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Erratum

Page 398, footnote, 5, Costa v. Cox should be omitted and the note should begin: "In this case the termination of the business may have been the reason for bringing suit...."

the insured, as required by the policy in order for insured's liability to attach. The plaintiff recovered below and on appeal this judgment was affirmed.[5] The court found that the question of co-operation, or lack thereof, on the part of Cox was properly for the jury, and discussed the failure of the insured to take further steps to find Cox. Judge Taft, dissenting,[6] stressed the fact that the suit was against Cox, not Howe, and that the evidence as to Cox's behavior was completely the opposite of the "co-operation" which was a condition precedent to plaintiff's right to recover. Taft further stated that the evidence failed to establish permission by Howe to use the automobile at the time of the accident, which would also relieve the insurer of liability.

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LABOR LAW

RIGHTS OF THE INDIVIDUAL EMPLOYEE

A number of Ohio cases were reported in the past year, dealing with the rights of an individual workman, both in relation to his employer and his union. This is an area of growing interest in the field of labor-management relations, and a rather natural subject of concern at this stage of development. Unions have achieved a much more secure position than they enjoyed twenty years ago, and are fairly well established in most of the larger industries in this state. The place of the individual in this scheme of things, therefore, appears to warrant greater attention. Some of the recent Ohio decisions may have considerable future significance.

In *Wesley v. Electric Auto-Lite Company*,[1] an action was brought by an employee seeking damages for time lost as a result of a layoff claimed to have been in violation of the collective bargaining agreement between the employer and the union. The court held, first, that the plaintiff was a third party beneficiary under the agreement, and as such was entitled to maintain the action. It was further held that the seniority provisions of such an agreement give rise to a property right which will be protected by the courts. Judgment was rendered for the plaintiff employee in the amount of $145.88, a sum equivalent to the pay which plaintiff would have received for seven consecutive Fridays if he had been retained in accordance with the applicable seniority provision. This is a highly significant determination, and furnishes a useful avenue of approach for an aggrieved employee who does not choose to utilize the grievance procedure afforded by the agreement.[2]

5. Costa v. Cox, 168 Ohio St. 379, 155 N.E.2d 54 (1958).
6. *Id.* at 384, 155 N.E.2d at 58 (dissenting opinion).

The court's holding on the seniority question may also be of interest to those in the field of labor-management relations. The collective bargaining agreement provided that when it became necessary to reduce the working force of a department, layoffs would be made according to seniority, in order to provide a normal eight-hour day and forty-hour week for employees in the polishing and buffing departments. The plaintiff was a senior employee and would have worked full time under this provision, but the employer unilaterally decided to cut all employees to a thirty-two hour week in order to avoid any layoffs. The court in effect held that this situation involved a reduction of the working force, within the meaning of the contract provision, and further held that the management prerogative clause could not be relied upon to alter or to modify an express provision found elsewhere in the agreement.[3]

The court was also called upon to construe the terms of a collective bargaining agreement in *International Union v. L. T. Patterson Company*,[4] although in this case the union joined with the individual plaintiffs in bringing suit. This was an action to recover vacation pay under an agreement providing for vacations with pay for employees (including employees laid off but still carried as employees) who "prior to June first of the current year" have the specified length of continuous service. Where the employer ceased business operations altogether on March fifth of the year in question, it was held that the employees were not entitled to vacation pay, since the

1. 159 N.E.2d 912 (Ohio Ct. App. 1959).

2. To an arbitrator, there is an immediate question as to the reason for not filing a grievance and, if necessary, submitting the matter to arbitration. The opinion throws no light upon this point, since there is no reference to a grievance or the arbitration thereof. Every collective bargaining agreement worthy of the name contains some reference to the handling of grievances and usually provides for arbitration as the last step of the grievance procedure, so it is not likely that the answer lies in a complete omission of such a provision in this particular agreement. Neither is it likely that an adverse decision had been rendered by an arbitrator, since an arbitrator's decision is considered final and binding upon the parties, there being no appeal therefrom under ordinary circumstances. It could be that the union declined to approve or process this particular grievance, but even this is subject to doubt since the Local involved, unlike other Locals of the same International Union, had refused to accept any deviation from the seniority provision as requested by the employer pursuant to an express provision for exceptions included in the agreement. It is clear that a grievance existed, even under the most limited definition, since the issue involved an interpretation of the express terms of the applicable agreement. The absence of any reference thereto may indicate a conclusion that the principle of exhaustion of internal remedies is not applicable in this situation. This would seem to be a proper determination in any event, since court consideration of the issue might not otherwise be available under ordinary circumstances. The availability of the courts in a case of this kind may be particularly valuable to an employee for whom the union has declined to file or process a grievance, although a wide acceptance of this method might add an unwelcome burden to already overcrowded dockets.

3. The latter ruling is certainly in accord with sound rules of construction, and is the view adopted by most arbitrators. As the court pointed out, the language of the seniority requirement in relation to layoffs was unambiguous and unequivocal, and the application thereof could not be made to depend upon business conditions or the amount of sales.

4. 159 N.E.2d 923 (Ohio C.P. 1956), *aff'd*, 159 N.E.2d 917 (Ohio Ct. App. 1956), *appeal dismissed*, 166 Ohio St. 148, 140 N.E.2d 318 (1957).

employment relationship had been terminated prior to the date the vacations presumably were to commence. The court reasoned that the employees, although having the required length of service, should not have the right to paid vacations after the business had ceased and the employment relationship had been terminated, unless the agreement specifically so provided.[5]

In *Petty v. Dayton Musicians' Association,*[6] the action was brought by a former agent or personal representative of various musicians, most of whom were members of the union, seeking damages allegedly caused by the union's publication of a notice to its members not to negotiate contracts through the plaintiff. He was not a member of the union, but was referred to as a sub-booking agent. The court held that a party who is not a member of the union, but is merely licensed or approved by it as an agent for its members, has no cause of action against the union unless it is alleged that the union's action was in violation of his contract, was factually unlawful in some other manner, or violated rights conferred upon him in some way by the union's constitution or rules.[7]

The protection afforded a union member by a court of equity, both as to his right to membership and to hold office, is illustrated by the decision in *Local 118 v. Utility Worker's Union.*[8] It was there held that the action of the executive board of a national union, ousting the officers of a local union for refusal to honor a picket line established in contravention of a no-strike clause in the existing contract between the union and the employer, was unreasonable, arbitrary and oppressive. The court vacated the suspension of these officers from membership and ordered their reinstatement into office. In addition, the national union was restrained from seizing any books, property,

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5. Costa v. Cox, 168 Ohio St. 379, 155 N.E.2d 54 (1958).
in the court instead of resorting to the grievance procedure, although it is entirely possible that the latter could have been used in conjunction with the winding up process. Since the decision obviously would not serve as a precedent for these parties in the future, the cost of a private arbitrator may have been an additional factor in this instance. Interestingly enough, the court considered itself bound by the provision, contained in many collective bargaining agreements, that "the arbitrator shall not have the power to add to or subtract from or modify any of the terms of this agreement." This language was construed as an expression of intention "that the contract is complete in itself and must be so recognized and respected by all." *Id.* at 927.

6. 153 N.E.2d 218 (Ohio C.P.), *aff'd,* 153 N.E.2d 223 (Ohio Ct. App. 1958).

7. The decision is clearly distinguishable on its facts from the supreme court's decision in Perko v. Local 207, Internat'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 168 Ohio St. 161, 151 N.E.2d 742 (1958), discussed in Teple, *Labor Law, Survey of Ohio Laws — 1958,* 10 WEST. RES. L. REV. 421 (1959). In the *Perko* case there was an allegation of interference with the plaintiff's contract of employment, he had been a member of the union, and much more drastic measures had been taken. Judgment was rendered on the pleadings in the instant case, and the court simply found that the petition failed to state facts sufficient to give rise to a cause of action either on the theory of libel or of an interference with the plaintiff's right to labor or contract.

8. 162 N.E.2d 524 (Ohio Ct. App. 1958).

or assets of the Local, and from interfering with the internal affairs thereof.[9]

At the same time, it was held in another case[10] that the Brotherhood of Railroad Trainmen was not subject to mandamus to require the holding of a convention in accordance with the union's constitution. The constitution required the holding of a convention for the election of officers and the transaction of other business every four years. The court said that this requirement could not be postponed by a referendum vote of the majority of membership, but held that since there is no law specifically enjoining the Brotherhood to call its convention, mandamus was not the proper remedy.[11]

Inadequacy of Remedy at Law

Sanders v. Vogenitz[12] involved the issuance of a mandatory injunction to enforce a collective bargaining agreement. The defendant was a member of the union and the proprietor of a barbershop in which he himself worked and employed another barber. He signed an agreement with the barbers' union, but subsequently refused to display the union shop card or pay his contributions to the union welfare fund as required by the agreement. No picketing was undertaken nor boycott attempted. Instead, the union's business agent brought this action on behalf of the Local and its members, to compel performance of the agreement. Since no adequate remedy at law appeared to be available, the court held that this was a proper remedy. Damages, it was said, would not adequately compensate for the defendant's violation of the contract terms; only equity, through the process of the mandatory injunction, could secure for the union membership all of the benefits for which the parties had contracted.

The inadequacy of the remedy at law in a case of this kind is well illustrated by the result in *Aeronca Independent Union v. Aeronca Manufacturing Corporation*,[13] wherein the plaintiff was held to be entitled to recover nominal damages in the total sum of one dollar, plus costs. This was an action by the union against the employer for

9. The court reasoned that the constitution of the national union, as interpreted by its president and executive board (so as to authorize breach of a no-picketing pledge), contravened the law of Ohio, and that the plaintiffs were therefore justified in bringing their action in a court of equity. On the issue of exhaustion of internal remedies, the court concluded that appeal to the convention of the national union, as prescribed in its constitution, would have been futile. No reluctance to interfere is apparent from the opinion.

10. State *ex rel.* Titler v. Brotherhood of R.R. Trainmen, 160 N.E.2d 321 (Ohio Ct. App. 1959). See also discussion in *Civil Procedure* section, p. 352 *supra.*

11. The court referred to general authority indicating that ordinarily mandamus will not lie to regulate the internal affairs of unincorporated associations, and a holding that it is not a proper means of requiring the secretary of a corporation to call a stockholders' meeting. The court does not suggest what other remedy might be available, but Title I of the Federal Reporting and Disclosures Act of 1959, enacted after this case was decided, may afford one answer.

12. 161 N.E.2d 70 (Ohio Ct. App.), *appeal dismissed,* 169 Ohio St. 233, 158 N.E.2d 896 (1959).

13. 153 N.E.2d 718 (Ohio C.P. 1958).

breach of the collective bargaining agreement by failure to deduct union dues from the employees' paychecks as agreed. The court ruled that the plaintiff, an unincorporated association, had no entity separate and distinct from its individual members, and since the defendant had paid the employee-members all of the wages due, the injury which the plaintiff had sustained when the defendant breached the agreement was a legal injury, without damage. No special damages had been shown.[14] This result may be compared with that obtained in *Sanford v. Boston Edison Company,*[15] where it was held that an assignment provision in a collective bargaining agreement for the collection of dues from the employees' wages could be enforced in an action for specific performance.

Federal Pre-emption

In *Oliver v. All States Freight, Incorporated,*[16] it was held that a provision in a collective bargaining agreement between the union and the employer fixing the price to be charged for the use and supervision of trucks and trailers used in the trucking business, where such equipment was owned by individuals who leased it to the carriers, was not within the scope of the Federal Labor Management Relations Act[17] so as to preclude the jurisdiction of a state court under the pre-emption doctrine. The court also held that the agreement was in violation of the Ohio statute prohibiting monopoly and restraint of trade,[18] and, therefore, warranted an injunction to prevent its performance. This determination was finally reversed, however, by the United States Supreme Court,[19] which held that the matter was within the general subject of wages, hours and other conditions of employment, for which collective bargaining is required by the terms of section 8 (d) of the National Labor Relations Act, and which is protected by section 7 thereof. There was no room, the Court said,

14. Defendant's refusal to deduct dues occurred on July 1, 1957, and the following January six hundred and forty-five employees delivered written revocations of the authorizations to make deductions. The court held that this amounted to ratification of the employer's action. The court also decided, however, that the failure of union officials to file non-communist affidavits and financial statements, as then required by the Federal Taft-Hartley Act to gain a place on a representation election ballot, was not such a breach of the agreement as to preclude recovery thereunder, on the strength of the United States Supreme Court's decision in UMW v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956). The court further held that the action could be maintained in the state court, since the subject matter was not within the exclusive jurisdiction of the NLRB, citing the *Perko* case, 168 Ohio St. 161, 151 N.E.2d 742 (1958). See note 7 *supra.*

15. 316 Mass. 631, 56 N.E.2d 1 (1944), referred to with particular emphasis in Sanders v. Vogenitz, 161 N.E.2d 70 (Ohio Ct. App. 1959).

16. 156 N.E.2d 176 (Ohio C.P. 1956), *aff'd,* 156 N.E.2d 190 (Ohio Ct. App. 1957), *appeal dismissed,* 167 Ohio St. 299, 147 N.E.2d 856 (1958).

17. Ch. 120, 61 Stat. 136-58 (1947), as amended, 29 U.S.C. §§ 141-44, 151-68, 171-82, 185-87 (1958).

18. Ohio Rev. Code § 1331.01(A), (B)(1)-(5).

19. International Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959).

for the application of state policy respecting monopoly which limited the solutions which the parties themselves could provide through agreements collectively bargained.[20]

Limitations On Picketing

Four decisions reported last year concerned the control of picketing. In *Richman Brothers Company v. Amalgamated Clothing Workers*,[21] the Ohio Supreme Court reviewed and affirmed the decision of the court of appeals reported in the 1957 Survey.[22] It was held that where interstate commerce is involved, non-violent stranger picketing to induce unionization is governed exclusively by the National Labor Relations Act,[23] and the state courts lack the power and jurisdiction to intervene.[24] Although it was recognized that "stranger picketing" is contrary to the existing public policy of the state,[25] it was decided that this policy cannot apply where interstate commerce is involved.

The situation has changed somewhat, of course, as a result of the enactment of the Federal Reporting and Disclosures Act of 1959,[26] which places additional federal restrictions on certain types of picketing, and permits the states to act in situations where the NLRB has declined to do so.

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20. In the words of the court, the interference of state law in this manner "would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here." *Id.* at 296. The recognition of the problem created by the use of the sub-contracting device, and the legitimate effort to meet it through collective bargaining, is much more apparent at the federal than at the state level. The threat of disruption of the bargaining process at the state level seems more immediate than the potential danger to matters of legitimate state concern, and the broad language of the federal court's opinion will undoubtedly yield to future state requirements which overbalance federal policy in this field of law. For a detailed discussion and a critical analysis of the United States Supreme Court's opinion, however, see Cox, *Major Labor Decisions of the Supreme Court, 1958*, 1959 PROCEEDINGS OF THE A.B.A. Section of Labor Relations Law, p. 23, 25-31.

21. 168 Ohio St. 560, 157 N.E.2d 101 (1959), *cert. denied*, 361 U.S. 838 (1959).

22. See discussion in Teple, *Labor Law, Survey of Ohio Law — 1958*, 9 WEST. RES. L. REV. 338 (1958).

23. Ch. 372, 49 Stat. 449 (1947), 29 U.S.C. §§ 151-66 (1947), as amended, 61 Stat. 136, 29 U.S.C. § *141 (1947), as amended, 73 Stat. 519 (1959).

24. The lower court's order had enjoined activity construed as mass picketing and interference with access to plaintiff's stores, but had declined to ban all picketing. Not satisfied, Richman sought review on motion to certify the record. In the supreme court, three justices dissented from the conclusion of the majority, although they did not make clear how the decisions of the United States Supreme Court should be distinguished or the doctrine of preemption avoided. Richman Bros. Co. v. Amalgamated Clothing Workers, 168 Ohio St. 560, 565, 157 N.E.2d 101, 105 (1959). The majority opinion by Judge Zimmerman relied heavily upon Garner v. Teamsters, 346 U.S. 485 (1953) and Hotel Employees Union v. Sax Enterprises, Inc., 358 U.S. 270 (1959), although expressing uncharacteristic irritation with the growing centralization of powers in the federal government.

25. Citing Crosby v. Rath, 136 Ohio St. 352, 25 N.E.2d 934 (1940) and Chucales v. Royalty, 164 Ohio St. 214, 129 N.E.2d 823 (1955), in both of which Judge Zimmerman dissented.

26. 73 Stat. 519 (1959).

In *Faxon Hills Construction Company v. United Brotherhood of Carpenters and Joiners*,[27] the court held that the evidence sustained a finding that a labor dispute did not exist between the employer and its employees when the Union commenced picketing early in October 1955, and that in any event, after the employer had arranged to have all its work done by subcontractors the following Spring, no labor dispute existed between the employer and the Union, notwithstanding the fact that the subcontractors may have been using non-union employees. The picketing, the court concluded, was for recognition purposes only.

The Union had demanded recognition as the bargaining representative, claiming it represented a majority of the employees. Some cards were offered in evidence indicating membership in the Union, but all of them, except one, were signed prior to the date when the picketing began, at which time, according to the evidence, not a single employee wanted to be represented by the Union. The employer suggested that an election be held by the NLRB to determine the question of representation, but neither party chose to file such a request with the NLRB, and no unfair practice charges were filed. The majority opinion relied upon *Crosby v. Rath* and *Chucales v. Royalty*.[28] The injunction was granted.

Ballas Egg Products Company v. Amalgamated Meat Cutters,[29] also involved an action by the employer for injunctive relief against organizational picketing at the employer's plant. The court recognized that peaceful picketing of a business engaged in interstate commerce is within the exclusive jurisdiction of the federal government, even though it is conducted by "strangers," but held that the state court retained the power to enjoin mass picketing, threats of physical injury or property damage to employees desiring to work, obstruction of entrances to the place of work or streets and public roads adjacent thereto, and picketing of the homes of employees. The court limited the Union to two pickets at any one time, requiring said pickets to walk from opposite ends of the sidewalk in front of the employer's

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27. 162 N.E.2d 161 (Ohio Ct. App. 1958), *appeal dismissed* 168 Ohio St. 497, 156 N.E.2d 321 (1959). In the decision herein discussed, the court of appeals was considering the matter on remand from the Ohio Supreme Court (168 Ohio St. 8, 151 N.E.2d 12 (1958)). For a discussion of the supreme court's decision, see Teple, *Labor Law, Survey of Ohio Law — 1958*, 10 WEST. RES. L. REV. 421, 424 (1959).

28. See note 25 *supra*. In the *Faxon Hills* case, Judge Matthews dissented, expressing the opinion that the situation existing when the case was first considered, had not actually changed. The court had originally found that a bona fide dispute between plaintiff and its employees existed at the time the picket line was established by the employees. He was further of the opinion that the resort to the strategy of substituting independent contractors for the employees did not transform a lawful strike into an unlawful one. The employees involved were carpenters. Faxon Hills Const. Co. v. United Bhd. of Carpenters and Joiners, 162 N.E. 2d 161, 163 (Ohio Ct. App. 1958) (dissenting opinion).

29. 160 N.E.2d 164 (Ohio C.P. 1959).