liability of members must be determined on principles of agency. A member will not be liable for acts of representatives or officers which he has not expressly or impliedly authorized.<sup>9</sup> No liability attaches merely because of membership in the association. To reach the funds of the association, it is necessary either to serve as parties defendant the various members of the organization,<sup>10</sup> or to bring a representative suit in equity.<sup>11</sup> In the absence of a statute<sup>12</sup> courts have commonly held that the association as such could not be brought in as a party defendant in a suit at law.<sup>13</sup> The remedy for torts, even committed by officers in the course of acts within the scope of their authority is against the persons who have actually committed them, and not against the association.<sup>14</sup>

Since some statutes, then, have made associations suable in their own names, and since the complaint in the *Coronado* case charged a violation of the Sherman Act (Comp. St. sec. 8820, 8821) the first inquiry is whether, by virtue of that act or other applicable statutes, the United Mine Workers could be sued as such. Arkansas statutes provide (Crawford and Moses Dig. sec. 1098) for representative suits<sup>15</sup> but this does not appear to have been such an action.<sup>16</sup> As the Arkansas court said in the *Baskins* case<sup>17</sup>: ". . . our statute does not authorize the bringing of actions against unincorporated associations in their

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prosecuted against all or any number of the persons making such contracts." See *Daniel v. Bethell*, 167 N. C. 218, 83 S. E. 307 (1914).

<sup>8</sup> *Queen v. Robson*, 16 Q. B. D. 137 (1885); *Ash v. Guic*, 97 Pa. 493 (1881); *Burt v. Lathrop*, 52 Mich. 106 (1883); *Meriwether v. Atkin*, 137 Mo. App. 32 (1909).

<sup>9</sup> See cases in note 8, *supra*.

<sup>10</sup> *Simpson v. Grand International Brotherhood of Locomotive Engineers*, 83 W. Va. 355, 98 S. E. 580 (1919); see also note in 33 H. L. R. 298.

<sup>11</sup> In equity, if it is alleged that the members of an unincorporated association are numerous, some members may be made parties defendant as representatives of the class. It has been held, however, several times, that a union might not be made a party defendant in this type of action. See *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638 (1906); *Wilcutt Co. v. Bricklayers' etc. Union*, 200 Mass. 110, 85 N. E. 897, 23 L. R. A. (n. s.) 1236 (1908); *Reynolds v. Davis*, 198 Mass. 294, 84 N. E. 457, 17 L. R. A. (n. s.) 162 (1908); *Am. Steel & Wire Co. v. Wire Drawers Union*, 90 Fed. 598 (1898).

<sup>12</sup> See, for example, statutes quoted *infra*, note 18. And see *Schouten v. Alpine*, 215 N. Y. 225, 109 N. E. 244 (1915); *Russell v. Stampers' etc. Union*, 107 N. Y. S. 303, 57 Misc. 96 (1907).

<sup>13</sup> See note 10 *supra*; *Baskins v. United Mine Workers of America*, 150 Ark. 398, 234 S. W. 464 (1921); *semble*, *Powers v. Bricklayers Union*, 130 Tenn. 643, 172 S. W. 284, L. R. A. 1915 E. 1006 (1914). For a collection of cases, see Martin, *Modern Law of Labor Unions*, 281. However, if the question is not raised by the association in the court below, it may be precluded from raising it on appeal: *Barnes v. Chicago, etc. Union*, 232 Ill. 402, 83 N. E. 932, 14 L. R. A. (n. s.) 1150, 122 Am. St. R. 129 (1908). Cf. *Ruddy v. United etc. Plumbers*, 79 N. J. L. 467, 75 Atl. 742 (1910), and *Brewer v. Abernathy*, 159 N. C. 283, 74 S. E. 1025 (1912).

<sup>14</sup> *Brown v. Lewis*, 12 T. L. R. 455 (1896).

<sup>15</sup> "Where the question is one of a common or general interest of many persons, or where the parties are numerous, and it is impracticable to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all." Practically the same provision occurs in Consol. St., North Carolina, (1919) sec. 457.

<sup>16</sup> In *Baskins v. United Mine Workers of America*, 150 Ark. 398, 234 S. W. 464, (1921), the court expressly refused to decide whether a representative suit could be brought at law under the Arkansas statute, but did decide that an action against the United Mine Workers of America did not come within the section of the statute quoted in note 15.

<sup>17</sup> *Supra*, note 16.

common name." For statutory authority for this suit, then, we must rely on the Sherman Act itself. Its pertinent provision is sec. 8 (Comp. St. sec. 8830): "The word 'person' or 'persons' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country." Chief Justice Taft concluded that this language was broad enough to include labor unions. The argument is, then, that since Congress stated in the Sherman Act that persons (defined as meaning, among other things, associations) violating the act should be liable in actions by injured parties, Congress meant to make associations suable by name. Granting that the term association includes trade unions, does it logically follow that the statute means that unincorporated labor unions shall be suable by name? Quite as logical a construction would seem to be that, while labor unions shall be liable for violation of the provisions of the Sherman Act, the general rules of the common law as to service of process and necessary parties shall prevail. That this should be the construction is supported inferentially by the rather elaborate statutory provisions for the suability of associations and partnerships by name in other jurisdictions.<sup>18</sup> Since such a statute constitutes a radical change in common law procedure, is it a reasonable construction to arrive at the same result by implication, merely, from the definition of the word "person" in the Sherman Act as including associations? Further, the provisions of sec. 7 of the Act (Comp. St. sec. 8829) under which treble damages are claimed, are these: "Any person who shall be injured in his business or property by any other person by reason of anything forbidden or declared to be unlawful by this Act *may sue therefor* in any circuit court<sup>19</sup> of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fee." (Italics ours.) It will be observed that this section does not provide that associations shall be suable as such, even reading it in connection with sec. 8, the definition section above quoted. It merely provides for the injured person's right of action, quite a different matter.

The cases cited by Chief Justice Taft<sup>20</sup> as being instances of suits against

<sup>18</sup> Cal. Civ. Code, sec. 388: "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability." N. Y. Code Civ. Proc. sec. 1919: ". . . . An action or special proceeding may be maintained against the president or treasurer of such an association (an unincorporated association consisting of seven or more persons) to recover any property or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor either jointly or severally. Any partnership or other company of persons which has a president or treasurer shall be deemed an association within the meaning of this section." Michigan Comp. Laws Sec. 12363: "Whenever any unincorporated voluntary association, club or society shall be formed in this state, composed of five members or more, having some distinguishing name, actions at law or in chancery may be brought by or against such association, club or society by the name by which it is known: Provided that this section shall not take away the right of the litigant to proceed against all the members of such association, club or society, if such litigant shall so elect to proceed."

<sup>19</sup> Now district court, see Jud. Code, sec. 289-291, Comp. St. sec. 1266-1268.

<sup>20</sup> *U. S. v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007 (1897); *U. S. v. Joint Traffic Assn.*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259 (1898); *Montague and Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608 (1904); *Eastern States Lumber Assn. v. U. S.*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A., 1915 A, 788 (1914).

unincorporated associations under the Sherman Act are, with a single exception,<sup>21</sup> equitable actions. In *U. S. v. Trans-Missouri Freight Assn.*, it appears that the various member railroads of the association were joined as parties defendant; and it was sought to enjoin them from agreeing together to maintain certain rates. In *U. S. v. Joint Traffic Assn.* and *Eastern States Lumber Assn. v. U. S.*, the actions were brought in New York, where, by statute, an association may be sued;<sup>22</sup> *Montague v. Lowry* was brought in California where there is a similar statute.<sup>23</sup> These cases, then, scarcely support the proposition that an unincorporated association may be sued as such at law, in the absence of statute.<sup>24</sup>

Another argument can be made in favor of the result in the *Coronado* case, even though no statute expressly authorizes a suit against labor unions by name. Chief Justice Taft cites a wide range of statutes giving labor organizations, for example, representation on official boards, the right to sue to protect union labels, and the right to maintain strikes.<sup>25</sup> While none of these enactments in itself is inconsistent with the previous theory that a labor union possesses no individuality as such, they can be urged as showing a steady legislative trend toward treating labor organizations as distinct entities, capable of unified group action, and entitled to certain rights and privileges as such. Some authorities argue quite convincingly that a series of legislative enactments may be just as helpful in determining a proper legal policy as judicial opinions or decisions. Evidently Chief Justice Taft felt that, even in the face of judicial opinion to the contrary, the general legislative policy of the past thirty years justified him in treating unions as entities. There is an analogy in the various cases dealing with joint stock associations, where, after various privileges ordinarily peculiar to a corporation have been given by statute to business organizations not actually incorporated, courts have finally determined that because of their enjoyment of the aggregate of these privileges, these organizations must also bear the liabilities of corporations.<sup>26</sup> Hence, while it would seem that the opinion that the union was suable as an entity in the *Coronado* case may not be justified as a matter of the construction of any particular statute, it can be supported on the basis of general legislative policy in dealing with labor unions.

<sup>21</sup> *Montague v. Lowry*, *supra*, note 20.

<sup>22</sup> See note 18, *supra*.

<sup>23</sup> See note 18, *supra*.

<sup>24</sup> Further, in none of the cases does it appear that counsel raised any question whether the association could be sued as such. On the effect of this failure, see note 9, *supra*.

<sup>25</sup> These statutes are classified in the margin of the opinion as follows: (1) Legalization of labor unions and labor combinations; (2) Exemption from anti-trust laws by statute; (3) Right given labor unions to sue to enjoin infringement of registered union label or trade-mark; (4) Unauthorized use of registered union label or trade-mark made an offense; (5) Unauthorized use of union card, badge or insignia made an offense; (6) Right to participate in selection of membership of boards of arbitration in labor controversies; (7) Right to have member of union on board of arbitrators; (8) Embezzlement of funds of labor union made a special offense; (9) Bribery of union representative made an offense; (10) All public printing to bear union label.

<sup>26</sup> *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 19 L. Ed. 1029 (1870); *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108 (1907); *Thomas v. Dakin*, 22 Wend. 9 (1839); *People v. Assessors*, 1 Hill 616 (1841). See also provisions in the Constitution of North Carolina, Art. VIII, Sec. 3: "The term 'corporation' as used in this article shall be construed to include all associations and joint stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued, in all courts, in like cases as natural persons." The same provision occurs in the New York Constitution, Art. VIII, Sec. 3. Suppose that in North Carolina labor unions are given some of the powers and privileges accorded them in other states, as catalogued in the *Coronado* opinion; would they become suable as entities under the Constitution? The leading case under this section seems to be *Hanstein v. Johnson*, 112 N. C. 253, 17 S. E. 155 (1893), a building and loan association case.

However interesting the lawyer may find the technical process by which the court endowed the labor union with a personality before the law, it is obvious that the real implications of this phase of the case are economic and social rather than legal. It is not within the province of this article to enter into an extended discussion of these implications. We can only suggest the problem in a general way.

Hitherto in the industrial struggle the employer has resorted to the injunction as his most powerful weapon against labor. For damages already suffered action lay only against the individual tort feorsors, or against those from whom they had express or implied authority. The practical difficulty of identifying and serving so large a group, added to the fact of financial irresponsibility in many cases, makes this a remedy of questionable value. The alternative is a suit against the union as such.

Whether we permit or deny such a remedy is a matter of policy. On the one hand we may question the wisdom of fostering within the social organization large groups which enjoy extensive powers and privileges arising out of collective action and yet escape any of the liabilities which ordinarily attach thereto. On the other hand, the state of the law at present with regard to just what acts of labor unions are lawful and to what extent they are liable for the acts of individual members is so uncertain that to hold them to a collective liability is to discourage their attempts to protect themselves from exploitation because of the risks involved. Such a result would considerably limit their powers in a struggle in which the balance of advantage is already against them. It should be noted, however, that the court's opinion that labor unions are suable as such is, in the nature of the case, confined to questions arising under the Sherman Act.

In England public policy against such collective liability has been expressed in the Trade Disputes Act of 1906,<sup>27</sup> which provides that trade unions as such shall not be subject to suits for damages arising out of torts. This statute was passed following the decision in the famous *Taff Vale* case<sup>28</sup> in which the court held labor unions suable as entities under the Trade Union Act of 1871.<sup>29</sup> Aided by a correspondingly liberal attitude on the part of English courts towards strikes and boycotts, this statute puts labor in England upon a much more advantageous footing than it occupies at present in the United States.

Even if we deny that such a policy of immunity is a wise one, we are confronted with the further question as to the wisdom of judicial determination of a policy of such importance, independently of an expression of public opinion through the legislature.

The decision, on the whole, has been commented upon with approval even by friends of labor.<sup>30</sup> It is to be hoped that the decision will result in some comprehensive enactment which will clarify the present uncertain status of labor unions in the industrial conflict.

<sup>27</sup> 6 Edw. 7. ch. 47.

<sup>28</sup> *Taff Vale Co. v. Amalgamated Society of Railway Servants*, [1901] A. C. 426.

<sup>29</sup> 34 & 35 Vict. c. 31.

<sup>30</sup> See e. g. Frankfurter—*The Coronado Case*, 31 *The New Republic* 328. See also the notes in 10 *Cal. L. R.* 506 and 32 *Yale L. J.* 59.